

SCANDAL IN THE PALACE

JUDGES IN INDIA ARE DIVINE BEINGS. AND IF YOU'RE AN EX-CJI, YOUR SINS ARE ABOVE MORTAL REPROACH...

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Arundhati Roy

Scandals can be fun. Especially those that knock preachers from their pulpits and flick halos off saintly heads. But some scandals can be corrosive and more damaging for the scandalised than the scandalee. Right now we're in the midst of one such.

At its epicentre is Y.K. Sabharwal, former Chief Justice of India, who until recently headed the most powerful institution in this country—the Supreme Court. When there's a scandal about a former chief justice and his tenure in office, it's a little difficult to surgically excise the man and spare the institution.

But then commenting adversely on the institution can lead you straight to a prison cell as some of us have learned to our cost. It's like having to take the wolf and the chicken and the sack of grain across the river, one by one. The river's high and the boat's leaking. Wish me luck.

The higher judiciary, the Supreme Court in particular, doesn't just uphold the law, it micromanages our lives. Its judgements range through matters great and small. It decides what's good for the environment and what isn't, whether dams should be built, rivers linked, mountains moved, forests felled. It decides what our cities should look like and who has the right to live in them. It decides whether slums should be cleared, streets widened, shops sealed, whether strikes should be allowed, industries should be shut down, relocated or privatised. It decides what goes into school textbooks, what sort of fuel should be used in public transport and schedules of fines for traffic offences.

It decides what colour the lights on judges' cars should be (red) and whether they should blink or not (they should). It has become the premier arbiter of public policy in this country that likes to market itself as the World's Largest Democracy. Ironically, judicial activism first rode in on a tide of popular discontent with politicians and their venal ways. Around 1980, the courts opened their doors to ordinary citizens and people's movements seeking justice for underprivileged and marginalised people. This was the beginning of the era of Public Interest Litigation, a brief window of hope and real expectation. While Public Interest Litigation gave people access to courts, it also did the opposite. It gave courts access to people and to issues that had been outside the judiciary's sphere of influence so far. So it could be argued that it was Public Interest Litigation that made the courts as powerful as they are. Over the last 15 years or so, through a series of significant judgements, the judiciary has dramatically enhanced the scope of its own authority.

Today, as neo-liberalism sinks its teeth deeper into our lives and imagination, as millions of people are being pauperised and dispossessed in order to keep India's Tryst with Destiny (the unHindu 10% rate of growth), the State has to resort to elaborate methods to contain growing unrest. One of its techniques is to invoke what the middle and upper classes fondly call the Rule of Law. The Rule of Law is a precept that is distinct and can often be far removed from the principle of justice. The Rule of Law is a phrase that derives its meaning from the context in which it operates. It depends on what the laws are and who they're designed to protect. For instance, from the early '90s,

we have seen the systematic dismantling of laws that protect workers' rights and the fundamental rights of ordinary people (the right to shelter/health/education/water).

International financial institutions like the IMF, the World Bank and the ADB demand these not just as a precondition, but as a condition, set down in black and white, before they agree to sanction loans. (The polite term for it is structural adjustment.) What does the Rule of Law mean in a situation like this? Howard Zinn, author of *A People's History of the United States*, puts it beautifully: "The Rule of Law does not do away with unequal distribution of wealth and power, but reinforces that inequality with the authority of law. It allocates wealth and poverty in such indirect and complicated ways as to leave the victim bewildered."

As it becomes more and more complicated for elected governments to be seen to be making unpopular decisions (decisions, for example, that displace millions of people from their villages, from their cities, from their jobs), it has increasingly fallen to the courts to make these decisions, to uphold the Rule of Law.

The expansion of judicial powers has not been accompanied by an increase in its accountability. Far from it. The judiciary has managed to foil every attempt to put in place any system of checks and balances that other institutions in democracies are usually bound by.

It has opposed the suggestion by the Committee for Judicial Accountability that an independent disciplinary body be created to look into matters of judicial misconduct. It has decreed that an FIR cannot be registered against a sitting judge without the consent of the chief justice (which has never ever been given). It has so far successfully insulated itself against the Right to Information Act. The most effective weapon in its arsenal is, of course, the Contempt of Court Act, which makes it a criminal offence to do or say anything that "scandalises" or "lowers the authority" of the court. Though the act is framed in arcane language more suited to medieval ideas of feminine modesty, it actually arms the judiciary with formidable, arbitrary powers to silence its critics and to imprison anyone who asks uncomfortable questions.

