



## Rafale rebuff

Supreme Court's decision exposes attempts to de-legitimise investigative journalism

The Supreme Court's decision to consider the relevance of the documents published in the media on the Rafale deal is a firm and necessary rebuff to the Central government's attempts to prevent judicial examination of these papers and to de-legitimise all investigative journalism on the subject. The court's unanimous verdict, rendered in two concurring orders by a three-judge Bench, means that review petitions filed against earlier orders declining an investigation into the purchase of Rafale jets will now be taken up on merits and that the petitioners are free to rely on these documents, regardless of their provenance. These documents include those published by *The Hindu*. A dissenting note by members of the India Negotiating Team, and notes that disclose unease in the Defence Ministry over parallel negotiations at the PMO's instance undermining the official parleys are among them. It would have been a travesty had the government succeeded in blocking judicial scrutiny of these documents, as they disclose significant details about the decision-making process. The government's desperate attempts to prevent the court from relying on these papers included a claim of privilege under the Evidence Act, a threat of invoking the Official Secrets Act (OSA) and an accusation that the published documents were "stolen" ones. Later, it toned down the allegation by saying the original documents had not been stolen, and what were published were unauthorised photocopies. None of these claims impressed the court, which relied on the principle that how a piece of evidence is obtained is immaterial, as long as it is relevant to adjudicating an issue.

The decision on the admissibility of the documents has significance beyond the Rafale issue: it revivifies the rights of a free press and underscores the principle that it is public interest, and not the content of a document alone, that will decide whether disclosure is needed or not in a given case. Referring to the publication of the Rafale documents in *The Hindu*, Chief Justice Ranjan Gogoi observed that "the right of such publication would seem to be in consonance with the constitutional guarantee of freedom of speech". Citing the U.S. Supreme Court decision on the Pentagon Papers, he noted that neither the OSA nor any other law vests any power in the executive to stop publication of documents marked 'secret' or the placing of such documents before a court of law which may be called upon to adjudicate a legal issue. It is premature to conclude, based on this development, that the court's earlier decision to not order a criminal investigation into the purchase of 36 Rafale jets will be revisited. However, it will certainly help provide clarity on several aspects of the murky deal. Had the government agreed to a parliamentary probe early on, it would not be suffering the sort of setback it has now faced in the Supreme Court.

## Dantewada ambush

As polling begins in Chhattisgarh, a brutal reminder of the Maoist challenge

The Election Commission has taken the correct decision to go ahead with the first phase of polling, on Thursday, in the Lok Sabha election in Chhattisgarh after the deadly Maoist attack in Dantewada on Tuesday. Maoists struck at a convoy in Dantewada, which comes under the Bastar parliamentary constituency, and killed Bhima Mandavi, the BJP MLA from Dantewada, and four security personnel. The aim was clearly to disrupt the electoral process, and it will be vital for the administration to ensure polling without fear of violence. Equally grimly, the attack underlines the reality that for all the reverses they have suffered in the past few years, the Maoists retain their ability to pick and choose targets. Initial reports suggest that an improvised explosive device blew up the lead vehicle in Mandavi's two-vehicle convoy, and the second then came under gunfire from the Maoists who had laid the ambush. A speedy inquiry should clarify the facts of the incident, but it is reported that the BJP legislator may have been complacent, choosing to ignore the police advice that he take along additional security cover that was available to him. However, these early details also show that in terms of intelligence the attackers managed to be one step ahead, despite the heavy security bandobast in the area in light of the Lok Sabha election.

Given that it is difficult to fully secure a State with a history of violent attacks, it is important that adequate measures be put in place to protect the candidates in the fray, over 160 of them, for the 11 Lok Sabha constituencies that will go to the polls in three phases, on April 11, 18 and 23. After the relatively peaceful conduct of the Assembly elections in the State late last year, it would have signalled a precipitous slide if the electoral process in Chhattisgarh were to be disrupted now. Beyond security for the peaceful conduct of elections, the latest attack highlights the need for the security forces to keep updating their standard operating procedures. It is also a call for the civil administration to keep extending its reach in the forests of central India, especially Bastar. Even as the security forces stare down the Maoist threat, the political and administrative responses are crucial. In most of the violence-hit regions of India, responsibility for security has been passed on to the paramilitary forces in abundant measure. The capacities of the State police need to be addressed. Local communities, in turn, have to be reassured that the fight against Maoism is also a political one. The Maoist argument lost its potency long ago. But the difficult task of addressing people's aspirations and concerns, especially about exploitation and alienation from their lands in the face of extractive policies in their resource-rich habitat, must be pursued on a war footing.

