A shocking mystery

Saudi Arabia's official version of Jamal Khashoggi's death just doesn't add up

Saudi Arabia's admission that Jamal Khashoggi, the dissident journalist who was last seen entering the Saudi consulate in Istanbul on October 2, died in a "fistfight" inside the building raises more questions than it answers. According to the latest Saudi version, a general despatched a 15-member team to Istanbul to confront Khashoggi as there is a general order in the Kingdom to bring back dissidents living abroad. Inside the consulate, a fight erupted between Khashoggi and the security men, and the journalist died when he was put in a chokehold. His body was handed over to a local collaborator. Saudi Arabia says it has arrested 18 people in connection with the death and dismissed five senior officials, which U.S. President Donald Trump has termed a "good first step". It's hard to agree with Mr. Trump. The Kingdom is clearly trying to distance Crown Prince Mohammed bin Salman, its *de facto* ruler, from the Khashoggi affair. Riyadh says MBS, as the Crown Prince is widely known, was unaware of the operation. But there are several gaps in this theory. First, it is difficult to imagine a rogue general carrying out such a complex operation inside a consulate in a not-so-friendly foreign nation without clearance from the top. And MBS, over the past year, has amassed such huge powers and has even been micromanaging policy decisions, that it would be difficult for an operation of this scale to be executed without it being brought to his notice. Second, it is difficult to believe that a rogue general would send to Turkey in two chartered aircraft a 15-member security team, including a forensic expert who was reportedly carrying a bone saw, just to confront a 59-year-old journalist.

The official version also does not explain why there was an effort at a cover-up for a fortnight if it was indeed a rogue operation gone bad. All these questions remain unanswered. The Saudi admission that Khashoggi had died came only after it became untenable for the Kingdom to stick to its position that he had left the consulate freely. Turkish officials gradually leaked out to the media information on Khashoggi's death, forcing even Saudi Arabia's Western allies to demand the truth from the Kingdom. The Turkish authorities claim to possess an audio recording relating to the assassination, according to which Khashoggi was tortured and killed inside the consulate, and his body dismembered. The world needs to know what actually happened to Khashoggi. Given the dubious role Riyadh has already played in trying to cover up the facts, it is unlikely that its own investigation will be seen to be impartial. The U.S., which has a special relationship with Saudi Arabia, should look beyond its own economic and diplomatic interests, and work towards setting up an international probe. Such an inquiry should establish the facts around Jamal Khashoggi's murder and reveal who ordered it.

Turf battle

The RBI makes a valid case against the proposal for a separate payments regulator

The Reserve Bank of India (RBI) and the Union government are once again at loggerheads over the legitimate extent of their powers. In a rare gesture, the central bank last week made public its reservations against the government's plans to set up an independent payments regulator, potentially setting the stage for a regulatory turf war. In a strongly worded dissent note against the inter-ministerial committee for the finalisation of amendments to the Payment and Settlement Systems Act, 2007, published on its website on Friday, the central bank observed that it would prefer the Payments Regulatory Board to function under the purview of the RBI Governor. "There is no case of having a regulator for payment systems outside the RBI," the note read. In support of its stance, the RBI stated that the activities of payments banks come well within the purview of the traditional banking system, which the central bank oversees as the overarching financial regulator. So, according to this logic, it might make better sense to have the RBI oversee the activities of payments banks as well instead of creating a brand new regulator for the growing industry. "Regulation of the banking systems and payment system by the same regulator provides synergy," it noted. The RBI, in essence, is pointing to the interconnection between the payments industry and the banking system to back the extension of its regulatory powers.

The RBI's case makes good sense when seen from the perspective of the cost of regulatory compliance. As stated above, there is definite overlapping between the current regulatory powers of the RBI and the proposed regulations for the payments industry. A unified regulator can thus help in lowering the compliance costs and enabling the seamless implementation of rules. Further, there is the real risk that a brand new regulator may be unable to match the expertise of the RBI in carrying out necessary regulatory duties. So it makes better sense to have the RBI take charge of the rapidly growing payments industry which can ill-afford regulatory errors at this point. The fact that the RBI has made public its dissent against the Union government's idea, suggests that the central bank has serious problems with the dilution of its current powers over the financial sector. However, the RBI's demand for the centralisation of regulatory powers also brings with it the need for exercising a greater degree of responsibility. At a time when there are increasing risks to the stability of the domestic financial system, both the government and the RBI must look to work together to tackle these risks instead of battling over regulatory powers.

