



## Probing the press

The Official Secrets Act can't be an instrument to censor embarrassing media revelations

The essential distinction between public interest and the interest of the government of the day seems to have been lost on the Attorney General. K.K. Venugopal's claim that documents pertaining to the purchase of Rafale jets published by the media, including this newspaper, have been "stolen" amounts to a definitive admission that they are genuine. The documentary evidence published so far indicates that "parallel parleys" held at the behest of the Prime Minister's Office undermined the Indian Negotiating Team's discussions with the French side; that internal questions had been raised about the absence of bank guarantees to hedge against possible default by the vendor; and that this had an adverse effect on the pricing of the 36 jets to be bought in fly-away condition. Few can doubt that these revelations advance the public interest, and have no impact on national security. The publication of the documents and news reports based on them constitute the legitimate exercise of the freedom of the press. The threat of a criminal investigation under the Official Secrets Act, 1923 (OSA) is disappointing, if not downright perverse. The government is also on weak legal ground when it claims the court should not rely on "stolen" documents while hearing petitions seeking a review of its judgment declining a probe into the Rafale deal. As the Bench, headed by Chief Justice of India Ranjan Gogoi, pointed out, the manner in which a document has been procured is immaterial, if it is relevant to an adjudication. As one of the judges asked, can the government seek shelter behind the notion of national security if a corrupt practice had indeed taken place?

It is to the credit of successive governments that the OSA has rarely been used against the press. The law primarily targets officials entrusted with secret documents, codes and other material, but Section 5 criminalises voluntarily receiving and possessing such documents, if given to them in contravention of the Act. In a limited examination of this section, the Law Commission observed in a 1971 report that its wording was quite wide. However, it left it to the government to decide against prosecution, if the information leak did not materially affect the state's interest. There is undoubtedly a case for distinguishing between an act that helps the enemy or affects national security, and one that advances legitimate public interest. In times when information freedom is seen as salutary for democracy, laws such as the OSA should yield to the moral imperative behind the Right to Information Act. This reasoning is embedded in Section 8(2) of the RTI Act, which says that notwithstanding the provisions of the OSA, "a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests." The government should refrain from using its secrecy laws to contend with embarrassing media revelations. It would do well instead to respond responsibly to questions thrown up by the revelations.

## Breathing clean

Political will is integral to the tackling of India's hazardous air pollution

An assessment of the quality of air across countries and in cities has come as a fresh warning to India on the levels of deadly pollutants its citizens are breathing. The IQ AirVisual 2018 World Air Quality Report published in collaboration with Greenpeace underscores that Delhi remains an extremely hazardous city to live in. The national capital exposes people to air containing annual average fine particulate matter (PM<sub>2.5</sub>) of 113.5 micrograms per cubic metre, when it should be no more than 10 micrograms as per WHO guidelines. In fact, Gurugram, which borders Delhi, fares even worse with a PM<sub>2.5</sub> level of 135.8 micrograms, while 15 of the 20 cities worldwide ranked the worst on air pollution metrics are in India. Delhi's air quality has been making headlines for years now. Yet, measures to mitigate emissions have not moved into crisis mode: the launch this year of the National Clean Air Programme for 102 cities and towns, including the capital, talks only of long-term benefits of mitigation programmes beyond 2024, and not a dramatic reduction in near-term pollution. This has to change, and an annual target for reduction be set to make governments accountable. Achieving a reduction within a short window is not impossible if there is the political will to reform key sectors: transport, biomass and construction.

The monitoring of air quality in real time across cities and towns in India is far from adequate or uniform. The evidence from Delhi, which is relatively more robust, has clear pointers to what needs to be done. The Ministry of Heavy Industries and Public Enterprises learnt from a commissioned study last year that dusty sources such as roads, construction sites and bare soil added about 42% of the coarse particulate matter (PM<sub>10</sub>) in summer, while in winter it was a significant 31%. Similarly, PM<sub>10</sub> from transport varied between 15% and 18% across seasons. Yet, it is the even more unhealthy PM<sub>2.5</sub> penetrating the lungs that causes greater worry. Vehicles contributed 18-23% of these particulates, while biomass burning was estimated to make up 15-22%, and dusty sources 34% during summer. These insights provide a road map for action. The Delhi government, which has done well to decide on inducting 1,000 electric buses, should speed up the plan and turn its entire fleet green. A transition to electric vehicles for all commercial applications, with funding from the Centre's programme for adoption of EVs, should be a priority in cities. Cutting nitrogen and sulphur emissions from industrial processes needs a time-bound programme supervised by the Environment Ministry. These are priority measures to get urban India out of the red zone.