# Trickeries of the money bill

The judgment in the tribunals case could have a profound bearing on India's constitutional arrangements



SUHRITH PARTHASARATHY

The Supreme Court has now heard oral arguments in *Revenue Bar Association (RBA) v. Union of India*, in which the validity of the Finance Act of 2017, insofar as it affects the structure and functioning of various judicial tribunals, is under challenge. At first blush, a dispute over the apparent inscrutabilities of a tribunal's working might strike us as uninteresting and, perhaps, even unimportant. But, as the *RBA*'s arguments show us, how the court decides the case will likely have a profound bearing on India's constitutional arrangements.

### Untrammelled power

Ordinarily, the Finance Act, which is enacted at the beginning of every accounting year, seeks to give effect to the government's fiscal policies. In 2017, however, the state wielded the statute like a blunderbuss. It not only set the fiscal agenda for the year ahead but it also toppled the existing regime governing the working of 26 different judicial bodies. Until recently, each of these panels was governed by a separate statute, and those laws individually contained a set of principles providing for, among other things, the criteria employed to select and remove members to and from these bodies, and for salaries, allowances and other such service conditions of the members.

But, in one fell swoop, the Finance Act not only abolished some of the tribunals but also altogether repealed the standards provided in the different statutes. In their place, the law vested in the Central government an absolute,

untrammelled power to make rules to effectively govern the operation of the tribunals.

The petitioners argued that this move runs sharply athwart judicial independence. The new law, in their belief, deputed to the executive what was really an essential legislative function. Many of these tribunals, which included the National Green Tribunal (NGT), the Income Tax Appellate Tribunal, the National Company Law Appellate Tribunal, and the Industrial Disputes Tribunal, they pointed out, performed roles that were originally undertaken by the higher judiciary. To assign to the executive's whims the task of establishing the criteria employed in selecting members to the panels and to provide for the members' service conditions was, therefore, pernicious to the basic principle of separation of powers. Consider one of the consequences. Despite the Supreme Court's previous ruling that the chairperson of a judicial tribunal ought to be equivalent to the Chief Justice of the high courts, as a result of the rules now made in furtherance of the Finance Act, in 13 different tribunals, a person who is merely qualified to be appointed as a judge of a high court can be selected as the presiding officer.

The *RBA*'s case, though, goes beyond questions concerning delegation of power. Of equal concern is the enactment of these stipulations through the wangled mechanism of the Finance Act. Substantive matters concerning the governing of tribunals, one would think, can scarcely be considered as a fiscal measure. Yet the draft law which introduced these provisions was classified as a money bill, and the sanction of the Rajya Sabha was altogether dodged. Although this too might appear on first glimpse to be a quarrel over esoteric matters of procedure, the consequences are enormous, travelling, as they do,

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to the heart of India's democratic apparatus.

### The need for the minutiae

In B.R. Ambedkar's vision, the Constitution embodied not only a charter of rights but also a foundation for republican governance. His worries that democracy in India was "only a top-dressing on an Indian soil, which is essentially undemocratic", saw him lay stress on a need to diffuse constitutional morality among India's citizens. Citing the classical historian, George Grote, while moving the draft Constitution on November 4, 1948, Ambedkar said constitutional morality had to be seen as representing "a paramount reverence for the forms of the Constitution". Since such reverence had to be cultivated, he thought it imperative that the Constitution commend the minutiae of administration rather than leave such matters purely to the legislature's wisdom. In the absence of such prescriptions, democracy, he feared, would wallow in decline.

The Constitution's verbosity has been a source of antipathy to many. Too long, too rigid, too prolix, Sir Ivor Jennings, a preminent British constitutional expert, reportedly said, of the document, in a lecture delivered at the University of Madras in 1951. But only years later Jennings was lauding India for representing the region's most successful constitutional experiment. This volte face, as it happened, was occasioned by those provisions of administrative intricacies, which Jennings had initial-

# Forcing China's hand?

The U.S. initiative to have Masood Azhar blacklisted at the UN Security Council marks a new turn



HARSH V. PANT

Late last month the U.S. opened another front in its ongoing multi-pronged tussle with China when it circulated a draft resolution to the powerful 15-nation UN Security Council (UNSC) on March 27 to blacklist Pakistan-based Jaish-e-Mohammed chief Masood Azhar and subject him to a travel ban, an assets freeze and an arms embargo. It did so knowing full well the Chinese position on the issue as China had put a hold on a French proposal to list Azhar under the 1267 al-Qaeda Sanctions Committee of the Council just a few days earlier.

