



# The court is not above the Constitution

The expectation of citizens is that the Supreme Court will lead by example, not by arbitrary diktat



KALPANA KANNABIRAN

In the midst of the political turmoil of a testing election season, a former junior court assistant at the Supreme Court sent copies of a sworn affidavit to 22 judges of the Supreme Court alleging sexual harassment by the Chief Justice of India and intimidation of her family members. The nature of the allegations is serious, and for a lesser citizen, it would *prima facie* have set the ball rolling on investigations, inquiries and appropriate actions by duly appointed committees. The fact that this is the correct course of action need not in this case detract from the cardinal principle of criminal law on the burden of proof – innocent until proven guilty.

## Derailing fair procedure

The immediate response of the Secretary General of the Supreme Court to the affidavit goes along predictable lines: "The allegations... are completely and absolutely false and scurrilous and are totally denied... The motive... is obviously mischievous... It would be extremely relevant to mention that the concerned individual and her family have criminal antecedents... It is not only mischievous but a complete afterthought (sic) of her to make these false allegations at this time... In fact there were complaints made against her... to the Secretary General on account of her inappropriate behaviour... Apart from the misconduct formally recorded, there were other counts of misconduct on her part... Its (sic) is also very possible that there are mischievous forces behind all this, with an intention to malign the institution."

In her affidavit, the complainant spoke of specific incidents, harassment of a specific nature, and against a specific person. Nothing in her sworn affidavit can on the face of it be construed as a general derogatory statement of the Supreme Court as an institution, nor as the general behaviour of judges of the Supreme Court. If there is an allegation against a specific person who occupies a



SHAMBER CHAKRAVARTY

high office, it is not an assault on the office. Construing it as such would pave the way to arbitrariness and impunity, and would undermine the Constitution that binds the court in irredeemable ways. On the other hand, it is possible that a thorough, impartial and fair investigation that is mindful of the asymmetries of power between the complainant and the respondent might find the complaint without basis. Instead, we find the first response on behalf of the respondent taking easy resort to "criminal antecedents" of the complainant and her family, as if that by itself negates the possibility of her being subjected to sexual intimidation. To derail the mere possibility of fair procedure is unacceptable by any standards.

The order passed shows the case as a 'Suo Motu Writ Petition (Civil) No. 1' and lists the Advocate General and the Solicitor General as Parties. The result of the special hearing was a gag-like order on the media signed by two judges, Justices Arun Mishra and Sanjiv Khanna: "Having considered the matter, we refrain from passing any judicial order at this moment leaving it to the wisdom of the media to show restraint, act responsibly as is expected from them and accordingly decide what should or should not be published as wild and scandalous allegations undermine and irreparably damage reputation and negate independence of judiciary. We would therefore at this juncture leave it to the media to take off such material which is undesirable." The CJJ was not one of the signatories, although he was present and

spoke at the hearing.

It is important to understand that although this issue has sent a shudder all around and gasps of disbelief and shock, the manner in which the complaint has been received and handled by sections of the Bench and sections of the Bar has been disconcerting to many in the legal profession. The Bar Council of India's statement speaks eloquently of its own standard: "The cock and bull story has been cooked up to plot some big conspiracy against the institution. Bar is fully standing with our CJ and the Judges of Supreme Court." The fact is that the Bar Council of India does not speak for all lawyers in the country, as the response of the Women in Criminal Law Association (WCLA) makes evident. The WCLA published a detailed statement demanding a free and fair investigation by a panel that excluded the three judges who constituted the Bench in the first sitting and demanded that the CJ not hold office till the inquiry is completed. The Supreme Court Advocates on Record Association and the Executive Committee of the Supreme Court Bar Association passed resolutions on April 22 disapproving the manner in which the complaint was dealt with and asserting the urgency of an independent impartial inquiry. These resolutions must be viewed in the light of conspiracy theories alluded to by the Bar Council of India and Finance Minister Arun Jaitley's statement that this was the work of "institution destabilisers" who represent "Left or ultra Left views". This attempt to impute a conspiracy jeopardises the security

of the complainant, her family and anyone who provides support in securing redress.

