

Judicial Accountability: Asset Disclosures and Beyond

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Public pressure, the principled position taken by certain judges and one ruling by the Delhi High Court have compelled public disclosure of assets by judges. But this is certainly not the end of the serious problem of a lack of judicial accountability. The main issue is the absence of an independent credible institution which could entertain complaints against judges, investigate them and take action against errant members of the bench.

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The foundations for the right to information in India were laid by a judgment of the Supreme Court in 1974 in the election case of *Raj Narain vs Indira Gandhi*, where the court while rejecting the government's claim of privilege on the disclosure of the security instructions for the prime minister, stated as follows:

In a government of responsibility like ours where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussions on public security. To cover with the veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against operation and corruption (AIR 1975 Supreme Court 865, para 74).

This principle of the right to information about the public acts of public officials was expanded by the Supreme Court in 2000 and 2002 in the *Association for Democratic Reforms and Peoples Union for Civil Liberties* cases, where the court held that this right to information of citizens included the right to know about the criminal antecedents as well as assets and liabilities of candidates aspiring to hold electoral office. The issue that this information about assets and liabilities was the personal information of the candidates and therefore did not come under the right to know of citizens was considered

and expressly rejected by the Supreme Court in the following words:

there is no question of knowing personal affairs of MPs and MLAs. The limited information is – whether the person who is contesting elections is involved in any criminal case... citizens who elect MPs and MLAs are entitled to know that their representative has not misconducted himself in collecting wealth after being elected (AIR 2002 Supreme Court 2112 para 50).

Measure of Good Governance

In India, all public servants employed by the central or a state government or any other public authority under their control are required under the relevant civil service rules to submit returns of movable and immovable assets owned by them and their immediate family. However these asset declarations are not made public and so far have not been accessible under the Right to Information (RTI) Act, though some State Information Commissions (such as the Himachal Pradesh State Information Commission which has ruled that the asset disclosures of IAS officers should be put on the web site) have ruled that they should be so accessible. There is, however, a growing number of countries in the world, where public disclosure of assets and conflicts of interest is required, as measures of good governance. In the United States, the Ethics in Government Act 1976 requires annual disclosure of financial information by the president, vice president, members of Congress, federal judges, presidential appointees, and other officials and employees earning at or above a specified pay scale or with policymaking responsibilities. Many other countries such as South Africa, Argentina, South Korea, Latvia, etc, require various forms of public disclosure of assets of public servants including judges.

The issue of asset disclosure of judges in India arose out of a RTI application filed with the Supreme Court by an untiring RTI activist Subhash Agarwal, seeking information as to whether judges of the high courts and the Supreme Court were complying with the 1997 "Code of Conduct" adopted at the Chief Justices Conference which required judges to disclose their assets in confidence to their chief justices. The

public information officer of the Supreme Court (endorsed by the chief justice) responded by saying that the information did not exist in the court registry. In the appeal before the Central Information Commission (CIC), it transpired that the Supreme Court was making a distinction between information with the Chief Justice of India's (CJI) office and that with the Supreme Court. The CIC rejected this distinction and directed the information officer of the Court to obtain this information from the CJI's office and provide it to the RTI applicant. This prompted the Supreme Court to file a writ petition in the Delhi High Court challenging the CIC order. Though the CIC had merely directed release of information about whether judges were disclosing their assets to the chief justice, the Supreme Court argued that this would pave the way for people seeking actual asset disclosures under the RTI Act. They claimed that asset disclosure was exempted under the RTI Act on the basis that this information was disclosed by judges to the chief justice under a "fiduciary relationship" and that this was "personal information having no relationship to public interest and would cause an unwarranted invasion of the privacy" of judges. The Court further claimed that the CJI was not a "Public Authority" amenable to RTI requests under the RTI Act, a claim the current CJI continues to maintain despite the recent resolution of the judges of the Supreme Court to declare their assets on the Court's web site.

Aborted Judges Bill

While the high court heard submissions in the matter and had reserved judgment, the issue became a major controversy after the government introduced the Judges (Declaration of Assets and Liabilities) Bill 2009, in Parliament (3 August 2009) providing for asset disclosure of judges, but with a controversial clause 6 which read,

Notwithstanding anything contained in any other law for the time being in force, the declaration made by a judge to the competent authority shall not be made public or disclosed, and shall not be called for or put into question by any citizen, court or authority, and save as provided in sub-section 2, no judge shall be subjected to any enquiry or query in relation to the contents of the declaration by any person.