Small wonder then that the media pulls up short when it comes to reporting issues of judicial corruption and uncovering the scandals that must rock through our courtrooms on a daily basis. There are not many journalists who are willing to risk a long criminal trial and a prison sentence.

Until recently, under the Law of Contempt, even truth was not considered a valid defence. So suppose, for instance, we had prima facie evidence that a judge has assaulted or raped someone, or accepted a bribe in return for a favourable judgement, it would be a criminal offence to make the evidence public because that would "scandalise or tend to scandalise" or "lower or tend to lower" the authority of the court.

Yes, things have changed, but only a little. Last year, Parliament amended the Contempt of Court Act so that truth becomes a valid defence in a contempt of court charge. But in most cases (such as in the case of the Sabharwal...er... shall we say "affair") in order to prove something it would have to be investigated. But obviously when you ask for an investigation you have to state your case, and when you state your case you will be imputing dishonourable motives to a judge for which you can be convicted for contempt. So: Nothing can be proved unless it is investigated and nothing can be investigated unless it has been proved.

The only practical option that's on offer is for us to think Pure Thoughts.

For example:

a. Judges in India are divine beings.

- b. Decency, wholesomeness, morality, transparency and integrity are encrypted in their DNA.
- c. This is proved by the fact that no judge in the history of our Republic has ever been impeached or disciplined in any way.
- d. Jai Judiciary, Jai Hind.

It all becomes a bit puzzling when ex-chief justices like Justice S.P. Bharucha go about making public statements about widespread corruption in the judiciary. Perhaps we should wear earplugs on these occasions or chant a mantra.

It may hurt our pride and curb our free spirits to admit it, but the fact is that we live in a sort of judicial dictatorship. And now there's a scandal in the Palace.

Last year (2006) was a hard year for people in Delhi. The Supreme Court passed a series of orders that changed the face of the city, a city that has over the years expanded organically, extra-legally, haphazardly. A division bench headed by Y.K. Sabharwal, chief justice at the time, ordered the sealing of thousands of shops, houses and commercial complexes that housed what the court called 'illegal' businesses that had been functioning, in some cases for decades, out of residential areas in violation of the old master plan.

It's true that, according to the designated land-use in the old master plan, these businesses were non-conforming. But the municipal authorities in charge of implementing the plan had developed only about a quarter of the commercial areas they were supposed to. So they looked away while people made their own arrangements (and put their lives' savings into them.) Then suddenly Delhi became the capital city of the new emerging Superpower. It had to be dressed up to look the part. The easiest way was to invoke the Rule of Law.

The sealing affected the lives and livelihoods of tens of thousands of people. The city burned. There were protests, there was rioting. The Rapid Action Force was called in. Dismayed by the seething rage and despair of the people, the Delhi government beseeched the court to reconsider its decision. It submitted a new 2021 Master Plan which allowed mixed land-use and commercial activity in several areas that had until now been designated 'residential'. Justice Sabharwal remained unmoved. The bench he headed ordered the sealing to continue.

Around the same time, another bench of the Supreme Court ordered the demolition of Nangla Macchi and other jhuggi colonies, which left hundreds of thousands homeless, living on top of the debris of their broken homes, in the scorching summer sun. Yet another bench ordered the removal of all "unlicensed" vendors from the city's streets. Even as Delhi was being purged of its poor, a new kind of city was springing up around us. A glittering city of air-conditioned corporate malls and multiplexes where MNCs showcased their newest products. The better-off amongst those whose shops and offices had been sealed queued up for space in these malls. Prices shot up. The mall business boomed, it was the newest game in town. Some of these malls, mini-cities in themselves, were also illegal constructions and did not have the requisite permissions.

But here the Supreme Court viewed their misdemeanours through a different lens. The Rule of Law winked and went off for a tea break. In its judgement on the writ petition against the Vasant Kunj Mall dated October 17, 2006 (in which it allowed the construction of the mall to go right ahead), Justices Arijit Pasayat and S.H. Kapadia said:

"Had such parties inkling of an idea that such clearances were not obtained by DDA, they would not have invested such huge sums of money."

The stand that wherever constructions have been made unauthorisedly demolition is the only option cannot apply to the present cases, more particularly, when they unlike, where some private individuals or private limited companies or firms being allotted to have made contraventions, are corporate bodies and institutions and the question of their having indulged in any malpractices in getting the approval or sanction does not arise."