The court is unlike other institutional settings – the Supreme Court is sequestered and the constitutional office of the Chief Justice of India is deemed sacred and inviolable. The argument is that an independent judiciary is indispensable to check arbitrariness on the part of the legislature and government. What is often forgotten is that an independent judiciary also importantly acts as a check on itself, and must apply the principles of natural justice and fair procedure to itself with greater rigour than it would to the parties that appear before the court. The expectation of citizens is that the court will lead by example, not by arbitrary diktat. The expectation also is that constitutional morality will guide the court, at all times; the constitutional presumption is that the court is not above the Constitution.

## The time to dissent is now

This very court, in the judgment on the right to privacy, observed unequivocally that judges have in the past erred in judgment, in an understanding of their powers and in their understanding of the Constitution and the rule of law. Can we forget Justice Rohinton Nariman's emotionally charged recall of the "three great dissents"? Can we forget Justice D.Y. Chandrachud's statement, "When histories of nations are written and critiqued, there are judicial decisions at the forefront of liberty. Yet others have to be consigned to the archives, reflective of what was, but should never have been...?" And it is the thin line of judicial dissents that has moved centre stage in our understanding of India's constitutional history today. Given the recent resurrection of dissents by the Supreme Court, it is important not to foreclose the possibility of judicial dissent by generalising the actions of the three justices to all the judges of the court. For, after all, to borrow in part from Justice Chandrachud, judicial dissent is the safety valve of constitutionalism. And dissent must be seen to be done. The time is now.

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# Talking with a different Modi

If he returns to power, as the Pakistan Prime Minister wants, Modi's priorities would be different from those in his first term



SUBHASH RAI

Early this month, Pakistan Prime Minister Imran Khan said he thinks that there may be a better chance of peace talks with India and that "some kind of settlement in Kashmir could be reached" if the BJP wins this general election. This suggests that Mr. Khan, who is considered to be close to the guardians of the Pakistani state, possesses the 'mandate' to redraw borders and expects the leader of the BJP to have a similar mandate from the people after the election.

## Attempts at rapprochement

Over several decades, India and Pakistan have fought wars, derided each other at international fora, and squandered away a few attempts at rapprochement. Yet this formulation of hard-line adversaries being able to arrive at genuine peace between the two countries is a tantalising possibility. There is proof from other countries of bitter adversaries being the best peacemakers. In 1972, the conservative U.S. President Richard Nixon's visit to Beijing to meet Chairman Mao Zedong brought to an end years of tension between the U.S. and China. The most important consequence of the rapprochement was that the two Koreas agreed to reunification as a principle. And in February 1979, Atal Bihari Vajpayee, as External Affairs Minister, revived India-China relations that had gone into a chill since the 1962 war. In 2001, Vajpayee, this time as Prime Minister, was reportedly on the brink of arriving at a resolution of the Kashmir dispute with Pakistan President Pervez Musharraf at the Agra Summit.

These examples show that conservatives can bring about peace. While at the Agra Summit, where a master politician like Vajpayee might have seen an opportunity to make an impact on the history of the subcontinent (only to have it scuttled by his arch-rival, yet fellow right-wing stalwart L.K. Advani), Nixon's attempt was not focused on making peace with China's ideology; it was an attempt to de-escalate tensions.

## A different Modi

Expecting de-escalation of tensions from Prime Minister Narendra Modi, if he is voted back to power, would be different though. Mr. Modi made a surprise visit to Lahore in

December 2015 to wish his then-Pakistani counterpart, Nawaz Sharif, on his birthday. Will he be inclined to do the same on Mr. Khan's birthday this year? If Mr. Modi returns to power after this election campaign, which has been filled with invocations of Pulwama and Balakot, then it would be on the anti-Pakistan plank. In 2014, Mr. Modi wanted to be the leader who gave an opportunity to a recalcitrant neighbour. A re-elected Mr.



