



## Bail over jail

The chain of arrest, custody, and remand must be linked only by due process

The power of arrest is an extraordinary one, conferred on the police to be employed with discretion and deliberation, not as a tool of oppression and harassment at the hands of prosecuting authorities or the government of the day. The Supreme Court has emphasised that arrests should never be a reflexive response to an allegation of an offence, or even its commission. The law that empowers the police to arrest people without warrants (Section 41 of the CrPC) is reasonably stringent, demanding that some conditions be met, including that such arrests be carried out to prevent commission of further offences, tampering of evidence, and influencing of witnesses. Unfortunately, a power that affects the liberty of citizens and which can ‘bring humiliation... and cast scars forever’, as the Supreme Court noted in *Arnesh Kumar v. State of Bihar* (2014), continues to be used in a cavalier way. Recently, Tamil Nadu has attracted attention in this connection, particularly for the heavy-handed treatment of those opposing the Chennai-Salem eight-lane highway project. The latest in a slew of unjustified round-ups and arrests was Swaraj India Party’s chief, Yogendra Yadav; ironically, he was on nothing more than a fact-finding mission to meet farmers affected by or opposed to the project.

Mr. Yadav was let off, but in most cases arrests without warrant follow a dishearteningly familiar course, with the accused sent to custody after the police oppose bail. In this prosecutorial ecosystem, jail succeeds in trumping bail almost every time and magistrates, who are empowered to refuse remand and grant bail, continue to issue orders mechanically. Tamil Nadu was witness to another high-profile example of this recently, when a student was arrested and remanded to 15 days judicial custody (before eventually being let off on bail) for political sloganeering on an aircraft; the complaint was filed by the BJP’s State president. The dilemmas over maintaining the right balance between individual liberty and the interests of society invariably become more acute when the charges against the accused, well-established or otherwise, are serious. The recent and shocking arrests of activists, over their alleged links to Maoists, have focussed attention on the severe restrictions on bail when booked under the Unlawful Activities (Prevention) Act. The prosecution has 180 days to file a charge sheet, a period during which bail is routinely denied. And after the charge sheet is filed, bail is extremely difficult to secure, dependent as it is on the accused establishing his or her innocence, a reversal of the usual burden of proof. If the Supreme Court decides that justice will be secured only by its intervention in the case, it will probably be forced to invoke its extraordinary powers under Article 142 of the Constitution, another reminder of the need to break the customary chain of arrest, custody and remand.

## Cloudy forecast

Developed countries, especially the U.S., need to commit funds to limit climate change

The conference of the UN Framework Convention on Climate Change in Bangkok last week, that was to draft a rulebook for the Paris Agreement ahead of a crucial international conference in Poland in December, ran into predictable difficulties over the issue of raising funds to help poorer nations. Some developed countries led by the U.S. – which, under the Trump administration, has rejected the agreement – are unwilling to commit to sound rules on raising climate finance. Under the pact concluded in Paris, rich countries pledged to raise \$100 billion a year by 2020 to help developing countries reduce their greenhouse gas (GHG) emissions and aid populations to cope with extreme events such as floods, droughts and storms. Obstructing the transition to a carbon-neutral pathway and preserving the status quo is short-sighted, simply because the losses caused by weather events are proving severely detrimental to all economies. By trying to stall climate justice to millions of poor people in vulnerable countries, the developed nations are refusing to accept their responsibility for historical emissions of GHGs. Those emissions raised living standards for their citizens but contributed heavily to the accumulated carbon dioxide burden, now measured at about 410 parts per million of CO<sub>2</sub> in the atmosphere, up from 280 ppm before the industrial revolution.

There is international pressure on China and India to cut GHG emissions. Both countries have committed themselves to a cleaner growth path. India, which reported an annual CO<sub>2</sub> equivalent emissions of 2.136 billion tonnes in 2010 to the UNFCCC two years ago, estimates that the GHG emissions intensity of its GDP has declined by 12% for the 2005-2010 period. As members committed to the Paris Agreement, China and India have the responsibility of climate leadership in the developing world, and have to green their growth. What developing countries need is a supportive framework in the form of a rulebook that binds the developed countries to their funding pledges, provides support for capacity building and transfer of green technologies on liberal terms. If scientific estimates are correct, the damage already done to the West Antarctic Ice Sheet is set to raise sea levels; a 2° Celsius rise will also destabilise the Greenland Ice Sheet. Failed agriculture in populous countries will drive more mass migrations of people, creating conflict. A deeper insight on all this will be available in October when the Intergovernmental Panel on Climate Change releases its scientific report on the impact of a 1.5° C rise in global average temperature. This is the time for the world’s leaders to demonstrate that they are ready to go beyond expediency and take the actions needed to avert long-term catastrophe.

