BRICS should help entrepreneurs: India

Jaishankar calls for reforms in global platforms

• Member countries of the BRICS group should assist private entrepreneurs to help them deal with the economic fallout of the coronavirus (COVID-19) pandemic, External Affairs Minister S. Jaishankar said on Monday. He also spoke of the need for reform in the multilateral global platforms during the video-conference of Foreign Ministers of the BRICS group which was convened by Russian Foreign Minister Sergey Lavrov.

• “He [Mr. Jaishankar] emphasised that we need to provide support to businesses, especially MSMEs, to tide over the crisis and ensure livelihoods are not lost. The External Affairs Minister emphasised that the pandemic is not only posing a great risk to the health and well being of humanity but is also severely impacting global economy and out by disruption of global trade and supply chains,” said a government release.

• Apart from Mr. Lavrov and Mr. Jaishankar, the videoconference was attended by China’s State Councillor and Foreign Minister Wang Yi, South African Minister of International Relations and Cooperation Grace Naledi Pandor and Brazilian Foreign Minister Ernesto Araujo.

• The virtual meeting was necessary as they are unable to travel due to the global travel restrictions because of the COVID-19 pandemic. The Minister showcased India’s pharmaceutical support to around 85 countries to deal with the viral infection. Mr. Jaishankar also highlighted the need for reforms in the multilateral bodies like the United Nations. Noteworthy that the UN Security Council members are currently discussing draft resolutions on the COVID-19 pandemic.
• Monday’s meeting will be followed by a BRICS Health Officials’ discussion to deal with the COVID-19 pandemic on May 7.

U.S. Commission on International Religious Freedom downgrades India in 2020 list

Religious freedom panel lists nation among ‘countries of particular concern’

• The U.S. Commission on International Religious Freedom (USCIRF) has downgraded India to the lowest ranking, “countries of particular concern” (CPC) in its 2020 report. The report, released in Washington by the federal government commission that functions as an advisory body, placed India alongside countries, including China, North Korea, Saudi Arabia and Pakistan. India was categorised as a “Tier 2 country” in last year’s listing. This is the first time since 2004 that India has been placed in this category.

• “India took a sharp downward turn in 2019,” the commission noted in its report, which included specific concerns about the Citizenship Amendment Act, the proposed National Register for Citizens, anti-conversion laws and the situation in Jammu and Kashmir. “The national government used its strengthened parliamentary majority to institute national-level policies violating religious freedom across India, especially for Muslims.” The panel said that the CPC designation was also recommended because “national and various State governments also allowed nationwide campaigns of harassment and violence against religious minorities to continue with impunity, and engaged in and tolerated hate speech and incitement to violence against them”.

• The Centre reacted sharply to the USCIRF report on Tuesday, terming it “biased and tendentious” and rejected its observations.

• “We reject the observations on India in the USCIRF Annual Report,” official spokesperson Anurag Srivastava said. “Its biased and tendentious comments against India are not new. But on this occasion, its misrepresentation has reached new levels. It has not been able to carry its own Commissioners in its endeavour. We regard it as an organisation of particular concern and will treat it accordingly,” Mr. Srivastava added.

• Three of the 10 USCIRF commissioners, including Gary Bauer, Johnnie Lee, and Tenzin Dorjee, dissented with the panel’s recommendation on India as being ‘too harsh’ and that ended up placing the country alongside what they termed as “rogue nations” like China and North Korea.

• “I am confident that India will reject any authoritarian temptation and stand with the United States and other free nations in defence of liberty, including religious liberty,” wrote Commissioner Bauer in his dissenting note.
• The commission also recommended that the U.S. government take stringent action against India under the “International Religious Freedom Act” (IRFA). It called on the administration to “impose targeted sanctions on Indian government agencies and officials responsible for severe violations of religious freedom by freezing those individuals’ assets and/or barring their entry into the United States under human rights-related financial and visa authorities, citing specific religious freedom violations”. In 2005, Prime Minister Narendra Modi who was at the time the Chief Minister of Gujarat was censured by the USCIRF. The commission had recommended sanctions against Mr. Modi for the 2002 riots and the U.S. government had subsequently cancelled his visa.

• The USCIRF 2020 report makes a specific mention of Home Minister Amit Shah, for not taking what it deemed as sufficient action to stop cases of mob lynching in the country, and for referring to migrants as “termites”. In December 2019, the USCIRF had also asked the U.S. government to consider sanctions against Mr. Shah and “other principal leadership” over the decision to pass the Citizenship Amendment Act. The Ministry of External Affairs had rejected the USCIRF statement as neither “accurate nor warranted” and questioned the body’s “locus standi” in India’s internal affairs. The MEA had also criticised the USCIRF for a tweet on religious segregation in hospitals while treating COVID-19 patients, saying that the U.S. body made “peremptory commentary on religious freedom in India” and spread “misguided reports”.

