



Long road home

India and Pakistan should adopt a more humane approach to each other's prisoners

The return to India of Hamid Nihal Ansari, an engineer from Mumbai who spent six years in a Pakistani prison, is cause for cheer on the otherwise bleak landscape of India-Pakistan relations. The plight of the young man, who had crossed over into Pakistan from Afghanistan in 2012 on a mission to save a woman he had befriended online and been arrested for espionage, had caught public attention in both countries. Subsequent investigations proved his innocence on all charges other than entering Pakistan illegally, but even so, the authorities there put him through a trial in a military court. In December 2015, the court sentenced him to three years in prison. All through his ordeal, Mr. Ansari's parents kept alive the struggle to bring him back, without letting the emotional and financial costs deter them. To its credit, the Ministry of External Affairs applied sustained diplomatic pressure on Islamabad, first to demand information on Mr. Ansari's whereabouts and then for a fair trial and consular access, which was never granted. The Government of Pakistan must also be commended for expediting Mr. Ansari's release after he completed his sentence on December 15, although it had received another month from a Peshawar court to finish the formalities. Above all, credit goes to citizens' groups in both countries that helped the family, particularly lawyers and human rights activists in Pakistan who worked pro bono to ensure Mr. Ansari's release.

Given the downturn in bilateral relations, further complicated by the international case India is pursuing against Pakistan over the conviction of Kulbhushan Jadhav, and instances of prisoners like Sarabjit Singh dying in Pakistani jails, it is nothing short of a miracle that Mr. Ansari has returned home safe and sound. New Delhi would do well to acknowledge the Imran Khan government's gesture in releasing him. Both India and Pakistan must dedicate themselves to freeing hundreds of other prisoners who remain in each other's jails, many of whom have completed their sentences but await long processes of identification and repatriation. According to government figures, Pakistan holds 471 Indian prisoners while India holds 357 Pakistani prisoners, a large number of them fishermen who inadvertently trespassed into each other's waters. The two countries must also revive the biannual meetings of the Joint Judicial Committee on Prisoners as agreed to a decade ago; the committee has not met since 2013. Its last recommendations, that women and children as well as prisoners with mental health issues be sent back to their countries on humanitarian grounds, are yet to be implemented. There is little to be gained by holding these prisoners hostage to bitter bilateral ties and prolonging the misery of their impoverished families. There needs to be a more humane approach.

Misusing NSA

The Manipur government must revoke the vindictive detention order against a journalist

The detention of a journalist in Manipur under the stringent National Security Act for a social media post is a clear instance of misuse of power and a blatant violation of his rights as a citizen. It indicates a dangerous trend among those wielding power to invoke laws aimed at preserving public order and security in a casual or vindictive manner, with utter disregard for constitutional provisions that uphold individual liberty. It is immaterial how scathing the Facebook post of Kishorechand Wangkhem was in its criticism of the Manipur Chief Minister and his party. Calling the Chief Minister a "puppet" can in no way be a reason to arrest him, as was done by the police in Imphal in November, on the charge of sedition. A magistrate granted him bail, noting that Mr. Wangkhem's remarks were no more than an expression of opinion against the public conduct of a public figure, albeit in "street language". However, in a sign that the regime of Chief Minister N. Biren Singh could not tolerate the journalist being set free, he was arrested again a couple of days later and detained under the NSA, which provides for detention for a year without bail to prevent someone from "acting in any manner prejudicial to the security of the state" or for "the maintenance of public order". The NSA can be used only against those advocating armed insurrection or violent disaffection. It is shocking that the statutory advisory board held there was "sufficient cause" for detention, when he posed no threat to public order or security. The State should revoke its vengeful detention order.

The Manipur government confirmed his imprisonment for a year as soon as the detention order was cleared by the advisory board. It is questionable whether a person can be detained under the NSA for one year at a go, as its provisions say the detention can only be for three months at a time and up to one year in total. This position has also been confirmed by the Supreme Court. The NSA advisory board consists of three members who are, or have been, or are qualified to be high court judges. It is not expected to approve detention orders in a routine or mechanical manner. At a time when the Law Commission is revisiting Section 124A of the Indian Penal Code, which deals with sedition, and there is a demand for its repeal, it is disturbing that State governments continue to use it. It is even more deplorable that on failing to make the sedition charge stick, a government puts away the same person under the NSA. This is a fit case for judicial review, and the protests and the outrage against the incarceration of Mr. Wangkhem ought to result in a stinging indictment of the State government's action. This will inhibit any future move to throttle free expression by misusing the law.

Towards a genetic panopticon

The DNA Bill will give the state untrammelled access to deeply personal and penetrating material



SUHRITH PARTHASARATHY

Parliament today serves less as a locus for debate and discussion and more as one for din and discord. But the pandemonium that appears to be the permanent state of affairs in both Houses scarcely seems to stop the government from passing laws, as we've seen this winter session. The government's disdain for dissent, though, makes the potential introduction of the DNA Technology (Use and Application) Regulation Bill, 2018, for consideration by the Rajya Sabha an especially invidious proposition.

