



A good beginning

The data protection bill drafted by the Srikrishna panel ticks many boxes

Given the vast amounts of personal data being collected by private companies and state agencies, and their flow across national jurisdictions, the absence of a data protection legal framework in India has been a cause for deep concern. This is even more so because in many cases individuals whose data have been used and processed by agencies, both private firms and state entities, are oblivious to the purpose for which they are being harnessed. The need for legislation was also underlined last year with the landmark judgment in *Justice K.S. Puttaswamy v. Union of India* that held the right to privacy to be a fundamental right. Against this backdrop, the draft legislation on data protection submitted by a committee of experts chaired by Justice B.N. Srikrishna to the Ministry of Electronics and Information Technology after year-long public consultations provides a sound foundation on which to speedily build India's legal framework. It seeks to codify the relationship between individuals and firms/state institutions as one between "data principals" (whose information is collected) and "data fiduciaries" (those processing the data) so that privacy is safeguarded by design. This is akin to a contractual relationship that places obligations on the entities entrusted with data and who are obligated to seek the consent of the "principal" for the use of personal information. The draft legislation puts the onus on the "data fiduciary" to seek clear, informed, specific and free consent, with the possibility of withdrawal of data of the "principal" to allow for the use and processing of "sensitive personal data".

In many ways, the draft legislation mirrors the General Data Protection Regulation, the framework on data protection implemented in the European Union this May, in providing for "data principals" the rights to confirmation, correction of data, portability and "to be forgotten", subject to procedure. It envisages the creation of a regulatory Data Protection Authority of India to protect the interests of "principals" and to monitor the implementation of the provisions of the enabling data protection legislation. Taken together, the draft bill and the report mark a welcome step forward, but there are some grey areas. The exemptions granted to state institutions from acquiring informed consent from principals or processing personal data in many cases appear to be too blanket, such as those pertaining to the "security of the state". These are hold-all phrases, and checks are vital. The report recommends a law to provide for "parliamentary oversight and judicial approval of non-consensual access to personal data". Without such an enabling law, the exemptions provided in the bill will fall short of securing accountability from the state for activities such as dragnet surveillance. The grey areas must spark public and parliamentary debate before a final legislation comes to fruition.

A result foretold

Hun Sen returns to power in Cambodia after the Opposition was effectively disabled

The outcome had been ensured long before Cambodia went to the polls on Sunday, with Prime Minister Hun Sen ensuring his return by keeping key Opposition leaders out of the fray and muzzling the media. The next morning, a spokesperson for his Cambodian People's Party was smugly claiming it had won all 125 parliamentary seats, renewing its mandate for another five years. Despite official estimates of turnout in excess of 80%, the CPP's victory is hollow. Mr. Hun Sen, who has been at the helm since 1985, left nothing to chance to see that his party was effectively uncontested. Voters were threatened with punishment if they responded to calls for an election boycott. A number of dummy parties joined what international observers called a sham election. Since Cambodia's first free elections in 1993, the CPP's single-party dominance had been largely enabled by a fragmented Opposition. But things changed before the 2013 elections with the merger of two big Opposition parties to form the Cambodia National Rescue Party. The CNRP came within striking distance of the ruling party in those polls, and its impressive showing in the June 2017 polls to local bodies underscored its potential further. Within months, the courts ordered its dissolution on allegations of a plot to overthrow the regime. Its leader, Kem Sokha, was arrested on treason charges; several CNRP veterans are in exile. The closure of a reputed newspaper last year exposed official intolerance of media freedom. Some voluntary organisations have been forced to wind up because of a perceived western bias.

The climate of fear and intimidation has drawn criticism from regional and global rights groups. New York-based Human Rights Watch recently released an investigation on Mr. Hun Sen's inner circle, made up mostly of top security personnel linked to the brutal Khmer Rouge massacres of the 1970s. Closer home, ASEAN has traditionally been averse to commenting on the internal affairs of member-countries. Meanwhile, the massive Chinese investments in infrastructure projects in Cambodia come with no overt political strings attached, and Mr. Hun Sen continues to capitalise on his close ties with Beijing to counter domestic and overseas criticism of his human rights record. The U.S. House of Representatives last week approved legislation to sanction top Cambodian officials implicated in the violation of the rule of law. The measure will be taken up by the Senate soon. Whether Mr. Hun Sen will adopt a more conciliatory approach in his new term is a matter of speculation. But Cambodians clearly need some respite, as they struggle to rebuild their nation after the widespread destruction during the genocide under the Khmer Rouge and the civil war that followed.