The judiciary's #MeToo moment

It is an opportunity to ensure that the defamation law is no longer used as a tool for harassment

GAUTAM BHATIA

In Isaac Asimov's famous *Foundation* novels, one of the protagonists often explains that "violence is the last refuge of the incompetent". In India, the fallout of the #MeToo movement has recently re-emphasised what was already well-known: defamation is the first refuge of the powerful. Whether it is M.J. Akbar's criminal defamation complaint against Priya Ramani, or Alok Nath's criminal and civil defamation complaints against Vinta Nanda, accusations of sexual harassment have seen a predictable response: the leveraging of criminal defamation law as a way of striking back.

Impinging on freedom

It is trite to say that there must exist a balance between the freedom of expression and the right to reputation. No legal system can allow false and slanderous statements to be made publicly, with impunity. Defamation law is the tool that is used to strike the balance. But it is the shape and the form of defamation law that often determines whether the balance has been struck appropriately, or whether, in the guise of protecting reputation, the freedom of speech and expression has been effectively stifled.

India's criminal defamation law undoubtedly belongs to the latter category. A colonial relic that was introduced by the British regime to suffocate political criticism, Section 499 of the Indian Penal Code provides an ideal weapon for powerful individuals to silence critical or inconvenient speech. First, unlike many other countries, defamation in India is a criminal offence (and not just a civil wrong), and a conviction entails both social stigma and potential jail time. Second, there is a very low threshold for a *prima facie* case of defamation to be established by a complainant. Simply put, he must only show that an "imputation" has been made that could reasonably be interpreted as harming his reputation. This is enough to set the wheels of the law in motion. While an accused has multiple defences open to her – such as demonstrating that her statement was true and in public interest, or that it was an opinion made in good faith, and concerning a public question – these defences are effectively available only after the trial commences. By this time, an accused individual has already been dragged to court multiple times, and must also then go through a long-drawn-out trial process, where the procedure is the punishment.

And third, even the defences open to an accused are insufficiently protective of speech, to an extent that is even less than what civil defamation allows. For example, while in a civil defamation case, a defendant need only show that her statement was true in order to escape liability, in a criminal defamation proceeding, an accused must show that her statement was true and in the public interest. This leads to the paradoxical situation where our legal system is more advantageous towards those at the receiving end of civil defamation proceedings, and harsher towards those who have to go through the criminal process!

All these – and more – arguments were made as recently as 2016, when the constitutionality of criminal defamation was challenged before a two-judge bench of the Supreme Court. Unfortu-

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nately, however, they were largely ignored by (then) Justice Dipak Misra, who simply held that Section 499 was constitutional, as it protected individual reputation. The disproportionality of criminalising what is essentially a civil wrong, and the numerous ways in which the specific structure of Indian criminal defamation law chills and suffocates free expression, was not considered by the court.

The movement

It is important to remember, however, that the 2016 challenge to criminal defamation was driven by politicians who – at the best of times – do not make for the most sympathetic of petitioners before a court. Much has changed in the last two years. And perhaps the most significant change has been brought by the #MeToo movement.

It has seen women articulate their experiences of sexual harassment, often at the hands of powerful and well-established men. What is striking about the movement is how it has compelled all of us to confront systematic male behaviour that may sometimes be difficult to define as a legal offence, but which is nonetheless sexually predatory and abusive. Issues involving hierarchies in the workplace, differences in age and influence, the power exercised by men who are highly regarded in their professions and the abuse of that influence – issues that were long suppressed and simply not talked about – have, at last, found public utterance. It is a time of upheaval, when old pieties have been exposed as morally and ethically bankrupt, and old codes of behaviour shown to be exploitative and unacceptable. The #MeToo movement has brought submerged experiences to the surface, and given individuals a fresh vocabulary with which to express what, for all these years, seemed simply inexpressible.

With the filing of the criminal defamation cases, therefore, the stakes have been made clear. Will powerful men be allowed to use the law to silence this new mode of public expression? Will criminal defamation be weaponised to restore the old status quo, and preserve and perpetuate the hierarchies that the #MeToo movement has challenged?

An opportunity for change

It is the courts that must now confront these questions. And the courts now have a fresh opportunity: this is no longer about an abstract challenging to the constitutionality of criminal defamation, but a live issue about the relationship between our legal system and a social movement aimed at publicly redressing long-standing injustices.

More than 50 years ago, courts in another country were faced with this challenge. In the 1960s, the American civil rights movement found itself under siege: States in the deep south not only violently reacted to the movement, but also filed defamation claims against newspapers, to stop them from covering it. Small factual errors in reports were picked up, and massive defamation suits were filed to harass and bankrupt reporters and newspapers. *The New York Times*, for example, was found liable for the crippling sum of $50,000, for its coverage of a civil rights protest in Montgomery, Alabama. When these defamation verdicts were challenged before the Supreme Court, therefore, no less than the fate of the civil rights movement was in its hands.