Problems with the draft Bill

The draft statute, approved by the Union Cabinet in July, not only disregards the serious ethical dilemmas that are attendant to the creation of a national DNA database, but also, contrary to established wisdom, virtually treats DNA as infallible, and as a solution to the many problems that ail the criminal justice system. What's more, any infringement of civil liberties, caused by an almost indiscriminate collection of DNA, is seen as a legitimate trade-off made in the interests of ensuring superior justice delivery. But what the Bill fatally ignores is that the disproportionality of the DNA bank that it seeks to create, and the invasiveness of its purport and reach, imposes a Faustian bargain on the citizen.

The genes encoded in deoxyribonucleic acid (DNA), which can be collected from blood, hair, skin cells and other such bodily substances, have undoubtedly proven to be an important tool in forensic

science. Much like fingerprints, a person's DNA profile is unique (except in the case of identical twins) and can, therefore, help in establishing the identity of, say, a suspect. That only a small amount of genetic material is needed to create such a profile makes the form of evidence especially appealing to criminal investigators. And to be sure, across the world, the use of DNA evidence has helped exonerate a number of innocent people from wrongful conviction, and has also helped find the guilty party in complex investigations.

It is to that end that we no doubt need a law to help regulate the manner and circumstances in which the state may be entitled to collect biological material from a person. The requirement for such a law is only accentuated by an amendment made to the Code of Criminal Procedure in 2005, which expressly authorises investigating officers of a crime to collect a DNA sample from an accused with the help of a medical practitioner. But for years, every iteration of a proposed Bill, aimed at regulating the use of DNA, has failed to provide a constitutionally sustainable model.

In its latest form, the draft law seeks to create a National DNA Data Bank, which will be maintained on the basis of various different categories, including a crime scene index, a suspects' index and an offenders' index, with a view to "facilitating identification of persons". This attempt at identification may relate, among other things, to a criminal investigation, to a judicial proceeding of any kind, and even to civil cases such as "parental disputes", "issues relating to pedigree", and "issues relating to establishment of individual identity". The proposed law, however, is not only decidedly vague on how it intends to



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maintain this DNA Bank, but it also conflates its objectives by allowing the collection of DNA evidence not only in aid of criminal investigations but also to aid the determination of civil disputes.

Moreover, while consent is not required before bodily substances are drawn from a person accused and arrested for an offence punishable with either death or imprisonment for a term exceeding seven years, in all other cases a person refusing to part with genetic material can be compelled to do so if a Magistrate has reasonable cause to believe that such evidence would help establish a person's guilt. Therefore, there's no end to the state's power in coercing a person to part with her DNA.

Infringement of privacy

When, in August 2017, a nine-judge bench of the Supreme Court in Justice *K.S. Puttaswamy (Retd) v. Union of India* declared that the Constitution recognises a fundamental right to privacy, it also explicated the various facets of this right. Significantly, it ruled that any meaningful right to privacy would include protection over the physical body. As a result, even if, for the purposes of argument, we were to consider a mandatory collection of bodily substances from a person as consonant with the right against self-incrimination that the Constitution guarantees — although on a dubious rationale courts have tended to see the drawing of genetic material as non-testimo-

Against the mandate for inclusion

The Transgender Persons Bill will do more damage than good if passed without revision



AJITA BANERJEE

The transgender community has once again been let down, as the Lok Sabha passed the Transgender Persons (Protection of Rights) Bill, 2018 in a hurry amid ongoing protests over the Rafale deal. The Bill, ostensibly aimed at protecting transgender persons' rights, has been drafted hastily, with no real understanding of gender identity and expression. This was made amply clear in the original draft, with the offensive and unscientific definition of a transgender person as someone who is "neither wholly male nor wholly female". After several submissions made by the transgender community and the recommendations of a parliamentary standing committee, the definition of transgender has been rectified and made inclusive of diverse gender identities.

However, all nuance of people's

self-identified gender expression is lost in the Bill. It proposes setting up a District Screening Committee comprising five people, including a medical officer and a psychiatrist, to certify a transgender person. This process is in direct violation of the Supreme Court's directions in *National Legal Services Authority v. Union of India* (or *NALSA*), 2014 that affirmed the right to self-determination of gender as male, female or transgender without the mandate of any medical certificate or sex-reassignment surgery (SRS). In fact, *NALSA* had clearly directed that "any insistence for SRS for declaring one's gender is immoral and illegal".

A regressive Bill

Drafted by the Ministry of Social Justice and Empowerment in 2016, the Bill was met with immediate protests from the transgender and intersex community as it has several provisions that take away from the rights accorded through *NALSA* while injecting disempowering and regressive clauses. The Bill does not provide for employment opportunities through reservations, disregarding the directions of the Court in



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NALSA "to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments."