The narrow and the transformative

The Supreme Court is hearing cases that place it at the heart of the culture wars



GAUTAM BHATIA

Upon reopening in July after its annual summer break, the Supreme Court has immediately found itself back in the spotlight. If the first half of the year (occupied entirely by the Aadhaar hearings) raised critical questions about the relationship between the individual and the state, then the second half – involving the (concluded) challenge to Section 377 of the Indian Penal Code, the (ongoing) Sabarimala case, and the (scheduled) constitutional challenge to adultery – has placed the court at the heart of the culture wars. While the Aadhaar challenge was argued on the relatively straightforward basis of when and to what extent the state can exercise its coercive power over individuals, the 377 and Sabarimala hearings have seen clashes between the invocation of personal rights and the claims of cultural and religious groups. This is set to continue with the forthcoming adultery hearings, where the state's objection to the decriminalisation of adultery is premised on the argument that it would destroy the institution of marriage.

Strategy of containment

When a constitutional challenge pits individuals against the state, the court's task is clear: if it finds that there has been a breach by the state, it must strike down the offending law (or rules), and vindicate the rights at issue. When, however, the court is called upon to settle a battle in the culture wars, the task is fraught with greater

complexity. This is because these conflicts often represent deep, long-standing and irreconcilable divisions in society, touching issues of personal belief and conviction. Constitutional documents often consciously refrain from directly addressing them: for example, the framers of the Constitution deliberately placed the provision for a uniform civil code in the unenforceable "Directive Principles" chapter, thinking that it was too divisive to be made a fundamental right.

This strategy of containment creates a situation where, for the most part, these conflicts remain submerged. The fear of permanent defeat prompts all parties to maintain a tense equilibrium. At times, however, the equilibrium is shattered when someone finally decides to break the stalemate, and raise the stakes towards a clear resolution. One method of resolution is through the courts. But ironically, it is the battles of the culture wars that are particularly ill-suited for resolution through the zero-sum game of courtroom litigation. Unlike in political or economic disputes, a decisive loss in a matter involving personal belief risks creating deeply embittered and alienated communities, and risks an erosion of faith in the neutrality and impartiality of state institutions.

The narrow approach

For this reason, there is a popular school of thought that asks the court to tread with particular caution when questions of culture are at stake. As far as possible – or so this school of thought holds – the court should avoid hearing and deciding such questions altogether. However, if it must decide, then it should do so on the narrowest grounds possible. Ideally, its rea-



V. SUBRAMANIAM

soning should be limited to technical points of law, avoid constitutional questions, decide only the case before it, consciously eschew establishing precedent, and, above all, refrain from expressing any opinion on the validity of any personal belief or conviction. The role of the court, in short, is to do everything it can to lower the stakes, and take a pragmatic, problem-solving approach to the conflict rather than an ideal-oriented, expansive one.

This narrow approach has been in play in both the cases that the court has heard so far, this July. In the Section 377 hearings, the government stated that it would not oppose the "reading down" of Section 377 as long as it was confined to same-sex relations between consenting adults in private. During oral arguments, every time the petitioners pressed for something more, government counsel urged the court to limit itself to simple decriminalisation, and nothing more. Similarly, in the Sabarimala hearings, what is at issue is the validity of a piece of subordinate legislation (specifically, a rule), on the basis of which women of a certain age are denied access to Sabarimala. While arguments before the court have, of course, been pitched upon the touchstone of religious freedom and non-discrimination, it is equally open to the court (if it so desires) to simply

hold that the rule exceeds the scope of the parent law, and is therefore invalid on purely statutory grounds. This would enable the court to avoid reaching any determination on whether Sabarimala is entitled to invoke the authority of religion (in this case, lord Ayappa's vow of celibacy) in order to deny girls/women between the ages of 10 and 50 the right to worship at the shrine. Indeed, this is precisely what the narrow approach would advocate.

The transformative approach

There is, however, a rival philosophy of constitutional adjudication. This philosophy holds that the Constitution is a transformative document, whose goal is to erase and remedy long-standing legacies of injustice. A particular feature of these injustices is their deep-rooted, social and institutional character. In the Indian context, the most obvious example is that of caste. The pervasive and corrosive influence of caste-discrimination in our society not only prompted the inclusion of a specific article in the Constitution abolishing untouchability (Article 17), but over and above that, gave rise to a constitutional vision of equality that specifically included affirmative action.

Consequently, where the narrow approach sees a culture war triggered by the disruption of a carefully-maintained accommodation of cultural difference, the transformative approach sees a long-suppressed protest against a system of hierarchy and subordination that has found its utterance in the language of constitutional rights. For the transformative approach, it would be a betrayal of the Constitution's transformative purpose if the court were to retreat in the face of strident claims to cultural integrity, and duck de-

ciding the "real" questions before it.