The U.S. Supreme Court responded. In one of the most famous judgments in its history, New *York Times Co. v. Sullivan* (1964), it substantially modified defamation law to ensure that it could no longer be used as a tool of harassment and blackmail. Articulating a very high threshold of "actual malice", the court ensured that journalists could go about their job without fear, as long as they did not intentionally or recklessly make outright false statements. Nothing less than this, the court held, was required by the constitutional right to freedom of expression, and a free press.

In 2018, our courts are now faced with a similar situation: a vitally important public movement is threatened by the heavy hand of the law of defamation. And, like the American courts at the time of the civil rights movement, our courts too have a golden opportunity. They may, for one, choose to revisit the constitutionality of criminal defamation. But even without that, there are enough ways to judicially interpret Section 499 to ensure that it no longer remains the tool of the powerful to blackmail, harass, and silence inconvenient speech. Incorporating the Sullivan standard into the law might be a start; but the interpretive possibilities are endless. All that we need is for the courts to understand what is at stake, and respond with the courage and the sensitivity that these times demand of them.

Gautam Bhatia is a Delhi-based lawyer

Ripe for prison reform

Political will is crucial to reform India's criminal justice system

R.K. RAGHAVAN

In an acknowledgment that the more than a century-old system of prisons in India needs repair, the Supreme Court, late last month, formed a committee on prison reforms. Headed by former Supreme Court judge, Justice Amitava Roy, it is to look into the entire gamut of reforms to the prison system. But this is not the first time that such a body is being set up, examples being the Justice A.N. Mulla committee and the Justice Krishna Iyer committee on women prisoners (both in the 1980s).

While marginal reforms have taken place, these have not been enough to ensure that prison conditions are in tune with human rights norms.

Punish or reform?

The terms of reference for the new committee are omnibus and seem ambitious. One must also not forget that its formation comes at a time when controversy surrounds the Tamil Nadu government's recommendation that the seven convicts in the assassination, in 1991, of former Prime Minister Rajiv Gandhi be released. The plea of the petitioners is that however heinous the crime, the penalty imposed – they have served 27 years – was beyond endurance.

This is the crux of the debate: incarceration in any form is uncivilised, especially when it is so long-drawn-out, and when the objective of criminal punishment should be one of reform rather than wreaking vengeance on a perpetrator of crime. The Hammurabi Code, it is argued, is no longer acceptable. In my view, any exercise to improve prison conditions – though not directly related to a plea for mercy, such as convicts in the Rajiv Gandhi case – must not ignore this axiom.

There is a divide here. Significantly, those pleading for clemency in this case are outnumbered, which is reflective of popular sentiment that a gruesome crime needs to be dealt with severely. It is also about the unresolved conflict in attitudes about incarceration – punishment or reform – which also explains the halfway jail reforms agenda seen in many countries.

So how do we render conditions within prisons less harsh and more humane? There are those who believe that if you keep improving prison conditions, there is likely to be an attendant impact on the incidence of crime. This accounts for the reluctance of many criminal justice administrators to employ or enlarge non-prison alternatives such as community service.

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The offshoot of all this is growing numbers of prisoners and the woeful incapacity of governments to build more and larger prisons. The question often asked by governments is, in these days of extreme fiscal stress, why should state resources be diverted to a 'negative exercise, whose benefits are dubious'? This is why jail officials are often asked to 'somehow manage' with existing modest facilities.

Packed to the gills

The data on prison overcrowding are frightening. Except in parts of Europe, where crime is still low or at acceptable levels, overcrowding is rampant.

In the U.S., for example, which has a humongous crime problem, complicated by gun violence and a strident racist overtone in combating crime, the prison system is creaking under the stress of numbers. At any time, it is estimated, there are more than two million prisoners in state and federal prisons. In the U.K., the latest available data (July 2018) show a current prison population of approximately 92,500.

In India, the publication, *Prison Statistics India*, brought out by the National Crime Records Bureau will provide food for thought for the Justice Roy Committee. In 2015, there were nearly 4.2 lakh inmates in 1,401 facilities, with an average occupancy rate of 114% in most. About 67% of total inmates were undertrials, a commentary on the speed and efficiency of India's criminal justice system.

There is an obvious poverty of ideas in justice administration. While public officials and social workers are agreed upon the need to reduce overcrowding, there is hardly any convergence on how to go about this delicate exercise. There is also an obvious fear of backlash against any move to decriminalise what is now prohibited by statutes.

