

PRIVACY IN THE AGE OF SUNSHINE LAWS

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

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A Constitution Bench of the Supreme Court has finally concluded hearing a crucial appeal (after being nine years in cold storage) under the Right to Information Act (RTI), 2005. One of the three crucial questions raised in this case pertains to whether judges are required to publicly disclose their assets under the RTI Act in light of Section 8(1)(j). This provision prohibits the sharing of personal information that has no nexus to public activity or which amounts to an unwarranted invasion of privacy unless the larger public interest justifies such a disclosure.

The five judges hearing the matter face a difficult choice. Any attempt by them to assert the fundamental right to privacy as the basis for not disclosing assets to the public would necessarily require an implied overruling of landmark judgments in *PUCL (2003)* and *Lok Prahari v. Union of India (2018)*, in which smaller benches of the court rubbished the privacy claims of the political class while forcing them to publicly disclose not just their assets but also the sources of their income. The final ruling of the Constitution Bench will also impact the contentious Section 44 of the Lokpal Act, 2013, which requires all public servants (this includes judges) to disclose their assets but is silent on whether the disclosure should be to the competent authority or the general public. This provision has already been the subject of an amendment in 2016.

This case has its origins in an RTI application filed in 2007 in which the Public Information Officer (PIO) of the Supreme Court was asked by Subash Agrawal whether the judges of the Supreme Court had complied with the terms of a resolution adopted in 1997, in which all judges had committed to disclosing information about their assets and liabilities to the Chief Justice of India (CJI). The resolution had specifically mandated that the information would remain “confidential”. In 2005, Parliament passed the RTI Act, creating a legal right to demand information held by public authorities which arguably also includes the CJI.

Interestingly, Mr. Agrawal never actually asked for copies of the declarations filed by the judges with the CJI. He only wanted to be informed of whether any such declaration were filed by the judges of the Supreme Court and High Courts. Yet the PIO sought to invoke, among other sections, Section 8(1)(j) of the RTI Act to deny him this information.

This provision of the RTI Act prevents public authorities from disclosing any “personal information” of citizens if such “disclosure had no relationship to any public activity or interest” or if such disclosure constitutes “an unwarranted invasion of the privacy of the individual” unless the PIO is “satisfied that the larger public interest justifies the disclosure of such information”.

When the matter reached the Delhi High Court, both the single judge and the Full Bench concluded that judges, like other public servants, had a fundamental right to privacy. This right, it held, could only be curtailed if the RTI applicant demonstrated a showing of “larger public interest” as required by Section 8(1)(j) of the RTI Act. In other words, public servants as a class of employees cannot be forced to disclose their personal assets to the public merely because they hold public posts. However, in individual cases, if the person seeking such information could demonstrate a “larger public interest” such as wrongdoing or impropriety on the part of the public official, the information could be disclosed.

It is likely that the Supreme Court will follow the Delhi High Court’s reasoning because of its own

decision from 2012 in *Girish Ramchandra Deshpande v. Central Information Commissioner*. The court was faced with a case where an RTI applicant sought information on the service record and assets of a serving bureaucrat. In a very brief judgment, the Supreme Court ruled that the assets of the bureaucrat could not be revealed to an applicant under the RTI Act unless there was a showing of a larger public interest. The applicant could not demonstrate the larger public interest and was denied the information.

A lot has happened on the privacy front since 2012. The litigation and the civil society campaign against Aadhaar resulted in a unanimous judgment from nine judges of the Supreme Court declaring informational privacy as a component of the fundamental right to privacy. When the Constitution Bench decides on Mr. Agrawal's appeal, it will most likely be viewing the privacy right enshrined in Section 8(1)(j) of the RTI Act through the lens of the Aadhaar judgment. If the Bench decides that all Supreme Court and High Court judges have a fundamental right to privacy (only two of the five judges hearing the case have voluntarily disclosed their assets) and that judges cannot be forced to disclose their assets to the public, questions will be asked as to why the court forced politicians to publicly disclose their assets and sources of income. It would then be only a matter of time before politicians and their spouses seek the overturning of the *PUCL* and *Lok Prahari* judgments, thereby turning back the clock on electoral transparency.

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