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Modi might not be in the need for such gestures. His ideological predilections will dissuade him as well. Besides, at the core of the Modi phenomenon has been his uncompromising persona. His appeal is to a core base that is of his own making and not necessarily that of the RSS-BJP combine. The base he appeals to believes in bravado and machismo.

## Arriving at peace

Mr. Modi has most often not felt the need to intervene and assuage the country on many issues that have been highly divisive. On the Gujarat riots in 2002, he compared his feelings to an occupant of a car involved in an accident. The travails of the people post-demonetisation and the poor implementation of the Goods and Services Tax were not even addressed, forget an apology being tendered. If that is the risk he was willing to take as Prime Minister in his first term, a rejuvenated Mr. Modi might even have the confidence to talk of the recreation of an Akhand Bharat. In the dream of Akhand Bharat, how can there be any compromise on a territorial dispute? There will be a collapse of many territories in such a dream and hence no territorial dispute to compromise on.

Mr. Khan might want the BJP back in power, but he will have to contend with a different Prime Minister Modi, if the latter does return. If there has to be durable peace in the subcontinent, the leaders who occupy high office should arrive at peace on the strength of political mandates that enjoin them to make peace.

Subhash Rai is Digital Editor, The India Forum

## SINGLE FILE

# The anatomy of beauty

Deconstructing the meaning of beauty today

MADHURIKA SANKAR



"With great hotness comes great responsibility," says the adorably vapid Haley Dunphy on the hit U.S. sitcom *Modern Family*. Little does the character realise the hidden import of her casual assertion in today's world.

Artists, scientists and philosophers concur that beauty is an inherently undefinable characteristic, combining the inward and the outward, the subjective and the objective, the evolutionary and the cultural. Indeed, 'beauty' is derived from the French word *beau*, which means 'physical attractiveness and goodness'. Right away, there is the suggestion of beauty and virtue as one and the same. Philosopher Francis Bacon theorised that "virtue is nothing but inward beauty; beauty nothing but outward virtue." This notion is pervasive and finds expression everywhere.

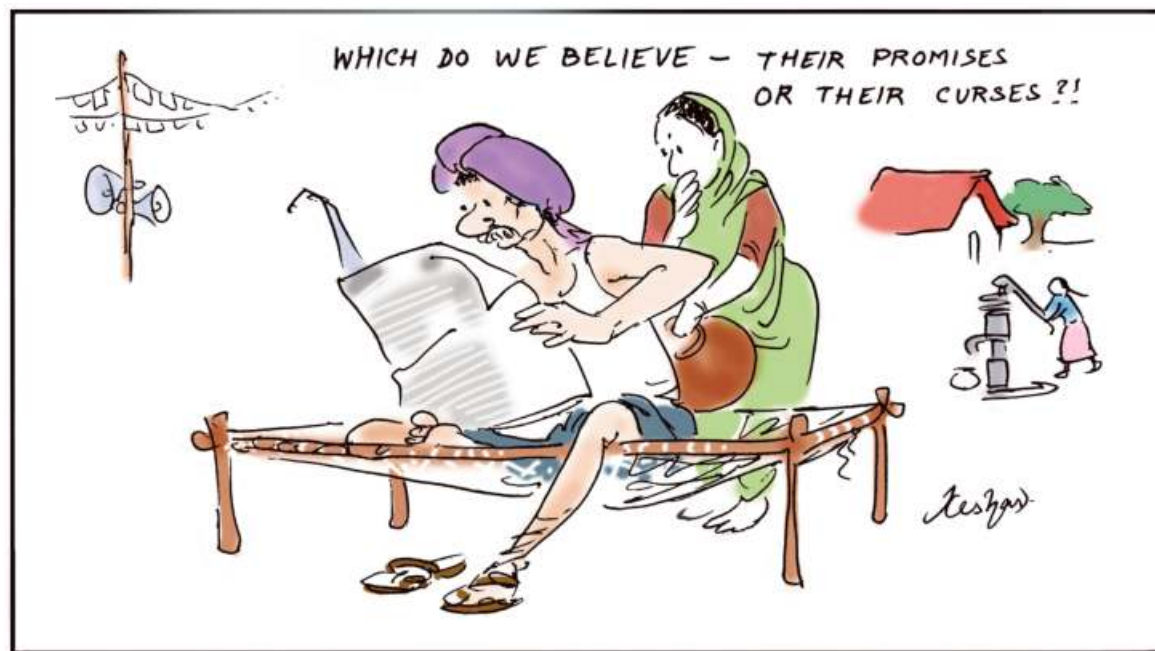
But there are dark trade-offs. An empirically beautiful person might have an easier time getting a job, finding a mate, and being taken seriously, but beauty often inspires people rolling out the proverbial red carpet, robbing you of any incentive to develop inner depth. And let's not forget the detrimental effect that the concept of beauty has on others who are perceived to lack the quality. The Western mass culture that predominates the world currently inspires anorexic, photoshopped ideals of beauty, instigating malcontent and insecurity in people. This insecurity often leads to detrimental personality changes, further marginalising the physically less-than-ideal individual.