It's a bit complicated, I know.

A friend and I sat down and translated it into ordinary English. Basically,

- a. Even though in this present case the construction may be unauthorised and may not have the proper clearances, huge amounts of money have been invested and demolition is not the only option.
- b. Unlike private individuals or private limited companies who have been allotted land and may have flouted the law, these allottees are corporate bodies and institutions and there is no question of their having indulged in any malpractice in order to get sanctions or approval.

The question of corporate bodies having indulged in malpractice in getting approval or sanction does not arise. So says the Indian Supreme Court. What should we say to those shrill hysterical people protesting out there on the streets, accusing the court of being an outpost of the New Corporate Empire? Shall we shout them down? Shall we say 'Enron Zindabad'? 'Bechtel, Halliburton Zindabad'? 'Tata, Birla, Mittals, Reliance, Vedanta, Alcan zindabad'? 'Coca-Cola aage badho, hum tumhaare saath hain'?

This then was the ideological climate in the Supreme Court at the time the Sabharwal "affair" took place.

It's important to make it clear that Justice Sabharwal's orders were not substantially different or ideologically at loggerheads with the orders of other judges who have not been touched by scandal and whose personal integrity is not in question. But the ideological bias of a judge is quite a different matter from the personal motivations and conflict of interest that could have informed Justice Sabharwal's orders. That is the substance of this story.

In his final statement to the media before he retired in January 2007, Justice Sabharwal said that the decision to implement the sealing in Delhi was the most difficult decision he had made during his tenure as chief justice. Perhaps it was. Tough Love can't be easy.

In May 2007, the Delhi edition of the evening paper Mid Day published detailed investigative stories (and a cartoon) alleging serious judicial misconduct on the part of Justice Sabharwal. The articles are available on the internet. The charges Mid Day made have subsequently been corroborated by the Committee for Judicial Accountability, an organisation that counts senior lawyers, retired judges, professors, journalists and activists as its patrons. The charges in brief are:

1. That Y.K. Sabharwal's sons Chetan and Nitin had three companies: Pawan Impex, Sabs Exports and Sug Exports whose registered offices were initially at their family home in 3/81, Punjabi Bagh, and were then shifted to their father's official residence at 6, Motilal Nehru Marg.
2. That while he was a judge in the Supreme Court but before he became chief justice, he called for and dealt with the sealing of commercial properties case in Delhi. (This was impropriety. Only the chief justice is empowered to call for cases that are pending before a different bench.)

3. That at exactly this time, Justice Sabharwal's sons went into partnership with two major mall and commercial complex developers, Purshottam Bagheria (of the fashionable Square 1 Mall fame) and Kabul Chawla of Business Park Town Planners (BPTP) Ltd. That as a result of Justice Sabharwal's sealing orders, people were forced to move their shops and businesses to malls and commercial complexes, which pushed up prices, thereby benefiting Justice Sabharwal's sons and their partners financially and materially.

4. That the Union Bank gave an Rs 28 crore loan to Pawan Impex on collateral security which turned out to be non-existent. (Justice Sabharwal says his sons' companies had credit facilities of up to Rs 75 crore.)

5. That because of obvious conflict of interest, he should have recused himself from hearing the sealing case (instead of doing the opposite—calling the case to himself.)

6. That a number of industrial and commercial plots of land in NOIDA were allotted to his sons' companies at throwaway prices by the Mulayam Singh/ Amar Singh government while Justice Sabharwal was the sitting judge on the case of the Amar Singh phone tapes (in which he issued an order restricting their publication.)

7. That his sons bought a house in Maharani Bagh for Rs 15.46 crore. The source of this money is unexplained. In the deeds they have put down their father's name as Yogesh Kumar (uncharacteristic coyness for boys who don't mind running their businesses out of their judge father's official residence.)

All these charges are backed by what looks like watertight, unimpeachable documentation. Registration deeds, documents from the Union ministry of company affairs, certificates of incorporation of the various companies, published lists of shareholders, notices declaring increased share capital in Nitin and Chetan's companies, notices from the Income Tax department and a CD of recorded phone conversations between the investigating journalist and the judge himself.

These documents seem to indicate that while Delhi burned, while thousands of shops and businesses were sealed and their owners and employees deprived of their livelihood, Justice Sabharwal's sons and their partners were raking in the bucks. They read like an instruction manual for how the New India works.

When the story became public, another retired chief justice, J.S. Verma, appeared on India Tonight, Karan Thapar's interview show on CNBC.