This led to a furore in Parliament and members of Parliament cutting across party lines unanimously condemned this clause. The feisty Ram Jethmalani alleged that the bill was an outcome of a conspiracy of corruption between the government and the judiciary. He said that, "what the bill does is, it creates a suspicion in the public mind that the judiciary is seeking favours from the executive – now, this privileged position, which the judges are seeking from the executive makes them totally subservient to the executive." The government was forced to withdraw the bill post haste.

Soon thereafter, Justice Shylendra Kumar of the Karnataka High Court wrote an article publicly disagreeing with the CJI's stand that asset disclosure would lead to harassment of judges at the hands of disgruntled litigants (*Indian Express*, 23 August 2009). He said that many judges were not opposed to public declaration of assets and the CJI could not speak on behalf of all the judges. He volunteered to put his asset declarations on the high court's web site.

Immediately thereafter, the media published Justice K Kannan's (from Punjab and Haryana High Court) disclosure of assets, made in April 2009 in response to the Campaign for Judicial Accountability's appeal to all the judges of the High Courts and the Supreme Court to voluntarily make their assets public. Clearly now, there were a trickle of high court judges, willing to defy the CJI to make their asset declarations public.

Justice Kannan had however expressed his view on his blog that while he had no objection to his own asset declarations being made public, he felt that the requirement to make it compulsory for judges to do so, could compromise their independence. His reasoning was that the judge could be embarrassed by a litigant who he was trying for possessing disproportionate assets and who in turn could accuse the judge of similarly possessing disproportionate assets. He felt that this could compromise the ability of the judge to fairly decide the case of that litigant. In response to Justice Kannan, I pointed out that this was not a valid objection, and that even if introducing accountability for judges could marginally

compromise their independence, the increase in judicial corruption due to lack of accountability would cause much greater damage to public interest than a marginal and rare compromise on the independence of a judge.

Soon after the contents of the Asset Disclosure bill became known, the Campaign for Judicial Accountability and Reforms (CJAR), (a campaign organisation which has been raising these issues) had issued a public statement rubbishing the judiciary's grounds for claiming secrecy over their assets. We pointed out that three reasons for withholding public disclosure have been advanced by judges. (i) Disgruntled litigants will misuse the disclosure to indulge in mudslinging against judges. (ii) That judges cannot defend themselves unlike politicians. (iii) That there are no clear rules and format for disclosure. The campaign pointed out that none of these reasons seem to be strong enough to justify the proposed secrecy. Disgruntled persons can fling mud on others in authority as well. But the Supreme Court rightly did not let that come in the way of ordering disclosure of assets of aspiring MPs and MLAs. They do not even have the protection of the Contempt of Courts Act that judges have. Making baseless allegations is civil and criminal defamation for which action can be taken by judges more easily than other persons. Moreover, the reputation of persons in public office is not sullied by baseless allegations of motivated persons. It is built upon their actions and behaviour, which is generally known. So far as a format for disclosure is concerned, a format for disclosure has been rigorously prescribed by the Supreme Court itself for election candidates. The same format could be used by judges, with whatever amendments that may be required. The CJAR said,

Only a public and annual declaration of assets as is done by all federal judges of the US including judges of the US Supreme Court would ensure that the objective of transparency through this proposed Bill is achieved.

Support for Disclosure

Many former chief justices, judges of the Supreme Court, including justice Krishna Iyer, justice J S Verma and justice V N Khare as well as eminent jurists like Ram

Jethmalani, Shanti Bhushan, Fali Nariman and Soli Sorabjee publicly aired their views in favour of public declaration of judges' assets. The issue snowballed into a major public controversy arousing a lot of media interest. Ultimately the CJJ had to yield to the unrelenting public pressure and the Supreme Court announced that the asset declarations of the judges would be put up on the Court web site.

