Source : www.thehindu.com Date : 2019-04-09

OPEN UP THE SUPREME COURT

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

Almost 10 years ago, on September 2, 2009, the High Court of Delhi handed down a landmark judgment dealing with the fledgling Right to Information (RTI) Act. It held that the **Office of the Chief Justice of India (CJI) was a "public authority", and therefore, subject to the provisions of the Act**. Information held by the CJI — including, in the context of the case, information about judges' assets — could be requested by the public through an RTI application. In ringing words, Justice Ravindra Bhat declared that the RTI was a "powerful beacon, which illuminates unlit corners of state activity, and those of public authorities which impact citizens' daily lives, to which they previously had no access".

The Supreme Court appealed against this judgment, and the case eventually wound its way to the Supreme Court, where a stay was granted, and matters remained in limbo for a few years. Earlier this month, however, a five-judge Bench of the court finally heard the case on merits, and reserved judgment. By this time, the issues under consideration involved not only Justice Bhat's ruling on the status of the Chief Justice as a public authority and the disclosure of judges' assets, but also the question of whether the **correspondence of the Collegium** (the body of judges that selects and makes appointments to the higher judiciary) was subject to the RTI.

The basic question, i.e. whether or not the Office of the CJI is subject to the RTI Act, has an easy answer: yes. As Justice Bhat correctly observed in the High Court judgment, "all power — judicial power being no exception — is held accountable in a modern Constitution". A blanket judicial exemption from the RTI Act would defeat the basic idea of "open justice": that the workings of the courts, as powerful organs of state, have to be as transparent and open to public scrutiny as any other body. Nor would bringing the judiciary under the RTI Act destroy the personal privacy of judges: as the High Court judgment noted, the RTI Act itself has an inbuilt privacy-oriented protection, which authorises withholding the disclosure of personal information unless there is an overriding public interest. While disclosure of assets is arguably justified by an overriding public interest, medical details or information about marital status, for example, are clearly not. There will always be borderline cases, of course, but that only calls for nuanced and fine-grained analysis of such cases, nothing more.

During the hearings, however, the question most at issue involved the disclosure of the correspondence of the Collegium. The Collegium includes the five senior-most judges of the Supreme Court, who collectively constitute the selection panel for judicial appointments to the Supreme Court (and the three senior-most judges when it comes to the High Courts). India is one of the few countries where judges have the last word on judicial appointments, through the mechanism of the Collegium. The Collegium itself is not mentioned in the text of the Constitution: it arose out of a judgment of the Supreme Court, and in response to increased executive interference in judicial appointments, particularly during Indira Gandhi's regime.

The Collegium began life, therefore, as a tool to secure and guarantee the independence of the judiciary. In 2015, the Supreme Court struck down a constitutional amendment establishing a National Judicial Appointments Commission, which would have replaced the Collegium. A majority of the five-judge Bench held that judicial primacy in appointments was the only constitutionally-authorised way of securing/ensuring judicial independence against an increasingly powerful political executive.

Through this time, however, the Collegium had come under increasing criticism. A major point of

critique was its opacity: it was increasingly being perceived that judicial appointments were too often made in an ad hoc and arbitrary manner. Perhaps the most vivid example of this was when former Supreme Court Justice Markandey Katju admitted that, as the Chief Justice of the Allahabad High Court, he had refused to recommend a High Court lawyer for judgeship because that lawyer was in a live-in relationship without being married. One may wonder what connection there is between a lawyer's marital status and his ability to discharge judicial functions, but this was, at any rate, a stark example of what the critics had in mind. Indeed, the Supreme Court's own NJAC judgment acknowledged this critique, and vowed to evolve a system where concerns of transparency were addressed. A small step towards this was made during Dipak Misra's tenure as CJI, when the resolutions of the Collegium began to be published online.

It is in this context that we must examine the arguments of the Attorney-General of India, who represented the Supreme Court before the Constitution Bench. The AG argued that disclosing the correspondence of the Collegium would "destroy" judicial independence. The CJI seemed to agree, noting that disclosing the reasons for rejection of a judge would "destroy" his or her life or career.

This is, however, a bewildering argument, when we consider that the Collegium system was specifically put in place by the Supreme Court in order to guarantee judicial independence. It is rather self-serving to argue, first, that there is only one permissible method to secure judicial independence — and that is through ensuring judicial primacy in the appointments process — and then to argue that the only permissible way in which this system can work is by making it immune to transparency. The Supreme Court cannot eat its cake and have it too: if it has instituted a process of appointment that makes itself the final arbiter of judicial appointments, then it must also ensure that that same process meets the standards of accountability in a democratic republic.

Indeed, a look at judicial appointments elsewhere suggests that transparency in appointments is integral to the process. In the United States, for example, candidates for judicial appointments in the federal judiciary are subjected to public confirmation hearings by the Senate. In Kenya and South Africa, the interviews of candidates taken by judicial appointments commissions are broadcast live. The public, thus, is in a position to judge for itself the selection process. This is crucial to maintaining public faith in the impartiality of the institution.

The Collegium, however, has immunised itself from any form of public scrutiny. The nomination process is secret, the deliberations are secret, the reasons for elevation or non-elevation are secret. This creates an extremely unhealthy climate, in which rumours become staple, and whispers about executive interference are exchanged in court corridors. CJI Ranjan Gogoi's publicly stated concern that "in the name of transparency, you cannot destroy an institution" betrays a refusal to engage with the manner in which institutions are actually destroyed: in an insidious and incremental manner, through the slow drip-drip erosion of trust.

"Sunlight is the best disinfectant" is a trite and overused phrase. In the context of public scrutiny of the Supreme Court, however, it is an apt one. The Collegium's recent decisions to recommend a set of names for elevation, and then hastily backtrack on them without any publicly stated reasons, dealt a serious blow to its reputation for impartiality and independence. The only way to salvage this is to open up the court. A judiciary that is confident of itself and of its place in the democratic republic should not be worried about subjecting judicial appointments to public scrutiny. The occasional discomfort that might come from the harsh public glare is more than outweighed by the cleansing value of transparency.

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