Privacy concerns during a pandemic

The government’s technology solutions to fight COVID-19 do not meet minimum legal requirements

• In his now-legendary dissenting judgment, delivered at the height of Indira Gandhi’s Emergency, Justice H.R. Khanna, invoking Justice Brandeis of the U.S. Supreme Court, wrote that “[the] greatest danger to liberty lies in insidious encroachment by men of zeal, well-meaning but lacking in due deference for the rule of law.” Justice Khanna was not speaking about the crushing of freedom at the point of a bayonet. He was concerned, rather, about situations where the government used the excuse of a catastrophe to ignore the rule of law. Quoting Brandeis, he said, “experience should teach us, “to be most on our guard to protect liberty when the Government’s purposes are beneficent.”

• Today we live in the midst of a grave public health crisis. There is little doubt that the government is best placed to tackle the COVID-19 pandemic. Doing so requires it to take extraordinary actions. This is why the efforts of the Central and State governments to maintain a nationwide lockdown, to enforce norms of physical distancing and to restrict movement, have been met with support.

• It can be tempting in these circumstances to argue that the executive’s powers are limitless; that, if the government so chooses, fundamental rights can be suspended at will. The pandemic, the argument goes, is an existential threat and the paramount need to save lives takes precedence over all other interests. Appealing though it is, this argument is not only wrong but also dangerous, for precisely the reasons that Justice
Khanna outlined: when faced with crises, governments — acting for all the right reasons — are invariably prone to overreach. Any temporary measures they impose have a disturbing habit of entrenching themselves into the landscape and creating a ‘new normal’ well after the crisis has passed. Paying close attention to civil rights, therefore, becomes critical, not to impede the government’s efforts, but to ensure that rights — fragile at the best of times, and particularly vulnerable in a crisis — are not permanently effaced.

Data and public health

• The state’s most significant responses to the pandemic have been predicated on an invasive use of technology, that seeks to utilise people’s personal health data. While the measures deployed intuitively sound reasonable, the mediums used in implementing the programme overlook important concerns relating to the rights to human dignity and privacy.

• Broadly, technology has been invoked at three levels. First, in creating a list of persons suspected to be infected with COVID-19; second, in deploying geo-fencing and drone imagery to monitor compliance by quarantined individuals; and third, through the use of contact-tracing smartphone applications, such as AarogyaSetu.

• Each of these measures has induced a miasma of despair. In creating a list of infected persons, State governments have channelled the Epidemic Diseases Act of 1897. But this law scarcely accords the state power to publicise this information. What’s more, these lists have also generated substantial second-order harms. As the director of the All India Institute of Medical Science, Dr. Randeep Guleria, pointed out, the stigma attached to the disease has led to an increase in morbidity and mortality rates, since many with COVID19 or flu-like symptoms have refused to go to hospitals.

• The use of geo-fencing and drone technologies is similarly unsanctioned. While cellphone based surveillance might be plausible under the Telegraph Act of 1885, until now the orders authorising surveillance have not been published. Moreover, the modified surveillance drones used are equipped with the ability to conduct thermal imaging, night-time reconnaissance, and also — as some private vendors have claimed — the ability to integrate facial recognition into existing databases such as Aadhaar. Contrary to regulations made under the Aircraft Act of 1934, the drones deployed also do not appear to possess any visible registration or licensing. Indeed, many of the models are simply not permitted for use in India.

• Most concerning amongst the measures invoked is the use of contact-tracing applications that promise to provide users a deep insight into the movements of a COVID-19 carrier. The purported aim here is to ensure that a person who comes into contact with a carrier can quarantine herself. Although the efficacy of applications such as these have been questioned by early adopters, such as Singapore, the Union government has made AarogyaSetu, its contact-tracing application, its signal response to the pandemic.

• Thus far, details of the application’s technical architecture and its source code have not been made public. The programme also shares worrying parallels with the Aadhaar project in that its institution is
not backed by legislation. Like Aadhaar it increasingly seems that the application will be used as an object of coercion. There have already been reports of employees of both private and public institutions being compelled to download the application. Also, much like Aadhaar, AarogyaSetu is framed as a necessary technological invasion into personal privacy, in a bid to achieve a larger social purpose. But without a statutory framework, and in the absence of a data protection law, the application’s reach is boundless. One shudders to think how the huge tranches of personal data that it will collect will be deployed.