In the 377 hearings, for example, the transformative approach was articulated by counsel representing mental health professionals, who argued that decades of social exclusion and ostracism of the LGBT community could not be remedied simply by "decriminalisation". Rather, it would require a declaration by the court that no institution – public or private – would henceforth be permitted to discriminate on grounds of sexual orientation, or deny any person their civil rights. This would accomplish two crucial things: first, it would be a small step towards removing the structural and institutional barriers that continued to stand between the LGBT community and equal moral membership in the community; and second, it would serve as a public acknowledgement of a wrong that society had been complicit in, and which society was not determined to remedy. Similarly, in the Sabarimala case, counsel have urged the court to hold that religion cannot be invoked to shield a discriminatory practice from constitutional scrutiny; and that, at the end of the day, constitutional morality must prevail over precepts that are rooted in any particular religion.

In these cases, therefore, the court is faced with a stark choice between the narrow and the transformative approaches to navigating the choppy waters of culture and the Constitution. Which direction it chooses to take depends upon what it believes the Constitution is for – and will have profound consequences in the years to come.

Disclaimer: Gautam Bhatia was part of a group of lawyers involved in the 377 challenge

The big five at 10

BRICS has grown in influence in its first decade but is still far from achieving its initial goals



RAJIV BHATIA

In the age of Twitter, BRICS, or the grouping of Brazil, Russia, India, China and South Africa, has produced a 102-paragraph-long Johannesburg Declaration, one of the longest in recent years. This implies that either this important multilateral grouping has a lot to say about the state of the world or it needs to hire a sharp editor.

It is prudent to proceed on the first assumption. There is little doubt that BRICS has grown in influence, expanded the arc of its interests, and established new institutions and partnerships in its first decade. More importantly, it has created for its members the habits of working together. Intra-BRICS cooperation is on a rising trajectory.

Yet, the fact remains that BRICS is still far from achieving its initial goals: reform of global financial governance, democratisation of the United Nations, and expansion of the Security Council – partially because two of its members (China and Russia) do not want the other three members (India, South Africa and Brazil) to obtain

parity in the global pecking order.

Summit highlights

In this backdrop, the 10th summit, held last week, framed its deliberations against U.S. President Donald Trump's unconventional approach on world affairs, particularly the looming trade wars. "The summit is about the context," said Maxim Oreshkin, Russia's Economy Minister. "We are at a time when the U.S. and China announce new measures almost every week."

BRICS leaders, therefore, stressed "the centrality of the rules-based, transparent, non-discriminatory, open and inclusive multilateral trading", based on the World Trade Organisation. This stemmed from their broader commitment to cooperate for strengthening multilateralism, the rule of law and an equitable international order. That one of the BRICS members (China) does not follow in word and spirit this high-sounding prescription in regard to Asian affairs may have escaped attention.

The other big idea emanating from the summit is to help nations to prepare for the Fourth Industrial Revolution. South Africa, as the host, zoomed in on it early and managed to create sufficient enthusiasm for it. Participants embraced it, articulating the need for a new strategy on employment,

education and skill development as the digital revolution unfolds. BRICS Partnership on New Industrial Revolution (PartNIR), however, will make a meaningful contribution only if it goes beyond the five ministries of industry. It should engage with the private sector and young innovators working at the cutting edge of technology today.

The summit saw further consolidation of the business pillar. The BRICS Business Council has been actively enhancing trade and economic cooperation in diverse sectors ranging from manufacturing and energy to financial services and regional aviation. Besides, the leaders renewed their commitment to an inclusive and "people-centred approach" on development. The steady progress in interactions through sports, films, education, culture and tourism has been commendable.

Africa, BRICS Plus

The BRICS outreach to Africa began at the last summit hosted by South Africa, in 2013; it has picked up momentum now. But African leaders want more. They need big loans from the New Development Bank (NDB) for their infrastructure projects. A South African official stated that this would happen soon but uncertainty persists. So far, the NDB has dispersed loans totalling \$5.1 billion – all to its



members only.

China introduced the "BRICS Plus" format at the Xiamen summit last year by inviting a few countries from different regions. South Africa emulated it, arranging the attendance of top-level representation of five nations of its choice: Argentina, Jamaica, Turkey, Indonesia and Egypt. The precise role of "BRICS Plus" countries will take time to evolve. An immediate benefit is the immense opportunities it provides for networking among leaders. A large number of bilateral meetings took place on the summit's sidelines. For us, the most important was the interaction between Prime Minister Narendra Modi and Chinese President Xi Jinping, the third in four months, which deepened the trend towards conciliation between Asia's two biggest powers.

Unity and divergence

As a partnership that represents over 40% of the world's population and accounts for 22% of global GDP, BRICS will continue to be an influential voice as long as its con-

vergences prevail over its divergences. Changing power equations within BRICS are being watched closely. China's dominance is a reality even as the grouping asserts the sovereign equality of all members. China-Russia proximity has been a continuing factor. Given its political and economic travails, Brazil played a low-profile role.