Washington has underlined that it would utilise "all available avenues" to ensure that Azhar is held accountable by the UNSC by suggesting that "while we strongly prefer that UNSC designations take place through the committee pro-

cess, the United States and its allies and partners, including those on the... Security Council, will utilise all available avenues to ensure that the founder and leader of the UN-designated terrorist organisation JeM is held accountable by the international community."

China, of course, has reacted strongly to this move by arguing that the U.S. decision to go directly to the UNSC to designate Azhar could scuttle China's efforts to resolve the issue amicably. As per the Chinese spokesperson, "China has been working hard with relevant sides and is making positive results. The U.S. knows that very well. Under such circumstances, the U.S. still insists on pushing the draft resolution, (which) doesn't make any sense."

### The U.S.-China angle

Washington will be aware that China would continue to oppose the move but the fact that it is willing to take on China so openly on this issue underscores that it wants to call China out publicly. This was reflected in U.S. Secretary of State Mike Pompeo's tweet: "The world cannot afford China's shameful hy-



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pocrisy toward Muslims. On one hand, China abuses more than a million Muslims at home, but on the other, it protects violent Islamic terrorist groups from sanctions at the UN."

France's proposal to get Azhar listed as a terrorist by the the UN's 1267 sanctions committee was scuttled by China despite the move having the support of 14 out of 15 members. In its zeal to shield Pakistan, China has used its veto on Azhar's listing at the 1267 UNSC sanctions committee four times in the past decade. But after the February 14 Pulwama attack that killed 40 Central Reserve Police Force (CRPF) personnel, for which

the JeM took responsibility, Chinese intransigence has come under the spotlight. After China's block last month, France moved quickly to impose sanctions on Azhar, including a freeze on his assets. It is working with its European partners the matter of putting Azhar on a European Union list of terrorists and terror organisations. The international community, apart from China, has rallied behind India after Pulwama and has pushed Pakistan to undertake serious measures to control terrorism emanating from its territory.

This has been shaped by India's diplomatic outreach over the last few years in which global support has been sought to reverse Pakistan's support to terrorist organisations. But what has given this an added sense of urgency is India's decision to up the ante after the Pulwama attacks by taking the fight to the Pakistani territory. This has now put the onus on Pakistan to de-escalate, a reversal of the post-1998 situation where in every India-Pakistan crisis it was New Delhi which was expected to take steps for de-escalation even as ev-

every time those actions exceed the Constitution's remit.

Ultimately, the Speaker derives her power from the Constitution. In classifying a draft law as a money bill, therefore, her decision has to be demonstrably justifiable. An immunity from judicial scrutiny would effectively allow the government to elude the Rajya Sabha's constitutional checks by simply having the Speaker classify a draft law as a money bill regardless of whether it, in fact, meets the conditions stipulated in Article 110(1) or not.

### From a parliamentary custom

The idea behind a money bill is derived from British parliamentary custom. But unlike in Britain, where judicial review of the Speaker's opinion is unambiguously prohibited, in India, Article 110 avoids creating any such bar. Money bills exist simply to ensure that the Rajya Sabha isn't allowed to bring down a government by refusing it access to the exchequer for everyday governance. To use it as a means to nullify the Upper House's democratic role in making substantive legislation denigrates the Constitution's form which Ambedkar and the Constituent Assembly considered inviolate.

As the lawyer Gautam Bhatia wrote in these pages ("The imperial cabinet and an acquiescent court", March 8, 2019), the Supreme Court has already squandered at least two opportunities in recent times to provide a sense of sanctity to the Constitution's carefully structured arrangements. The dispute over the Finance Act of 2017, therefore, assumes particular significance. In deciding the case, the court will do well to pay heed to Ambedkar's warnings, by recognising that the niceties of constitutional form are not a matter of trifles.

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ery crisis was precipitated by Pakistan. After every crisis, the international community, especially the West, would persuade India to ease tensions, and in most cases India relented. The post-Pulwama South Asian strategic equilibrium has shifted as New Delhi has made it clear that it could not be expected to look the other way from Pakistani provocations.

### Regional peace

The latest American move is an unprecedented one, and is not only aimed at forcing the Chinese hand on Masood Azhar but is also a recognition of the new regional context in South Asia where a stronger global attempt to rein in Pakistan is the only viable option of maintaining regional peace. As the U.S. and China prepare the South Asian chessboard, Indian moves have suddenly become the decisive ones and both the powers are calibrating their own moves accordingly.