He brought all the prudence and caution of a former judge to bear on what he said: "...if it is true, this is the height of impropriety...every one who holds any public office is ultimately accountable in democracy to the people, therefore, the people have right to know how they are functioning, and higher is the office that you hold, greater is the accountability...." Justice Verma went on to say that if the facts were correct, it would constitute a clear case of conflict of interest and that Justice Sabharwal's orders on the sealing case must be set aside and the case heard all over again.

This is the heart of the matter. This is what makes this scandal such a corrosive one. Hundreds of thousands of lives have been devastated. If it is true that the judgement that caused this stands vitiated, then amends must be made.

But are the facts correct?

Scandals about powerful and well-known people can be, and often are, malicious, motivated and untrue. God knows that judges make mortal enemies—after all, in each

case they adjudicate there is a winner and a loser. There's little doubt that Justice Y.K. Sabharwal would have made his fair share of enemies. If I were him, and if I really had nothing to hide, I would actually welcome an investigation. In fact, I would beg the chief justice to set up a commission of inquiry. I would make it a point to go after those who had fabricated evidence against me and made all these outrageous allegations.

What I certainly wouldn't do is to make things worse by writing an ineffective, sappy defence of myself which doesn't address the allegations and doesn't convince anyone (Times of India, September 2, 2007).

Equally, if I were the sitting chief justice or anybody else who claims to be genuinely interested in 'upholding the dignity' of the court (fortunately this is not my line of work), I would know that to shovel the dirt under the carpet at this late stage, or to try and silence or intimidate the whistle-blowers, is counter-productive. It wouldn't take me very long to work out that if I didn't order an inquiry and order it quickly, what started out as a scandal about a particular individual could quickly burgeon into a scandal about the entire judiciary.

But, of course, not everybody sees it that way.

Days after Mid Day went public with its allegations, the Delhi high court issued suo motu notice charging the editor, the resident editor, the publisher and the cartoonist of Mid Day with Contempt of Court. Three months later, on September 11, 2007, it passed an order holding them guilty of criminal Contempt of Court. They have been summoned for sentencing on September 21.

What was Mid Day's crime? An unusual display of courage? The high court order makes absolutely no comment on the factual accuracy of the allegations that Mid Day levelled against Justice Sabharwal. Instead, in an extraordinary, almost yogic manoeuvre, it makes out that the real targets of the Mid Day article were the judges sitting with Justice Sabharwal on the division bench, judges who are still in service (and therefore imputing motives to them constitutes Criminal Contempt): "We find the manner in which the entire incidence has been projected appears as if the Supreme Court permitted itself to be led into fulfilling an ulterior motive of one of its members.

The nature of the revelations and the context in which they appear, though purporting to single out former Chief Justice of India, tarnishes the image of the Supreme Court. It tends to erode the confidence of the general public in the institution itself. The Supreme Court sits in divisions and every order is of a bench. By imputing motive to its presiding member automatically sends a signal that the other members were dummies or were party to fulfill the ulterior design."

Nowhere in the Mid Day articles has any other judge been so much as mentioned. So the journalists are in the dock for an imagined insult. What this means is that if there are several judges sitting on a bench and you have proof that one of them has given an opinion or an order based on corrupt considerations or is judging a case in which he or she has a clear conflict of interest, it's not enough. You don't have a case unless you can prove that all of them are corrupt or that all of them have a conflict of interest and all of them have left a trail of evidence in their wake. Actually, even this is not enough. You must also be able to state your case without casting any aspersions whatsoever on the court. (Purely for the sake of argument: What if two judges on a bench decide to take turns to be corrupt? What would we do then?)

So now we're saddled with a whole new school of thought on Contempt of Court: Fevered interpretations of imagined insults against unnamed judges. Phew! We're in La-la Land.

In most other countries, the definition of Criminal Contempt of Court is limited to anything that threatens to be a clear and present danger to the administration of justice. This business of "scandalising" and "lowering the authority" of the court is an absurd, dangerous form of censorship and an insult to our collective intelligence.

The journalists who broke the story in Mid Day have done an important and courageous thing. Some newspapers acting in solidarity have followed up the story. A number of people have come together and made a public statement further bolstering that support. There is an online petition asking for a criminal investigation. If either the government or the courts do not order a credible investigation into the scandal, then a group of senior lawyers and former judges will hold a public tribunal and examine the evidence that is placed before them. It's all happening. The lid is off, and about time too.