# Too close for comfort?

Dialogue with the U.S. should not define India’s strategic future or its other bilateral relationships



HAPPYMON JACOB

The India-U.S. 2+2 meeting on September 6 between the Defence and Foreign Ministers of the two countries appeared to be a singularly one-sided affair. Washington was calling the shots, and New Delhi was trying to wriggle out of U.S. pressure without much success. The inaugural round of the 2+2 Dialogue is therefore ‘advantage U.S.’ While carefully analysing the outcomes of the talks and the future direction of India-U.S. relations, it is difficult to get overjoyed by heart-warming American phrases like “India is a consequential emerging partner” or Washington naming and shaming Pakistan. Let’s look at the bigger, more nuanced and consequential picture.

### Buy American

Behind the carefully-constructed narrative of strategic rationales and geopolitical calculations underpinning India-U.S. relations, the American team came to New Delhi with an unambiguous sales pitch. Not that there wasn’t any strategic rationale to the high-level meeting, but the underlying American sales pitch was remarkable. Consider the U.S.’s insistence that India should bring down its oil imports from Iran to ‘zero’ in deference to the restrictions imposed by its unilateral withdrawal from the Iran nuclear deal. The U.S. also recommends that India buy American oil to make up the deficit. As a matter of fact, U.S. oil exports to India have more than doubled in

the past year, thanks to the U.S. sanction fears, thereby helping a booming domestic crude oil industry. Notably, at the 2+2 meeting, the Indian side did not manage to get a waiver for importing Iranian crude.

Second, Washington seeks to impose the punitive provisions of a U.S. federal law called Countering America’s Adversaries Through Sanctions Act (CAATSA) on countries dealing with Russian defence and intelligence sectors, making it difficult for India to buy the much-needed S-400 missile system. For a country with close to 60% of its weapons systems originating from Russia, this would be a huge setback. Again, it’s clear the U.S. would like India to buy its weapons instead. There is still no clarity on whether India’s request for a “one-time waiver” was granted by the U.S. to buy Russian weapons at the 2+2 meeting; the joint statement is silent on this. If such a waiver was indeed not granted, it must be considered a major setback.

In the run-up to the 2+2 meeting, the U.S. also put considerable pressure on India to reduce the bilateral trade deficit, which is in India’s favour, by buying more American goods.

### Key security agreement

During the 2+2 meeting, the two countries also signed the Communications Compatibility and Security Agreement, or COMCASA. The agreement is one of three considered to be “foundational” for a viable India-U.S. military relationship. In 2016, India and the U.S. had signed the Logistics Exchange Memorandum of Agreement (LEMOA), allowing their militaries to replenish from the other’s bases. The third, the Basic Exchange and Cooperation Agreement for Geo-



spatial Cooperation (BECA), is yet to be negotiated. It is necessary to take stock of the national security implications of these agreements.

The argument in favour of signing COMCASA is that it “will facilitate access to advanced defence systems and enable India to optimally utilise its existing U.S.-origin platforms”. India’s U.S.-sourced P-81 and C-130J aircraft had to use low-tech communication equipment as the U.S. could not provide India with such technologies due to domestic legal restrictions, unless India signed COMCASA. Moreover, in the absence of COMCASA, and the attendant high-tech equipment, the interoperability between Indian and U.S. forces would be severely hampered.

While there is some merit in this argument, given that the India-specific COMCASA is not a public document, we do not know the scope of the agreement. Therefore, the government needs to clarify several concerns. For one, there is the issue of visits by U.S. inspectors to Indian bases to carry out inspections on the COMCASA-safeguarded equipment sold to India.

Since we do not know how intrusive this inspection would be, it is useful to look at the language from a similar agreement signed

# A greater transformation

In reading down Section 377, the Supreme Court has showed the way to deepen democracy



ARVIND NARRAIN

In its decision in *Navtej Singh Johar v. Union of India* last week, the Supreme Court has finally struck down the colonial-era law criminalising homosexuality and the lives of LGBTQ persons. In a 493-page verdict, with four concurring judgments, the court traversed the protections of fundamental rights in the Constitution to find that the provision violated the rights of LGBTQ persons to dignity, equality, privacy and expression.

### ‘Personal matters’

The judges were unequivocal that Section 377 of the Indian Penal Code cavalierly intruded into a zone of intimate decision which is entitled to constitutional protection. As Justice D.Y. Chandrachud put it, “the choice of a partner, the desire for personal intimacy and the yearning to find love and fulfilment in human relationships have a universal appeal.” And: “the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.”

The opinion of the Chief Justice of India, Dipak Misra, invoked Johann Wolfgang von Goethe, Arthur Schopenhauer and John Stuart Mill to stress the right to develop one’s individuality against the demands of social conformity. In the context of LGBTQ persons – where the struggle is often to assert one’s personhood in an isolating, ostracising environment in which heterosexuality is the norm – this constitutional protection given to intimate choices against the dictates of societal conformity cannot be overstated.

