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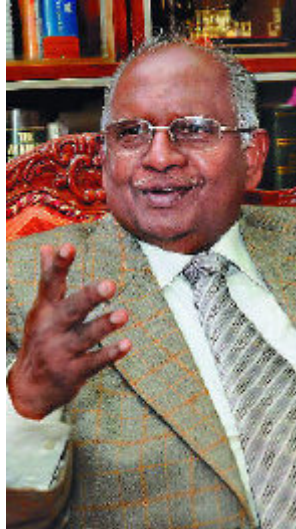
## THE JUDICIARY

### Trying times

V. VENKATESAN

**The Supreme Court faces new challenges in the wake of certain developments**

V.V. KRISHNAN



**K.G. Balakrishnan, Chief Justice of India, who is retiring in May.**

Chief Justice of India (CJI) K.G. Balakrishnan completed three years in office on January 13 and will retire on May 11. In the last four months of his term he will face perhaps the most daunting challenge of his career: that of restoring the people's faith in the Supreme Court, which has been dented by several developments in the recent past.

The first major challenge will be a response of the Supreme Court, which completes 60 years of its existence on January 26, to the Delhi High Court's judgment saying that the CJI's office was covered by the Right to Information Act (RTIA). The CJI had openly disagreed with such an interpretation. The verdict was delivered on January 12 by a three-judge Bench of Chief Justice A.P. Shah and Justices Vikramajit Sen and S. Muralidhar.

It came on an appeal by the Secretary General of the Supreme Court against a judgment delivered by Justice Ravindra Bhat of the Delhi High Court on September 2 last year. Justice Bhat had directed the Central Public Information Officer (CPIO) of the Supreme Court to provide the information sought by an applicant under the RTIA, Subhash Chandra Agrawal, about the declaration of assets by judges of the Supreme Court.

The three-judge Bench agreed with Justice Bhat that the expression “public authority” as used in the RTI Act had wide amplitude and included an authority created by or under the Constitution, which included the office of the CJI.

The Supreme Court, in its appeal, contended that Agrawal had no right to information regarding declarations made by judges of the Supreme Court pursuant to a 1997 resolution, passed by a Full Court meeting, requiring the judges to declare their assets to the CJI.

Specifically, Attorney General G.E. Vahanvati, who was the Supreme Court’s counsel before the High Court, argued that to exercise the right to information there should be a legal sanction to hold or control such information. He argued that the 1997 resolution and the resolution adopted at the 1999 Conference of Chief Justices of High Courts and Judges of the Supreme Court on the Restatement of Values of Judicial Life had no force of law and that there was no legal or constitutional requirement to file the assets declaration.

The Attorney General disagreed with Justice Ravindra Bhat’s contention that the two resolutions were binding because they were passed at a conference of Chief Justices. He pointed out that the 1997 resolution did not contemplate any sanction or in-house procedure in the event of non-filing of an asset declaration.

These arguments failed to convince the High Court’s three-judge Bench. It considered the RTI Act as a beneficial piece of legislation as its overarching purpose was to facilitate democracy by helping to ensure that citizens had the information required to participate meaningfully in the democratic process and to help make the governing authority accountable to the people. In construing such a statute, the court ought to give to it the widest operation its language will permit, the Bench held.

The Bench rejected the AG’s contention that the 1997 and 1999 resolutions were not binding instruments. The resolutions, it pointed out, emphasised that any code of conduct or like expression of principles for the judiciary must be formulated by the judiciary itself. That would be consistent with the principles of judicial independence and separation of powers, it said.

The Bench said subordinate judges, under the rules governing their conditions of service, were under an obligation to declare their assets. Therefore, the degree of accountability and answerability of a High Court judge or a Supreme Court judge could be no different from that of a magistrate, it said. All judges, functioning at various levels in the judicial hierarchy, form part of the same institution and are independent of undue interference by the executive or the legislature, the Bench pointed out.

It said the Supreme Court was undermining its own independence, which had been asserted in the Second Judges case (1993), by questioning the binding nature of the 1997 and 1999 resolutions and by contending that there had to be a law to compel judges to disclose their assets.

The Bench also dismissed the AG’s contention that unless questions about how the resolutions were to be implemented, by whom, to what extent and in what manner were answered, the resolutions would not have a binding effect. It said the

disclosure of assets by judges and their spouses and dependants on the websites of the Supreme Court, the Kerala High Court and the Madras High Court showed how the resolutions could be implemented. The consequence of not complying with the resolutions was linked to the faith in the system, the Bench suggested.

Dismissing the Supreme Court's appeal, the High Court Bench said democracy expected openness, and openness was a concomitant of free society.

On the contention that the Supreme Court should not hear the appeal against the High Court judgment because it was the litigant, the AG disagreed and said there was a distinction between the administrative and judicial sides of the Supreme Court. He suggested that it was the Supreme Court's administrative wing that was the litigant, and, therefore, there could be no bar on the court's judicial side hearing the matter. But such subtle distinction within the Supreme Court is hardly convincing.