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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.

### BJP manifesto

By taking up issues of ultranationalism and national security in its manifesto, the Bharatiya Janata Party has devised a clever election strategy (Editorial, "Blinkers on", April 10). But the Prime Minister's popularity has dwindled, which opinion polls have highlighted. The Congress's NYAY scheme, the discouraging job scenario, and the aftermath of the goods and services tax and demonetisation are some of the spoilers. The manifesto is silent on senior citizens who were looked after well under the UPA. In his relentless pursuit of 'rob Peter to pay Paul principle', the Finance Minister has drastically reduced interest rates in banks and post offices savings schemes and handed over the spoils to industry to create non-existent jobs.

KANGAYAM R. NARASIMHAN, Chennai

■ The promise of a Ram temple in Ayodhya means

the BJP can't garner votes without invoking the issue (Editorial, "Blinkers on", April 10); it is a promise that is inimical to democracy and secularism and all the liberal ideals our Constitution subscribes to. From a broader perspective, all political parties do not seem to be focussing enough on protecting the environment from corporate plunder – an issue that affects the livelihood of millions of ordinary and less-privileged people. The Mahatma rightly said that India lives in the villages, but today it is the unchecked pressure of development that is devastating the environment and rural livelihoods.

SUKUMARAN C.V., Palakkad

■ The manifesto is nothing but a blueprint for a 'saffron India'. There is enough evidence in the last five years that the ruling party has a penchant to interfere in the independent functioning of Central institutions. Dubious ways of allowing pieces of

legislation without debate in Lok Sabha under the guise of a 'money bill' point to a regime that has no respect for established conventions. Mob-lynching under the garb of 'cow-protection' is another horror bequeathed to the nation. Moves to put down dissent and opinion show that even law-abiding citizens have much to fear.

K. NATARAJAN, Madurai

■ Essentially, there is nothing sacrosanct or legally binding about poll manifestos. There is little chance that party manifestos will sway public opinion in an election nor does the average citizen get an opportunity to read them. Pakistan-centric election canvassing will not make Pakistan go away. It is our neighbour and we have to live with that reality. There is no plan on how any political party will eventually resolve the thorny relationship. India is under an enormous misinformation campaign largely fuelled by political parties using their back office

cyber cells. This poses a grave challenge to the very diversity that is India's unique heritage.

H.N. RAMAKRISHNA, Bengaluru

■ Economic woes will weigh on the voter but may not determine the outcome of the Lok Sabha election. The BJP's main opponent does not have any compelling economic propositions either. And elections are not determined by economics alone. The BJP has the ultimate, powerful weapon – a Prime Minister who has unmatched oratorical skills and popularity.

C.V. VENUGOPALAN, Palakkad

### The first vote

Nobody needs to teach the people about the valour, s of our defence forces. They already have a lot of gratitude towards our armed forces. Therefore, the Prime Minister's appeal to first-time voters is perplexing. It runs the risk of being misconstrued in terms of 'us

and them' (Page 1, "Dedicate your first vote to armed forces, Modi tells young voters", April 10). People should not get carried away by such oratorical appeals, but judge him and his party on the basis of performance.

D. SETHURAMAN, Chennai

■ It is almost as if the armed forces are also contesting the elections. Is this not a blatant violation of the model code of conduct? Not only is our leader attempting to politicise the armed forces but he is also looking at them as a part of goods and services being offered by his party. Prime Ministers will come and go but the armed forces will go on forever.

ABDUL ASSIS P.A., Thrissur, Kerala

■ It is unfair to make an issue out of every utterance and attribute motives. The sacrifices made by our armed forces have never been the talking points during elections. The statement could well be

construed as aimed at invoking the spirit of nationalism in the minds of young voters who are otherwise ignorant of the sacrifices of our armed forces personnel. Requesting voters to dedicate their votes for the country, society and armed forces is way better than asking for votes on a caste and communal basis, which almost all parties do without any compunction.

V. SUBRAMANIAN, Chennai

### Emerging concern

I wonder how Indian health authorities are reacting to reports on the spread of a multi-drug resistant fungus, *Candida auris*, especially in hospital settings. In a country where health-care responses vary and where there is still limited awareness of the dangers of antibiotic misuse, a central and clear response becomes all the more important.

SHYMALA NATARAJAN, Chennai

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