The judges were also clear that the guarantee of equality at its heart was the guarantee of equal citizenship. The criminalising ambit of Section 377 violated this guarantee as it “singles out people, by their private choices” and “marks them as less than citizens – or less than human”.

### A stereotypical morality

The harm of Section 377 was not just that it prohibited a form of intimate and personal choice but that it encoded a stereotypical morality which has deep-ranging social effects. As Justice Chandrachud put it, Section 377 “perpetuates a certain culture”, based on “homophobic attitudes” which make “it impossible for victims to access justice”. The right not to be discriminated against on grounds of one’s sexual orientation is violated by the prejudicial



stereotypes about the LGBTQ community fostered by Section 377. It is for this reason as well that Section 377 was read down by the judges.

This constitutional guarantee of the right to develop one’s personhood and the right to equal citizenship is firmly anchored in the notion of constitutional morality, as referenced by Justices Misra, R.F. Nariman and Chandrachud. The denial to LGBTQ persons of the right to dignity is incompatible with the morality of the Constitution. As Justice Chandrachud put it, “there is an unbridgeable divide between the moral values on which it [Section 377] is based and the values of the Constitution”.

The idea that majority opinion should prevail over the right to dignity and liberty of the minority was explicitly rejected. As Justice Nariman put it, “it is not left to majoritarian governments to prescribe what shall be orthodox in matters of social morality”.

By explicitly setting out the Court as a guarantor of minority

rights, regardless of the opinion of “popular or legislative majorities”, the Court has signalled its determination to defend the Constitution. In a time when lynchings have become the order of the day and government remains a mute spectator, the role that the judiciary has to play in safeguarding the right to life of minorities of all stripes and hues cannot be overstated.

The logic of *Navtej Singh Johar* is anchored within what both Justices Misra and Chandrachud called “a transformative Constitution”. According to Justice Misra, “the purpose of having a constitution is to transform society” to “embrace therein” the “ideals of justice, liberty, equality and fraternity”. The mandate to transform society in allegiance to the Constitution is a task vested in the state, the judiciary and the citizen.

There is also a related concern whether the installation of U.S.

communication systems would compromise the secrecy of Indian military communication systems. Most importantly, it might also be useful to debate the utility of such India-U.S. agreements since, at the end of the day, the two countries are not likely to be deployed alongside each other in a conflict situation. The argument here is not that India should not make use of American assistance in strengthening its national security, but there should be more clarity on what it entails.

### Balancing China

Even though the “Joint Statement on the Inaugural India-U.S. 2+2 Ministerial Dialogue” did not explicitly mention China, the section on the Indo-Pacific region implicitly referred to it. There is no denying the fact that the “China threat” is one of the major talking points between Washington and New Delhi today. While China is indeed a challenge, there is only so much India-U.S. cooperation can do to address that challenge for India. India is an Asian country, with several Southern Asian security challenges, and its ability to meet those challenges with the help of an offshore (and declining) superpower is at best limited, and counter-productive at worst.

The India-U.S. relationship shouldn’t be allowed to define India’s geopolitical character, strategic future or the limits of its other bilateral relationships. In a world that is far more chaotic than ever since Independence, India must keep its options open and be multi-aligned, even as the U.S. forms a key part in that scheme of things.

Happymon Jacob is Associate Professor of Disarmament Studies at Jawaharlal Nehru University, New Delhi

The implications of a transformative Constitution are wide ranging and its power can be harnessed by inter-caste, inter-religious and same sex couples, all of whom are battling a form of social morality which is at odds with the Constitution. In fact Justice Chandrachud called “the right to love not just a separate battle for LGBTQ individuals but a battle for us all”.

The court, through this decision, has harnessed the transformative power of the Constitution and amplified a way of thinking rooted in the values of respect for dignity, equality and fraternity. If this way of thinking, rooted as it is in the struggle against forms of discrimination perpetrated by a conservative social morality, becomes more widely accepted, India will be less of a majoritarian democracy and more of a form of constitutional democracy.

### Continuing task

It is in this sense that we have to understand the work still to be done after this remarkable judgment. If a law has taken root in the social, cultural and legal consciousness, the challenge of extirpating the prejudice which the law has fostered is still immense. One has to only think of the prejudice and violence Denotified Tribes still face at the hands of the state and society even after the colonial-era Criminal Tribes Act was repealed in the late 1940s.

It is this immense task of com-

monstrating the prejudicial attitudes encoded in Section 377 which has to continue. Justice Nariman was cognisant of this challenge and mandated the Union of India to give “wide publicity to the judgment” and conduct “sensitisation and awareness training for government officials and in particular police officials in the light of observations contained in the judgment”.