To make matters worse, the Bill criminalises begging, thereby targeting transgender persons who rely on begging for sustenance. Such provisions disregard the lived realities of transgender persons for whom begging often is the last resort. In fact, provisions such as these could give immunity to the police to exert force on transgender persons and "rehabilitate" them in beggars' homes or detention centres against their will. Such harsh measures of detaining marginalised individuals under

the garb of rehabilitation have also been criticised by the Delhi High Court in *Harsh Mander v. Union of India*, 2018. The court declared provisions of the Bombay Prevention of Begging Act, 1959 as unconstitutional on grounds that they violate Article 14 (equality before the law) and Article 21 (right to life and personal liberty), and affect the rights of persons who have no other means of sustenance apart from begging.

The Bill fails to extend protection to transgender persons who might be victims of sexual assault or rape, as the Indian Penal Code recognises rape in strict terms of men and women as perpetrator and victim, respectively. While the Bill makes "sexual abuse" punishable, with a disproportionate punishment of imprisonment only up to two years, it does not define the acts that constitute sexual offences. This makes it difficult for transgender persons to report such crimes and access justice. Moreover, the Bill does not grapple with the realisation of civil rights such as marriage, civil partnership, adoption and property rights, thereby continuing to deprive transgender persons of their funda-

mental rights and the constitutional guarantee provided by the Supreme Court in *NALSA*.

Transgender persons have faced prejudice, discrimination and disdain for years, and it is dehumanising to deny them their dignity, personhood and, above all, their basic human rights. The Bill in its present form continues to push them into obscurity, making a mockery of their lives and struggles by failing to secure for them their constitutional rights.

Still time to reconsider

The need of the hour is a robust Bill with strong anti-discrimination provisions that will remedy the historical injustices faced by the transgender community, which continues to fight for the most basic rights even today. The community has its hopes pinned on the Rajya Sabha. It is hoped that the Bill will be revised and brought in line with the *NALSA* judgment to ensure full realisation of transgender persons' fundamental rights.

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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.

Keeping promises

It is rare for a party to fulfil its promises ("Cong. keeps promise in Rajasthan," Dec. 20). Those opposed to farm loan waivers should also look at the crores of rupees that commercial banks write off every year, most of which are corporate defaults. The government should think of ways to recover such massive amounts of public money.

G.B. SIVANANDAM,
Coimbatore

Farm loan waivers are an implicit way of taxing the public in the future. Political parties ought to realise that they are providing band-aids where surgery is needed. They must come up with permanent solutions. India cannot claim that agriculture is the backbone of the economy without backing it with proof.

S. ARJUN PRASANNA,
Bengaluru

In search of jobs

Every citizen of India has the right to live and work anywhere in the country. Madhya Pradesh Chief Minister Kamal Nath's argument that the youth of his State have been deprived of jobs because of migrants from Bihar and Uttar Pradesh is an unfortunate one ("Furore over Kamal Nath remarks", Dec. 19). Mr. Nath himself was born in U.P., studied in Dehradun and West Bengal, and is now Chief Minister of Madhya Pradesh. If State governments make an effort to improve opportunities in their respective States, why would the youth go elsewhere?

P.G. MENON,
Chennai

Wrecking institutions

It is amusing to hear Prime Minister Narendra Modi say that the Congress has "humiliated every

institution" when the BJP is busy doing just that ("Expose Congress games, says Modi", Dec. 20). Whether it's the Reserve Bank of India, the Central Bureau of Investigation, the Election Commission or even the judiciary, it's an open secret that the government has forced these institutions to act according to its own whims and fancies.

THARCIOUS S. FERNANDO,
Chennai

A changing capital

The harsh disruptions in Delhi are painful for those who have lived in the city for a long time ("Metropolis of the mind," Dec. 20). Till a few years back, a teacher like me could take his school students to almost any stadium in the city, but with security increasing in these spaces, these stadiums are mostly closed nowadays. Some grounds, like the ones in Delhi

University's north campus, provided unfettered access to people of all ages and classes. These are now walled off and only a few card-holding people are allowed to enter at specified hours. Iconic buildings in Pragati Maidan have been destroyed. Red Fort has been handed over to a private body. Delhi is changing in many ways before our eyes and we are unable to do anything about it. History tells us that Delhi has been plundered at different times by invaders. This time, it is being robbed not just of its resources but its public character, and the plunderers are no invaders but salesmen and leaders.

FIROZ AHMAD,
Delhi

Restrictions on liberty

The writer, Apoorvanand, has come to the conclusion that individual freedom has been restricted by the state

by nitpicking assertions of state functionaries before courts in different cases ("We are not mere subjects of the state", Dec. 20). His advocacy of political laissez faireism, where unfettered individualism is revered as an end in itself, appears nice as a theory. However it would lead to social disorder and chaos, if practised. Nowhere in the world do we see citizens enjoying unrestricted freedom of expression; there are always reasonable constraints. The arrest of a few activists does not imply that we have reached a stage where criticism of the state is considered

CORRECTIONS & CLARIFICATIONS: A Sports page story titled "Prabhsimran has 'potential': More" (Dec. 20, 2018) erroneously said Prabhsimran was bought by *Royal Challengers Bangalore*. Actually, he has been bought by *Kings XI Punjab*.

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