Mr. Modi and his delegation were pro-active and visible. A South African commentator observed that India was playing "a delicate geopolitical game with the U.S., China and Russia as their spheres of influence wax and wane" across regions. To Delhi's satisfaction, four paragraphs in the summit declaration were devoted to the problem of international terrorism. But no decision was taken to set up the BRICS credit rating agency that India favours. The India-South Africa partnership helped to ensure that the Johannesburg Declaration was balanced and well-rounded in its orientation.

The critical question is whether BRICS's exertions will have appreciable impact on G-7, the grouping of the developed countries, which is in disarray, and particularly on the U.S. administration.

Rajiv Bhatia is Distinguished Fellow, Gateway House, and former High Commissioner to South Africa

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.

'Industrialist' remark

The Prime Minister may say that he has "no fear in being seen with industrialists" (July 30), but the country is concerned and afraid of his slow and steady shift to push India towards capitalism – after being a socialist country for many decades. One does not mind his affinity towards good and harmless industrialists but not with those businessmen who are tainted; the numerous bank scams and the role of big businessmen speak for themselves. Proof of his conscience being clear should be made transparent – in the form of his words and deeds.

J. EDEN ALEXANDER,
Thanjavur, Tamil Nadu

■ Mr. Modi's conscience might be clear but it is only transparency in actions that will reassure the public. The nexus between the political class and big business has always thrived in India.

Concessions, allocations, bailouts and a favourable monetary policy as opposed to economic theory are possible favours bestowed on business organisations. The nation needs to discuss and debate the political culture of the country that works with the influence of capitalists. The Prime Minister's fight against corruption and black money should begin with the elimination of big ticket corruption which is marked by the vicious circle of money and elections.

N. SADHASIVA REDDY,
Bengaluru

■ Politicians and political parties in India depend quite a lot on the contributions and the largesse of businessmen for their political sustenance. Hence the Prime Minister's comment needs to be taken with a pinch of salt. As an astute politician, and given that elections are round the corner, he will understand the importance of financial

backing that association with established business houses will bring to the party. However, the spate of scams that have rocked the nation has been a blot. Only an approach without prejudice to the problems of the common man will usher in the good days.

PACHU MENON,
Comba, Margao, Goa

Temple entry

A few readers ('Letters to the Editor') have been arguing, some subtly, that removing the restrictions on women visiting the Sabarimala temple in Kerala is in violation of the tenets of the religion and long-standing practices followed. Some have even said that it is not right to view every issue through the lens of the Constitution. One should understand that all the tenets cited, including the one restricting the entry of women of a certain age to the temple, have only been scripted by humans and not

by the deity per se. To err is human.

THARCIUS S. FERNANDO,
Chennai

Wait no more

Perumal Murugan's thoughts on the unfortunate episode of 'moral policing', which forced Malayalam writer S. Hareesh to stop serialising his novel, *Meesha*, are noteworthy (Editorial page, "And it will subside...", July 28). A creative work of literature should be judged by its literary merit. But today, intolerance has reached new heights as 'digital mobs' are thriving and are spreading hatred and chaos. The government should act to deter such influence of the mob. There cannot be any more delay in passing legislation in this regard.

ANJALI B.,
Thiruvananthapuram

Reaching out

It is saddening that while there are the "rumours"

about DMK president M. Karunanidhi's state of health being spread as usual by those who indulge in this ungainful revelry, what is being missed is the refreshing manner in which the AIADMK is reaching out to the DMK. That it has even stepped up its conciliatory tone in comments about the former Chief Minister should not be missed. I hope this gesture heralds goodwill

between the two regional parties that have always been at loggerheads with each other on most issues. One hopes that this paves the way for an Opposition- and regime-friendly atmosphere in the Legislative Assembly. The updates on the health of the leader are transparent.

N. VISVESWARAN,
Chennai

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

CORRECTIONS & CLARIFICATIONS:

In the article titled "CEG@225 Illustrious Engineering" (Edge supplement, July 30, 2018, some editions), *Gopalaswami Parthasarathy* (diplomat, and former Indian High Commissioner to Pakistan, Myanmar and Australia) had been erroneously referred to as *Gopalapuram Parthasarathy*.

In "ISRO-like ocean mission planned" (July 30, 2018) it was erroneously mentioned that India was allotted 1,50,000 sq km area for ocean exploration. Actually, India was allowed to explore 1,50,000 sq km but was finally allocated only 75,000 sq km.

In the report, "Army's Smerch systems to roll on Indian wheels" (July 30, 2018), it was mentioned that India procured additional Smerch systems under a second deal in 2007. It should have been 2017.

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, Kasturba Buildings, 855 & 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