# The imperial cabinet and an acquiescent court

The Supreme Court has squandered the chance to rein in an increasingly powerful Central executive



GAUTAM BHATIA

In the last six months, the Supreme Court has frequently found itself in the headlines. In September, it handed down four landmark judgments on fundamental rights: decriminalising same-sex relations and adultery, opening up Sabarimala to women of all ages, and (partially) upholding Aadhaar. And soon after that, the court was in the eye of a political storm. Its Rafale and Central Bureau of Investigation judgments were subjected to intense scrutiny, and continue to be debated.

After the dust has settled, however, and these blockbuster cases consigned to memory, the most important legacy of the 2018-19 Supreme Court may lie elsewhere: in two decisions that have attracted less attention. These are the court's findings on the legal status of "money bills" (a part of its Aadhaar judgment), and its judgment on the distribution of power between the Central government and the government of Delhi. These two decisions were about constitutional structure: about the balance of power between the different organs of the state, the federal character of the Republic, and fundamental questions of democratic accountability.

We are often tempted to think that our rights and freedoms depend upon the Constitution's fundamental rights chapter, and the judiciary's willingness to enforce it against the state. There are other important ways, however, in which a Constitution guarantees freedom. It does so, also, by dividing and distributing political power between state organs in order to

avoid concentration of authority, and to ensure that these different organs act as checks and balances upon each other. The surest dam against totalitarianism is to guarantee that no one stream of authority becomes powerful enough to sweep away everything else in the time of a flood.

### Money bills

Therefore, away from the glamour of fundamental rights adjudication, and away from the thrill of political controversy, it is in cases involving constitutional structure that courts often exercise significant influence upon the future direction of the Republic. And it is in this context that we must examine the recent decisions on money bills and on federalism.

First, money bills. Despite strong protests, the Aadhaar Act was passed as a money bill. This affected a crucial element of our constitutional structure: bicameralism. Bicameralism, in our parliamentary democracy, requires that a bill must be scrutinised and passed by both Houses of Parliament before it becomes law. The Lok Sabha represents the voice of the democratic majority. The Rajya Sabha represents the interests of the States, as well as perspectives free of immediate, electoral interests. The basic idea is that law-making is a balanced and deliberative process, not an exercise in pure majoritarianism. The crucial purpose of the Rajya Sabha is to act as a check and a balance upon the Lok Sabha, by scrutinising bills in a more deliberative and reflective manner, and raising concerns that may have been glossed over or evaded in the Lower House.

The role of the Rajya Sabha becomes even more important when we consider a unique Indian innovation: anti-defection. In the 1980s, it was decided that the only way to combat party defections



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was to disqualify members who voted against the whip, except under very tough conditions. This effectively meant the end of intra-party democracy: individual MPs could no longer vote according to their conscience, and had to follow the dictates of the cabinet. Consequently, where there is a single-party majority in the Lok Sabha, the executive can effectively rule by decree, as it is in no threat of losing a vote if it fails to persuade its own party members. With the Lower House no longer able to check the government, the only remaining legislative forum that can then do so is the Rajya Sabha.

A money bill, however, takes the Rajya Sabha out of the equation: it only needs Lok Sabha approval. In combination with the anti-defection law, this places absolute power in the hands of the executive, and skews the democratic process. Hence, its use must be restricted to the most limited of circumstances. This was what was argued in the Aadhaar case: that the terms of the Constitution (Article 110) mandated that money bills be narrowly limited to those that fell exclusively within the categories set out in Article 110. The Aadhaar Act, which established a biometric database and set up an authority (the UIDAI) to administer it, could not in any sense be called a "money bill" simply because the funds for the Authority

came from the Consolidated Fund of India. The majority judgment in the Aadhaar case, however, allowed the Act to stand as a money bill (after taking out a provision allowing private party use), and thus, effectively, gutted the Rajya Sabha's role in the democratic process. After the court's judgment, governments wanting to bypass Rajya Sabha scrutiny on a range of important issues can simply insert a provision specifying that money for a project is to come from the Consolidated Fund.

### Federalism

Meanwhile, the court was also considering another issue of democratic structure: the dispute between the central government (acting through the Lt Governor) and the government of Delhi. This dispute effectively turned upon the text of Article 239AA of the Constitution, a somewhat ambiguously drafted provision establishing Delhi as a hybrid federal entity — somewhere between a State and a Union Territory. In July 2018, while considering the overall constitutional position, a five-judge bench of the Supreme Court made it clear that, wherever the constitutional text was capable of more than one interpretation, the court would favour a reading that increased democratic accountability: that is, in case of doubt, power would lie with the government that had been directly elected by the people (in this case, the Delhi government).