Handling white collar crimes

There is a popular view that in order to reduce prison populations, proven non-violent offenders could be dealt with differently. But it is frustrating that no consensus has evolved across the world on this relatively uncomplicated issue.

White collar crime has assumed monstrous proportions but there is no reason why we should continue to lock up offenders instead of merely depriving them of their illegal gains. Devising swift processes of attachment of properties and freezing of bank accounts are alternatives to a jail term. There are legal impediments here, but these can be overcome by ensuring a certain fairness in the system, of the state taking over illegally acquired wealth. The argument that not all gains made by an economic offender are open is not convincing enough to opt for incarceration over punitive material penalties. In India, progress has been made in freezing 'benami' holdings of major offenders even though it may not be a 100% effective step of cleaning up. But these are the first steps towards making economic crimes unaffordable and unattractive for the average offender.

On prison officials

Another complaint against prisons is the brutality and venality of prison officials, again common across the world. A solution will be a point to ponder over for the Justice Roy Committee.

Finally, improving prison conditions has no political leverage. Just as humane prisons do not win votes, the bad ones do not lose votes for any political party. As long as there are no stakes here for lawmakers, one can hardly hope for model prisons, where inmates are accommodated with due regard to their basic human needs and are handled with dignity.

R.K. Raghavan is a former CBI Director

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.

Punjab accident

As far as railway safety is concerned, India needs a system that necessitates the use of an underpass or a bridge instead of using boom gates. Rail track crossings with boom gates are ancient and radar sensor systems are not adept enough to handle the large volume of traffic passing through. With 3,479 unmanned rail crossings (broad gauge) out of a total of 5,792 unmanned and 19,507 manned crossings, and many casualties every year, the country requires swift measures that are related to rail safety (Editorial, "Avoidable tragedy", October 22).

ADITHYA SARMA,
Groningen, The Netherlands

■ The accident shows how cheap life is in India. The blame game is also on – to pin responsibility on the Congress-led Punjab government or the Indian Railways. However, in my opinion, the "anything goes" line of thought is the main reason. Instead of indulging in ugly blame games and scoring brownie points, I would suggest that States and the Indian Railways go about the task of equipping themselves with the latest technology to avert accidents. This should be a wake-up call to implement the latest in sensor-driven technology.

Q. QASMI,
Hyderabad

■ The attitude in India towards safety has always been lackadaisical. Incidents occur frequently as a result of overcrowded buses, trains, gatherings on bridges, at religious festivals and even on boats and barges.
If only a modicum of attention is paid to have safety precautions in place, many of these ghastly incidents may not occur. Hopefully, the magisterial inquiry will fix responsibility on the guilty.

H.N. RAMAKRISHNA,
Bengaluru

Labour rights

The problems that accompany migrant labour are noticed only during times of untoward incidents. The phenomenon of migration is linked to the underdevelopment of the origin States. Hence regulation of migrant workers at destination States appears to be the only viable solution. Since migration cannot be rolled back in many parts of India, the employer should be held responsible for the new entrants in a city or town, with a proper flow of information to the police and labour departments. All rights must be ensured.

N. VIJAI,
Coimbatore

At Sabarimala

Reforms are best brought about through social movements and not through pieces of legislation or judgments (OpEd, "The pilgrimage's progress", October 22). One wishes that the activist women had not rushed to the Sabarimala temple so soon. They could have been a little more patient and concentrated on building social support. Having to depend on the State's police to visit the temple is ironic. The right has gained the most from the judgment and seems to have united conservatives of all hues. One sincerely hopes that the progressive spirit of Kerala is not just skin deep and that this storm too will be overcome, like the response to the floods.

SREEKUMAR N.,
Hyderabad

■ Comparing happenings at Sandur or any other with Sabarimala is irrelevant as each temple will have its own peculiar hereditary characteristics. There have been changes and people older than the writer have witnessed them. The writer should have refrained from making certain observations. Rituals and traditions that are followed by certain temples should be allowed to stand. As far as the protesters who had gathered at Sabarimala are concerned, they were venting their disappointment and should not be sneered at.

K.R. UNNITHAN,
Chennai

Cricket ranking

India may be the top team in International Cricket Council Test rankings, but we cannot assume that India is truly a top Test team (Single File, "Best at home, not abroad?", October 22). We will not be able to know where we stand until we step out of the comfort of the home zone. Trying to retain the top spot by playing one-sided tours will not help. We must compete with stronger teams. The results against England and South Africa will tell us our mettle.

PRANAV DONGRE,
Mumbai

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