On Maratha Reservations Judgment: Part-1

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The Supreme Court's constitution bench judgment striking down the Maharashtra government's reservations for Marathas has affirmed and applied well accepted tests laid down in the Indra Sawhney judgment. However, it has also missed an opportunity to re-examine the artificially imposed 50% limit on reservations in jobs and seats. The justification for retaining the same, however, could also affect reservations for the economically weaker sections.

A constitution bench judgment of the Supreme Court in *Dr Jaishri Laxmanrao Patil v the Chief Minister* (2021) (hereinafter "Patil") struck down the Maharashtra State Reservation (of seats in educational institutions in the state and for appointments in public service and posts under the state) for Socially and Educationally Backward Classes (SEBC) Reservation Act, 2018 (hereinafter "2018 Maharashtra law"). Holding that the Maratha community in Maharashtra was not a "socially and educationally backward class" (SEBC) and that the 2018 Maharashtra law pushed the quantum of reservations in Maharashtra beyond 50%, the Court declared the law to be in violation of Articles 14, 15 and 16 of the Constitution.

Four opinions have been delivered by the five judges on the bench with Justice Ashok Bhushan authoring the lengthiest and most detailed opinion to which Justice Abdul Nazeer concurred entirely, while the remaining three judges (Justices Nageshwara Rao, Hemant Gupta and Ravindra Bhat) agreed partially.

Though six questions were framed by the Court,[1] they can be divided into two sets. The first set of three questions relates to the judgment in *Indra Sawhney v Union of India*[2] and its application to the Maratha reservations. The second set of three questions relates to the interpretation of the provisions introduced by the Constitution (102nd Amendment) Act, 2018.

On the first three questions, there is unanimity among all the judges. All judges agree on Justice Bhushan's answers to the first set of questions. However, on the second set of questions, the Supreme Court was divided 3:2 with Justices Bhushan and Nazeer in the minority, and Justices Rao and Gupta agreeing with Justice Bhat on the interpretation of the 102nd amendment.

An important judgment in many ways, Patil deserves deeper engagement not just for the political implications but also the impact it will have on laws granting reservations for dominant caste groups.[3] Further, this judgment gives us hints on how the Court will approach the question of the constitutional validity of the Constitution (103rd Amendment) Act, 2019 which permitted the state and central governments to grant reservations to non-Scheduled Castes (SCs)/ Scheduled Tribes (STs)/Other Backward Classes (OBCs) beyond the 50% limit imposed in Indra Sawhney.

To this end, this column is the first of a two-part series where part I examines the opinions in Patil in depth. In this column, I discuss what the judges said in the context of the first set of questions and the implications of the same. In the first section of this column, I explore what the Court held in the specific context of the Maratha reservations, focusing on the main judgment of Justice Bhushan which has largely been concurred to by the other judges. In the second section, I deal with the question of whether the Court was right in saying that there was no need to reconsider the 50% limit laid down in the Indra Sawhney case.

In the forthcoming second part, I propose to go in depth into the flawed interpretation of the 102nd amendment which has enormous implications for reservations and federalism in India.

Constitutional Validity

In Patil, the Supreme Court heard multiple appeals from the judgment of the Bombay High Court which upheld the 2018 Maharashtra law, but limited the reservations for jobs and seats to 50% in the state.[4] The high court placed reliance on the Justice Gaikwad Commission ("the commission") which said that Marathas were SEBC and not adequately represented in state government services to hold that the Maharashtra state government was justified in granting reservations to the community. The high court judgment did come under much criticism, not least because of its somewhat uncritical acceptance of the commission's

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flawed methodology and conclusions about what constitutes "social and educational backwardness" (Ashraf 2019).

The constitution bench in Patil has fundamentally disagreed with the Bombay High Court on the question of whether Marathas are SEBC. Without trying to second-guess the commission's methodology, the Court has looked at the commission's own report and data and noted the huge flaws in the way in which the commission came to certain conclusions. Going through the data in the commission's report, the Court finds that the Maratha community is more than "adequately represented" in state government services. Whereas the commission had compared the representation of Marathas to the overall strength of employees, the Supreme Court rightly pointed out that their representation should be compared to the strength of general category employees. Seen this way, the Supreme Court found that there is no basis to claim any underrepresentation warranting a reservation of jobs in accordance with Article 16(4).[5]

Likewise, for the purpose of determining whether Marathas are a SEBC for the purposes of Article 15(4) and therefore meriting reservation in educational institutions, the Court was unconvinced by the data analysed by the commission. What it found was that Marathas were present in large numbers in professional education, civil services under the union, and even in teaching positions in the universities.[6] Whereas the commission took the view that the proportion of Marathas in all of these was somewhat less than their proportion in the population, the Supreme Court pointed that that was not the test to deem a community SEBC.

What the Court has done in Patil is to show that going by the data that the commission itself collected, Marathas would well be a "forward" caste that is not only politically well represented, but whose members occupy sufficient posts in jobs and seats in educational institutions. This finding conforms to other research which has shown that Marathas as a community are much better off than SCs, STs and OBCs in the state, and by no means can be considered "backward."[7]

A further ground to strike down the 2018 Maharashtra law was that it resulted in reservations in Maharashtra exceeding the 50% limit set down in the Indra Sawhney case. Here, on behalf of the state of Maharashtra, two arguments were raised. First, the 50% limit needed to be re-examined in light of changed circumstances. Second, even in Indira Sawhney, it was held that the 50% limit could be breached in exceptional circumstances, and the Gaikwad Commission had found circumstances in which this limit could be breached. In the next section I will discuss how the Court addressed these arguments.