When it came to applying this principle to the specific disputes between the two entities, however, a two-judge bench of the Supreme Court seemed to resile from this fundamental democratic principle. The February 2019 judgment bears very little evidence of democratic concerns: the heart of the dispute was about control over the civil services, which directly impacted day-to-day governance.

While the constitutional provisions themselves were ambiguous, one judge held that the Delhi government had no control over civil servants above a certain rank, while another judge held that the Delhi government had no control over civil servants at all.

### Fear of an imperial executive

In 1973, the American historian Arthur M. Schlesinger coined the term "Imperial Presidency", to characterise the increasing concentration of power in the office of the President, at the cost of other democratic institutions (such as the U.S. Congress and the Senate). Over the last few decades, many scholars have noticed this drift towards the increased powers of the political executive, across liberal democracies.

The Supreme Court's decisions on Articles 110 (money bills) and 239AA (status of the federal unit of Delhi) have concentrated greater power in the hands of the executive. By expanding the scope of what counts as money bills, the court has set the cabinet down the road of transforming itself into a Roman-style emperor. And by privileging the centralising tendencies of the Constitution over its federalising ones, the court has squandered the chance to develop a strong jurisprudence on the federal structure, that could have been of use in future disputes between the Central government and various federal units. The impact of these decisions will not be felt immediately, but in the long run, unless set right, one enduring legacy of the recent court — and, in particular, of Justice A.K. Sikri, who authored both decisions and who retired this week — might be the judicial facilitation of an imperial executive.

Gautam Bhatia is a Delhi-based lawyer. Disclaimer: he was part of the legal team challenging Aadhaar

## Women and the workplace

Do UN strategies to deal with sexual harassment and ensure gender parity offer examples to follow?



RADHA KUMAR

For more than a century, March 8 has marked International Women's Day — a global day celebrating the achievements of women and promoting gender equality worldwide. But as we pause to celebrate our many advances, we must also acknowledge how much remains to be done.

### Interlinked issues

Two interconnected issues have emerged as priorities over the past two years: sexual harassment at the workplace and obstacles to women's participation at all levels of the workforce, including political representation. The 2017-18 explosion of the #MeToo movement across social media uncovered countless cases of unreported sexual harassment and assault, first in the U.S. and then in India. In both countries, it led to the resignations or firing of dozens of prominent men, mostly politicians, actors and journalists.

It also prompted a range of public and private organisations to examine the internal institutional

cultures surrounding sexual harassment, gender parity, and gender equity. Amongst them, the United Nations.

UN Secretary-General António Guterres has been a staunch supporter of women's rights since his election in 2016, stating the need for "benchmarks and time frames to achieve [gender] parity across the system, well before the target year of 2030". In September 2017, the UN released a System-wide Strategy on Gender Parity to transform the UN's representation of women at senior levels. Today the UN's Senior Management Group, which has 44 top UN employees, comprises 23 women and 21 men.

### A mirror within

In response to the MeToo movement, the UN recently conducted a system-wide survey to gauge the prevalence of sexual harassment among its more than 200,000 global staff. Though only 17% of UN staff responded, what the survey uncovered was sobering. One in three UN women workers reported being sexually harassed in the past two years, predominantly by men. Clearly, the UN gender strategy has much to improve, but then the UN, like most other international and national organisations, has a decades-old cultural backlog to tackle.

The inter-governmental UN is as affected by prevalent national cul-



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tures as are individual countries. Some might argue more, since the UN Secretary-General has to find a way through contending blocs of countries that support or oppose women's rights' goals. This is where UN research plays a significant role. As findings on the Millennium Development Goals (MDGs) indicate, many countries, including India, were able to substantially increase their performance on issues such as sex ratios and maternal mortality once their leaders had signed on to the MDGs. Tracking performance on the Sustainable Development Goals, a more comprehensive iteration of the MDGs, will again provide useful pointers for policymakers and advocates going forward.

### Efficacy of single window

At the same time, Mr. Guterres is to be commended for holding a mirror to organisational practices when it comes to sexual harassment or gender parity. Bringing the issue of gender inside the organisation, to reform its practices,

will enable the UN to stand as an example of the rights it advocates.

How can organisations as large as the UN improve their internal cultures surrounding sexual harassment, gender parity, and gender equity? This issue has generated considerable debate in India, where political parties have begun to ask how they are to apply the rules of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which lays down that every office in the country must have an internal complaints committee to investigate allegations of sexual harassment. With thousands of offices across the country, and barely any employee trained to handle sexual harassment, Indian political parties ask whether broader structures, such as district or regional complaints committees, could play the role of office ones. In this context, does the UN Secretary's single window structure for such complaints provide a better practice? One caveat is that it does not apply across the organisation, so UN agencies, including the multi-institute UN University that aims to achieve gender parity at the director level by end 2019, still have to identify their organisation-specific mechanisms.