The court, through this decision, has harnessed the transformative power of the Constitution and amplified a way of thinking rooted in the values of respect for dignity, equality and fraternity. If this way of thinking, rooted as it is in the struggle against forms of discrimination perpetrated by a conservative social morality, becomes more widely accepted, India will be less of a majoritarian democracy and more of a form of constitutional democracy.

It is in this sense that we have to understand the work still to be done after this remarkable judgment. If a law has taken root in the social, cultural and legal consciousness, the challenge of extirpating the prejudice which the law has fostered is still immense. One has to only think of the prejudice and violence Denotified Tribes still face at the hands of the state and society even after the colonial-era Criminal Tribes Act was repealed in the late 1940s.

Arvind Narrain is a founding member of the Alternative Law Forum in Bengaluru

## 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’s drug problem

It was deeply saddening to read about the women drug addicts of Punjab (‘Ground Zero’ page, “Punjab’s new addicts”, September 8). The situation seems to be dreadful and we, as a society, should hang our heads in shame. It was a rude shock to me to read that some of the women are so badly affected that they are ready to give their bodies to peddlers in exchange for drugs and are also oblivious to the plight of their children. The incident of a mother letting her children go hungry till the neighbours took note is shocking. The government in Punjab needs to summon all the help it needs to swiftly end this catastrophe-in-the-making.

R. RAJASEKARAN,  
Kumbakonam, Tamil Nadu

■ The candid report swiftly changed one’s perception about Punjab – the golden

State known for its hard-working people, the grain basket of India and that part of India that sends forth gallant and brave men to serve in the defence forces. It is a pity that the State is in the throes of the drug menace. It is disturbing that the political class has tried to sweep the issue under the carpet. That entire families are addicted to drugs is unfortunate. Drug peddlers have to be identified and stringent action taken against them. How the long arm of the law has been unable to deal with the kingpins of this dark trade is baffling.

K. JAYANTHI,  
Chennai

### Readers speak

A number of readers have pointed out how reading the daily in their formative years helped improve their proficiency in the English language. *The Hindu*

educates and empowers its readers through its balanced reporting. I am sure that it will continue to follow the principles of journalism, fairness and ethical values (Page 1, “Let us know you better”, September 1).

K. MAHABUB ALI,  
Hyderabad

■ I am 62 and have been reading the daily from the age of 10. Our neighbours, a doctor and his family, used to buy the paper and I was made to visit their house to read a few articles in order to improve my English. I was also permitted to cut out a few pictures for my scrapbook. Some of the beautiful photographs (black and white) of cricket matches are still with me. After I entered school final, my father decided that our family could afford to buy the paper for me. This gave me a strong foundation throughout my banking career, especially when it

came to drafting important correspondence. My complaints: I am sad that the paper has begun taking sides in connection with anything about the BJP. The pro-Congress-DMK stance is also upsetting. Analyses are now made to fit around pre-conceived decisions. The e-edition of paper has no courage to publish readers’ views without moderation.

S.V. RADHAKRISHNAN,  
Chennai

■ I am 86 and not a day passes without reading *The Hindu*. I always find it to be informative and the reporting crisp and newsworthy, whether it is by a Special Correspondent or a Staff Reporter. I recall the splendid reports by K. Balaraman from America, the lucid writing of Krishnarao Shelvankar from London, the review of the musical concert ‘Arabhi’, the religious discourses covered by D.V.V. and even the

hebdomadal column by D.A.

MANI NATARAJAN,  
Chennai

■ I am not a decades old reader. I began reading the daily only three years ago when preparing for a set of competitive examinations. The draw were the reports on the sports pages and the Editorials. I can say that reading this paper regularly will help those preparing for competitive examinations especially when it comes to “current affairs”. As a student from a government school, I found the paper to be of help in improving my English.

A. ANISH,  
Nagercoil, Tamil Nadu

**Note woes**  
In a brave example of how not to manage currency, the Reserve Bank of India has officially debased the national currency. The RBI issued new ₹2,000 and ₹200 notes, post the

demonetisation that hurt the masses, with replacements unavailable for a long time, and where existing ATMs were not recalibrated to accommodate their changed sizes. If these denominations are mutilated or torn, there are great difficulties in getting them exchanged for their full nominal value unlike the case with other denominations. We should not forget that in India, cash still accounts for the vast majority of transactions. A minimum of 88% of the original dimension should be intact for a full refund, and 44% for a half refund for the ₹2,000 note while for the ₹200 rupee note, it should be 78% and 39%, respectively. With this form of ‘currency depreciation’, are we now in for notes with a shelf-life like that of vegetables?

S.G. VENKATRAMANI,  
Chennai

MORE LETTERS ONLINE:  
www.hindu.com/opinion/letters/