Is the 50% Limit Sacrosanct?

To start with the second argument first, while the Indra Sawhney judgment no doubt allowed for the breaching of the 50% limit in "extraordinary situations," the Court found that the commission had not made out any case for why this limit ought to be breached in the case of the Maratha community.[8] The sole basis for the commission's conclusion that the 50% limit ought to be breached was the fact that 85% of the population were "backward castes" and it would be unjust to limit this 85% to just 50% of the seats.

This, however, was itself based on the assumption that Marathas (constituting about 30% of the population) were SEBC as a whole. When the Supreme Court concluded that Marathas were not SEBC, obviously the proportion of the population deemed as such would only be about 55%.

The Supreme Court, however, did not lay down what the "extraordinary situations" were in which the 50% limit could be breached. The finding on the 50% limit in this case was contingent on the conclusion that the Marathas were not SEBC and the Supreme Court did not independently expand on what could be the extraordinary circumstances in which the 50% limit could be breached. Curiously, the Supreme Court doubled down on the importance of the 50% limit by referring to B R Ambedkar's speech in the Constituent Assembly where he expressed his view that reservations of 70% in jobs would be undesirable.

This gives us a clue on how sacrosanct the Supreme Court held the 50% limit in Indra Sawhney and tells us how it disposes off the first argument—that the 50% limit itself needs re-examination. I have argued before that the 50% limit is a pure judicial creation that has no basis in the constitutional text and, in fact, goes against the constitutional mandate of equal opportunity (Kumar 2016). It is perhaps reflective of what Anurag Bhaskar and Surendra Kumar argue in a forthcoming paper that "the jurisprudence on reservations reflects so many empirical, intellectual, and constitutional slippages and wanton disregard for precedent." One sees this in Patil as well.

Not only does the Court find that there is no reason to re-examine the 50% limit in Indra Sawhney, it goes further to suggest that the 50% limit is not just a valid judicial innovation but a basic feature of the Constitution itself! The judgment states:

> 164. To change the 50% limit is to have a society which is not founded on equality but based on caste rule. The democracy is an essential feature of our Constitution and part of our basic structure. If the reservation goes above the 50% limit which is reasonable, it will be slippery slope, the political pressure, make it hardly to reduce the same. Thus, answer to the question posed is that the percentage of 50% has been arrived at on the principle of reasonability and achieves equality as enshrined by Article 14 of which Articles 15 and 16 are facets.[9] [sic]

Following the chain of reasoning here, that equality is a basic feature and limiting reservations to 50% of seats and jobs is essential to equality seems to lead us to the absurd notion that the 50% limit itself is a basic feature of the Constitution! The immediate implication of this, should it be considered binding, would be to render the 103rd amendment—permitting reservations for "economically weaker sections (EWS)"—unconstitutional since it permits the EWS reservations to cross the 50% limit. I have argued elsewhere that the EWS reservations are unconstitutional. But for different reasons (Kumar 2019). But turning a numerical limit into a basic feature of the Constitution seems like an absurd extension of the idea of a "basic feature."

Nonetheless, it remains to be seen whether the Court itself takes this particular notion seriously in subsequent cases, not least of all in the pending challenge to the 103rd amendment (Roy 2020).

Conclusions

The Court's conclusions on why Maratha reservations are unconstitutional follow well-settled constitutional principles and are based on detailed factual material which show that the community is by no means "socially and educationally backward." Reservations, to repeat the oft-repeated aphorism, are for parity and not charity.[10] In affirming the tests laid down in Indra Sawhney on these aspects, the Court has ensured that the tool of reservations does not become an exercise in distributing political patronage among dominant castes but kept for social justice purposes.

However, at the same time, in upholding the sanctity of the 50% limit on reservations set down in Indra Sawhney, the Court has limited the effectiveness of the tool. The argument raised, calling for a relook at the 50% limit, was rebutted with a somewhat bizarre reasoning, raising the 50% limit almost to the level of a basic feature of the Constitution. Patil therefore has implications not only for the pending cases relating to reservations for dominant castes, but will also have an impact on the validity of the 103rd amendment. If the 50% limit is raised to the level of a basic feature of the Constitution, the amendment which permits states and the centre to go beyond 50% only in the context of EWS reservations will not stand judicial scrutiny. However, if the Court carves out exceptions only for EWS reservations it will have to invent entirely new jurisprudence to do so—risking reservations, changing from measures seeking parity to those granting charity.

NOTES

1 Patil, para 9, p 11.
2 1992 (Suppl), 3 SCC 217.
3 For instance, Haryana's law granting 10% reservation to the Jat community in the state is currently under challenge in the Supreme Court (*Financial Express* 2018).
4 *Dr Jishri Laxmnarao Patil v Chief Minister of Maharashtra,* (2019), 4 Bom CR 481.
5 Patil, para 306, p 258.
6 Patil para 323, p 277.
7 Also see Mridul Kumar, "Reservations for Marathas in Maharashtra," *Economic & Political Weekly* , Vol 44, No 14, 4 April 2009 and Ashwini Deshpande and Rajesh Ramachandran, "Dominant or Backward? Political Economy of Demand for Quotas by Jats, Patels, and Marathas," *Economic & Political Weekly*, Vol 52, No 19, 13 May 2017.
8 Patil, paras 222–45, pp 191–212.
9 Patil, para 164, p 143.
10 See Justice O Chinappa Reddy's opinion in *K C Vasantha Kumar v State of Karnataka 1985,* SCR Supl (1) 352.

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