Clearly, we need further research before we can arrive at a judgment: perhaps a follow-up to the UN's sexual harassment survey

that looks at complaints received and action taken. In India, going by past figures — since the current government has not released data for the last two years — the impact of the 2013 Act, one of the most comprehensive in the world, has been poor. Despite a large jump in complaints recorded, convictions have not shown a proportionate rise, largely due to poor police work. That is an obstacle which the UN, with its internal mechanisms, may not suffer from as far as first responses are concerned, but will certainly face as and when cases come to law.

Both the UN's early successes and the Indian experience offer lessons to UN member-states, few of which have gender parity or serious action against sexual harassment in the workplace. In the U.S., companies such as General Electric, Accenture, Pinterest, Twitter, General Mills and Unilever are setting and achieving targets to increase female representation at all levels of their workforce. This March 8, let us hope that companies worldwide pledge to follow the examples in the U.S. And that other institutions, whether universities or political parties, follow the UN example. Gender reforms begin at home, not only in the family but also in the workplace.

Radha Kumar is Chair of the Council of the UN University, Tokyo

## 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.

### 'Secret papers'

I am flabbergasted by the Attorney General's statement in the Supreme Court that the "secret documents" published by *The Hindu* on the purchase of 36 Rafale fighter aircraft for the Indian Air Force were "stolen" from the Ministry of Defence and that the government was thinking of initiating "criminal action" against the daily as persons publishing them were guilty under the Official Secrets Act ("Secret papers on Rafale deal stolen: govt.", March 7). The government has now proved right those who have voiced their concerns about governmental actions undermining constitutional norms. As a corollary, the government has also proved the veracity of the documents published by

*The Hindu*. The government has only portrayed its weakness by attacking the messenger and ignoring the message. The government must now stop hiding behind a wall of obfuscation.

MANKIRAN N.,  
Ludhiana, Punjab

■ With the AG's admission, the issue gets murkier. It is simply incomprehensible how such important documents are unsecured in the Defence Ministry. The daily's revelations and the AG's stance have given many the ammunition to question the government. Rather than contemplating criminal action, the government must clear the air and the issues.

G.B. SIVANANDAM,  
Coimbatore

■ It was the BJP that made merry over leaks about the

AgustaWestland deal to pin down the Congress. But now desperate to dodge the missiles from the Rafale deal, it declares the coin itself to be stolen. Little does it realise that masterpieces of art acquire unprecedented value when stolen. The Supreme Court, as the curator, would be interested more in the safety of the piece of art than any other aspect. So would be the citizen as the insurer. After all, he is the one who pays for the loss of truth.

R. NARAYANAN,  
Navi Mumbai

■ The AG's threat makes the government no different from a fascist regime. It is a fact that *The Hindu* has had a spirit of ethical journalism since time immemorial. The government's demand to reveal the whistleblower is not a threat to *The Hindu*

alone, but a threat to democracy itself.

ADRIAN DAVID,  
Chennai

■ Being labelled a document thief is a small price to pay for a newspaper of *The Hindu's* standing in the discharge of its obligations. The charge of theft must be worn as a badge of honour as it was made in response to placing information in the public domain which the government wanted to suppress in order to hide the truth about the deal. Not naming one's source is a universally accepted journalistic privilege, which is not for any government to deny. The court's observations that the 'stolen' documents are not 'untouchable' and can be looked at as supplementary to the review petitions puts the government on the

defensive.

G. DAVID MILTON,  
Maruthancode, Tamil Nadu

■ It is indeed shocking and unbelievable for the government to say that these are "stolen documents". Such a statement lowers the image of the country in the eyes of the world. It also shows that there are moles in various governments willing to share such documents. How far such a practice is in terms of ethics and in the name of public interest is a debatable point.

M.S. VAIDYANATHAN,  
Chennai

■ When a book, *Keralathile Africa* (The Africa in Kerala) was published in 1963, highlighting the plight of the disinherited, displaced and alienated Adivasis of Kerala, the then Kerala government tried to initiate disciplinary

action against the author, K. Panoor, a government employee, by invoking the Defence of India Rules. The devastating irony was that it was an LDF government.

SUKUMARAN C.V.,  
Palakkad, Kerala

### Which game?

Even an ordinary cricket fan will agree that the priority of Indian cricket now is the forthcoming World Cup and not the IPL. It is of paramount importance that the BCCI make sit mandatory for players selected for the World Cup to be withdrawn from at least the second leg of the IPL to prevent them from incurring injuries ('Sport' page, "India should know which tournament is more important", March 6).

R. SIVAKUMAR,  
Chennai

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