Evolutionary aesthetics posits that the aesthetic preferences of human beings have evolved based on survival needs and are rooted more in biology than culture. The cultural dominance of the definition of beauty in the modern world is but a moment in time in relation to the sweep of socio-biological history. Nineteenth century sculptor Rodin was precocious in his understanding of our modern age: "Constantly I hear: 'What an ugly age! That woman is plain. That dog is horrible.' It is neither the age nor the woman nor the dog which is ugly, but your eyes, which do not understand."

The nicest, most evolved person, who understands the empirical fact that beauty is skin deep, will probably still linger over a more attractive person than a more substantive one, finding excuses to rationalise his or her deep desire for facial symmetry, unblemished skin and lustrous hair.

Renaissance mastermind Leonardo da Vinci looked for scientific precision in art and nature, symmetry being a reflection of beauty. Indeed, the Golden Ratio refers to a mathematical formula for ideal aesthetics and that it remains constant across multiple disciplines of study is a humbling resolution of our inherent struggles over beauty, to this day.

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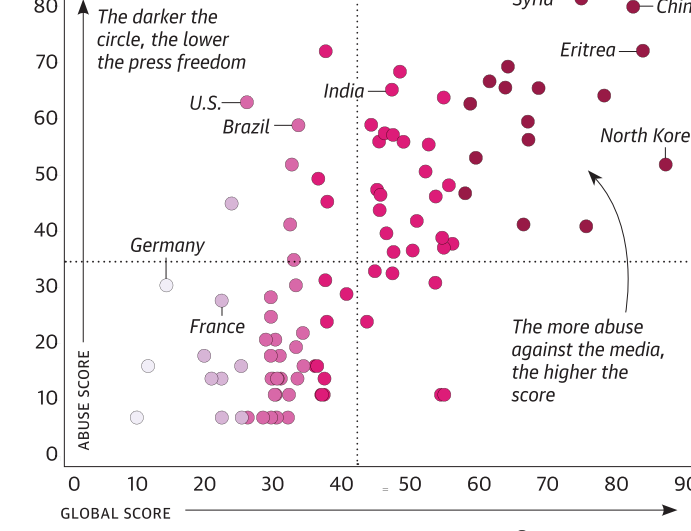
## DATA POINT

# Shaky fourth pillar?

India's position fell two spots to 140 out of 180 countries in the Press Freedom Index of 2019. The report observes that journalists have increasingly become targets of violence by police forces, Maoist radicals, criminal organisations and politicians. It also points to increased online threats against journalists. By Varun B. Krishnan