Justice Ravindra Bhat of the Delhi High Court finally delivered judgment on the Supreme Court's writ on 2 September 2009 after the Court made it clear that it would not withdraw its writ petition despite the judges' decision to put their asset declarations on the Court web site. Justice Bhat emphatically rejected the chief justice's oft-repeated claim that the CJJ was not a public authority and that the CJJ's office was not amenable to the RTI Act. He also held that information about whether judges had been declaring assets to the chief justice was decidedly held by the CJJ and had to be disclosed to the applicant. He also rejected the Supreme Court's contention that the asset disclosures have been given by judges to the chief justice in a fiduciary relationship (one of trust, like a lawyer-client or patient-doctor relationship), by holding that this information was required to be provided to the chief justice by the Code of Conduct adopted by the judges themselves. But he went on to hold that the information was personal information of judges entitled for protection under clause 8(1)J of the exemptions in the RTI Act, unless the information officer or the CIC came to the conclusion that the public interest in disclosure of this information outweighs the interest of privacy of the judge. However, since the applicant in this case did not ask for the actual asset disclosures but only whether judges were making them, Justice Bhat did not decide whether the public interest in disclosure of judges' assets outweighs the public interest in protecting the privacy of judges. Overall, the judgment is a stinging rebuff to the CJJ and it is to be seen if he would like to push this issue further by taking it up in appeal before a division bench of the high court or to the Supreme Court.

This issue of asset disclosure of judges' assets caught the public and media

imagination also because it was associated with the RTI Act, which has become one of the most popular legislations of recent times. The Campaign for Judicial Accountability and Reforms took up this campaign, though it was not among our principal demands for judicial accountability. In a statement issued in response to the Supreme Court decision, the CJAR pointed out that the decision of the Supreme Court judges

...does not obviate the need for a law to make such public declarations compulsory. Indeed, the law must provide for an annual public declaration of assets and liabilities as well as income tax returns of all public servants, including judges. It is only when people can compare the assets of public servants with their legal sources of income, that one can catch public servants who have acquired assets disproportionate to their legal income. The argument that income tax returns or asset disclosures of public servants is an unwarranted invasion of privacy of public servants is specious, since in a democracy, the people who are the real sovereign are entitled to know whether their public servants are paying their taxes and whether they have acquired assets which are disproportionate to their legal income.

Absence of an Independent Institution

The public disclosure of assets by judges, though a welcome first step, is certainly not the end of the serious problem of judicial accountability or the lack of it.

The main problem is the absence of an independent credible institution, which could entertain complaints against judges, investigate them and take action against errant judges. This needs to be a full-time body which is independent of the government as well as of the judiciary. Institutionalising an in-house body of sitting judges as a Judicial Council to entertain complaints against judges as proposed in the Judges Inquiry Amendment Bill will not serve the purpose. In-house bodies of lawyers, i.e., the Bar Council, and of doctors, i.e., the Medical Council have notoriously failed to seek accountability of lawyers and doctors for misconduct. Such bodies are plagued by inevitable conflict of interest. Moreover, a body of sitting judges would not be able to devote the time required to properly enquire into complaints against judges, which have been growing.

Apart from this, there is a serious problem with the method of appointing judges to the higher judiciary. There is not only no transparency in the process, there is also no system or method followed for preparing shortlists or for choosing among eligible candidates. The whole process is totally arbitrary and ad hoc, which has led to political favouritism when appointments were in the hands of the executive, and nepotism when appointments have been with the judiciary. Here too, we need

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a full-time independent institution that can methodically, systematically and transparently go about the job of selecting judges of the higher judiciary.

We also need to get rid of the Veeraswami judgment which restrains criminal investigation of judges without the prior written permission of the C.J. This has tied the hands of investigating agencies from investigating judges of the higher judiciary. A Judicial Bureau of Investigation under an independent Judicial Complaints Commission should be set up to investigate complaints against judges.

We also need to amend the Contempt of Courts Act to do away with the colonial and antiquated “scandalising or lowering

the authority of the Court”, from the definition of criminal contempt. This has deterred public exposure of corrupt judges, and it is certainly not necessary to protect the honour or dignity of honest judges or of the judiciary.

The road to securing judicial accountability, therefore, is still long and hard. But proper accountability for such a powerful and vital organ like the Indian judiciary is absolutely vital for the survival of rule of law and of democracy in this country. The lessons from the asset disclosure controversy are that an organised public campaign and galvanised public opinion can and sometimes does bring about fundamental institutional changes in a society.

Disclosure by New Appointees

As this goes to print, news has come that five new judges have been recommended for appointment to the Supreme Court. Again, as always, the process of selection has been done without any transparency. Though some of the judges nominated enjoy excellent reputations, some others do not. One does not know how and on what basis the selection has been made. The least that needs to be done in this context is to publish their asset declarations at least some time before the appointments are notified. That is the minimum that the people of the country deserve. It is indeed their fundamental right, declared by the Supreme Court itself.