The importance of civil rights

•The Supreme Court’s judgment in K.S. Puttaswamy v. Union of India (2017) is renowned for its incantation, that each of us is guaranteed a fundamental right to privacy. But the Court also recognised that the Constitution is not the sole repository of this right, or indeed of the right to personal liberty. For these are freedoms that inhere in all of us. The Court additionally thought it important, as Justice S.K. Kaul wrote, that the majority opinions of Justice Khanna’s brethren be buried “ten fathom deep, with no chance of resurrection.”

•To be sure, the right to privacy is not absolute. There exist circumstances in which the right can be legitimately curtailed. However, any such restriction, as the Court held in Puttaswamy, must be tested against the requirements of legality, necessity and the doctrine of proportionality. This will require government to show us, first, that the restriction is sanctioned by legislation; second, that the restriction made is in pursuance of a legitimate state aim; third, that there exists a rational relationship between the purpose and the restriction made; and fourth, that the State has chosen the “least restrictive” measure available to achieve its objective.

•In this case, not only are the government’s technological solutions unfounded in legislation, there is also little to suggest that they represent the least restrictive measures available. A pandemic cannot be a pretext to abnegate the Constitution. Inter arma silent leges, said Cicero: “For among [times of] arms, the laws fall mute”. But our fight against COVID-19 is no war. Even if it were, our Constitution is intended for all times — for times of peace and for times of crises.

Unlocking justice in the lockdown

Without legal practitioners being classified as essential, fundamental rights cannot be realised

•The pandemic has compelled the government to suspend work, movement, businesses, services, liberty and more. The Constitution itself, however, cannot be suspended. Any measures enforced under statutory frameworks must conform to the Constitution. Nevertheless, practically, with the near-complete shutdown of India’s justice system, such operation of the Constitution lies in limbo.

•Several situations today warrant the intervention of the judiciary. For instance, the enforcement of the constitutional rights of life, health and food requires urgent resolution. Any constitutional
challenge, however, requires unfettered access to lawyers and courts. The non-inclusion of both in the state’s list of permitted activities effectively denies such access.

• Peculiarly, the judiciary too has retreated into the background. While the higher courts are hearing ‘urgent’ matters, the lower courts are entertaining only ‘remand’ cases. In doing so, they have ceded important constitutional and legal space to the executive. Video-based online proceedings have been proposed as an alternative. But their success rests on the assumption that everyone has equal access to properly functioning equipment as well as fast Internet. The idea also assumes that all courts are Internetenabled and all functionaries are tech-savvy.

No legal protection

• Meanwhile, the state is still active in its traditional policing functions. In Guwahati, on April 7, two activists were arrested in connection with a 2018 case, a day after complaining that officials were siphoning off rice meant for public distribution. Last week, the Delhi police booked two students under the Unlawful Activities (Prevention) Act, in a case related to communal violence in Delhi over the Citizenship (Amendment) Act of 2019. Article 22 of the Constitution guarantees every individual the right to consult and to be defended by a legal practitioner of their choice upon being arrested or detained in custody by the state. While arrests by the police are rampant, legal protection has almost vanished on account of non-functioning lawyers and courts. Without legal practitioners being classified as essential, one wonders if fundamental rights can substantively be enforced.

• Moreover, in the enforcement of lockdown, reports of summary punishments by the police without any sanction of the law are pouring in from across the country. Videos of police forcing persons to perform push-ups and squats; vandalising vegetable carts; and harassing migrant labourers and the homeless are evidence of arbitrariness. The ease with which we have given up on the principles of rule of law is deplorable.

• With justice being inaccessible, the populace has become powerless in both the public and private spheres. The National Commission for Women has reported an increase in incidents of domestic violence. Despite abusers and victims being locked down for over 40 days, the institutional response has been to take away the civil remedy of obtaining ‘protection orders’ against the abuser under the Protection of Women from Domestic Violence Act, 2005.

The lacunae must be remedied

• In contrast to India’s response, the U.K. first notified legal practitioners as key workers and then notified how different categories of courts shall function. In the U.S., the Department of Homeland Security categorises ‘workers supporting the operations of the judicial system’ as essential.

• In India, the judiciary and the executive should have instituted means to serve the cause of justice. A comprehensive response should have outlined the minimum judicial infrastructural requirements; the nature, type and manner of priority cases; enforcement of physical distancing guidelines; and list of
key personnel permitted to ply to and from courts, prisons, police stations, residences, etc. These lacunae must be remedied. Justice must not become a casualty to the pandemic.