### In poor company

India's 'abuse score', a measure of the intensity of abuses and violence against journalists and the media, is much higher than the average. India's overall score puts it in the 'very serious' category in terms of lack of press freedom



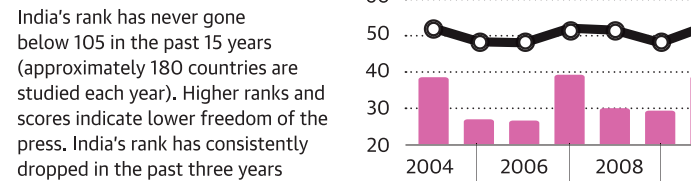
### BRICS scores

The rankings of all BRICS nations slipped by a few places in 2019. In the West, the U.S. moved from the 'satisfactory' to the 'problematic' category

Country	Rank	Rank change	Score
S. Africa	31	-3	22.19
U.S.	48	-3	25.69
Brazil	105	-3	32.79
India	140	-2	45.67
Pakistan	142	-3	45.83
Russia	149	-1	50.31
Bangladesh	150	-4	50.74
China	177	-1	78.92
North Korea	179	1	83.4
Turkmenistan	180	-2	85.44

**Methodology:** The degree of freedom in 180 countries is determined by compiling the responses of media professionals, lawyers and sociologists to a questionnaire. The no. of abuses against journalists and media is then weighted with qualitative feedback

### Track record



Source: Reporters Sans Frontières

## FROM The Hindu ARCHIVES

FIFTY YEARS AGO APRIL 23, 1969

### A scuffle averted in the Lok Sabha

A scuffle between the R.S.P. member, Mr. Tridib Kumar Chaudhuri, and the Congress member, Mr. N.P. C. Naidu, over the Calcutta Rabindra Sarobar Stadium incident was averted in the Lok Sabha to-day [April 22, New Delhi] by the timely intervention of their colleagues. The stadium incident crept into the proceedings of the House when the Defence Minister, Mr. Swaran Singh, was replying to a call-attention motion tabled by Mr. S.M. Banerjee and others on the refusal of army officials to surrender some of the sepoy to the civil authorities as directed by a Calcutta Magistrate. The exchanges between Mr. Chaudhuri and Mr. Naidu was drowned in the noise that marked the proceedings. An excited Mr. Chaudhuri rushed to the seat of Mr. Naidu who was making gesticulations at Mr. Chaudhuri. Fearing that a clash between the two members was inevitable, several members including Mr. A.S. Saigal, Mr. G.G. Swell and Mr. S.M. Banerjee prevailed upon Mr. Chaudhuri to calm down.

A HUNDRED YEARS AGO APRIL 23, 1919.

### Indian Labour Conditions.

At the Plenary Session of the Peace Conference held in Paris to-day [April 11], Lord Sinha in course of his speech on the International Labour Convention, said that from the industrial standpoint, India was in an extremely backward condition, but they hoped in the next few years that a great impetus would be given to indigenous industries. If these industries were to be developed on sound foundations they must look to the welfare of their workers. Already something had been done in India, the Factory Act of some years ago had already had good results, but as regards India's climatic, social, and other conditions, their own Factory Commission recommended that progress must be slow. They had watched the building up of this Convention with some misgiving fearing that allowance would not be made for peculiar conditions.

## POLL CALL

### Recount

An election recount is a repeat tabulation of votes cast in an election in order to determine the accuracy of the initial count. Political parties and candidates sometimes demand a recount in close contests if they believe there has been an error in the counting of votes. In India, provisions relating to recount are contained in Rule 63 of the Conduct of Election Rules, 1961. However, a recount is not possible if the election result has been declared and a candidate certified as the winner. In such cases, the only remedy is for an aggrieved candidate to challenge the election in court.

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