### Judiciary's independence

The CJI initially said the Supreme Court's Full Court meeting would decide whether to appeal against the High Court's judgment. Later, he said either the Supreme Court collegium or he himself could decide. The CJI was dissatisfied with the judgment because, as he claimed in a media interview, the High Court said all the information available with his office came under the RTIA. Clarifying further, he said if a particular kind of information was given to the applicant it could affect the independence of the judiciary. Taking the example of appointment of judges, he said: "Here, we have to seek opinions in writing from colleagues who have served with judges considered for elevation. Now, if I start divulging such information, it will affect the independence of the judiciary. We want protection on this limited point."

A careful reading of the January 12 judgment of the High Court reveals that something that is not final cannot constitute information under the RTIA. Draft judgments, notes and jottings of judges while hearing a case cannot constitute information in the public domain, as judges may revise their views while writing final judgments. Similarly, opinions of colleagues who have served with judges considered for elevation to the Supreme Court are part of the consultation process within the collegium and, therefore, not final. Such opinions cannot constitute information held in the public domain. In other words, information whether a colleague was consulted on the appointment of a judge could be shared under the Act but not the colleague's opinion itself, which was just an input to the decision-making by the collegium.

### Obsession with primacy

Notwithstanding the emphasis on transparency in the High Court's judgment, the process of appointment of judges continues to be opaque. Following the government's rejection of the collegium's recommendation to elevate Justice P.D. Dinakaran, Chief Justice of the Karnataka High Court, to the Supreme Court, the collegium asked the government to keep its recommendation in abeyance, an option not available to the collegium under the law. The judgments in the Second Judges and Third Judges cases envisage only two options to the collegium, that is, either reiterate a recommendation or withdraw it.

Meanwhile, the CJI continued to maintain, in his interviews to the media, that the collegium did not violate procedure while recommending Justice Dinakaran for

appointment to the Supreme Court, and that the first allegations against the judge were made only after the collegium's recommendation became public.

In defence of its advice to keep the recommendation in abeyance, the collegium reportedly cited the admission of a motion in the Rajya Sabha, under Article 124(4) of the Constitution, to remove Justice Dinakaran from office. A three-member panel headed by Justice V.S. Sirpurkar of the Supreme Court has since been constituted to examine the allegations against Justice Dinakaran. Justice A.R. Dave, Chief Justice of the Andhra Pradesh High Court, and P.P. Rao, Senior Advocate of the Supreme Court, are the other members.

The government has said that if the proposed appointee has "doubtful integrity" that is reason enough to stop him from reaching the Supreme Court, and it is not necessary that there has to be a thorough probe into the allegations against the judge before the decision to appoint him is taken. The government's stand is buttressed by the judgment in the First Judges case, portions of which are still valid law. The Supreme Court held in that case that reputation for integrity was the most relevant consideration in deciding whether a person should be appointed as a judge (Paragraph 102).

#### New controversy

The Supreme Court collegium found itself in yet another controversy when it reiterated on January 11 its recommendation to elevate Justice Chandramauli Kumar Prasad, Chief Justice of the Allahabad High Court, as a judge of the Supreme Court. The government had returned the file of Justice Prasad following a note put up by President Pratibha Patil asking whether seniority had been overlooked in making the recommendation. Clarifications were also sought in respect of certain allegations against Justice Prasad.

The collegium – comprising Chief Justice Balakrishnan and Justices S.H. Kapadia, Tarun Chatterjee, Altamas Kabir and R.V. Raveendran – decided to stick to its stand and send back the file to the Union Law Ministry for processing the recommendation.

The Chief Justice of the Jharkhand High Court, Gyan Sudha Mishra, had complained to the Prime Minister and the President about her supersession in the process of the collegium considering Justice Prasad's name. It is not clear why the collegium did not consider her elevation to the Supreme Court even though there has been no woman judge in the Supreme Court for several years.

According to a report in *The Hindu*, the collegium did not find substance in the allegations against Justice Prasad. But it is not clear whether the collegium answered the President's concerns over the overlooking of seniority.

The CJI told the media that "there are reasons why a particular person is not considered", but did not elaborate. If the reasons are indeed serious, say observers, how could one justify her continuance as the Chief Justice of the High Court?

The lack of transparency in the collegium's functioning has affected adversely the reputation of another woman judge, Justice Nirmal Yadav of the Punjab and Haryana High Court. It was alleged that a packet containing Rs.15 lakh in cash meant for her was delivered mistakenly at the residence of her colleague, Justice Nirmaljit Kaur, on

August 13, 2008, by an assistant to former Haryana Additional Advocate General Sanjeev Bansal.

On Justice Kaur's complaint, the police registered a first information report (FIR). Later, the then Punjab Governor and Chandigarh Administrator, Gen. S.F. Rodrigues, after consultation with the Chief Justice of the Punjab and Haryana High Court, asked the Central Bureau of Investigation (CBI) to investigate. The CBI made out a case for prosecuting Justice Nirmal Yadav under the Prevention of Corruption Act.

Meanwhile, the CJI appointed an in-house committee headed by Justice H.L. Gokhale, then Chief Justice of the Allahabad High Court, and including another Chief Justice of a High Court and a judge of a High Court, to inquire into the allegations against Justice Nirmal Yadav. The Gokhale Committee reportedly found substance in the allegations and recommended initiation of proceedings to remove her from office. The Chandigarh Police also arrested the key accused in the case and secured evidence.

But the then Attorney-General, Milon Banerjee, advised the Law Ministry that there was not a shred of evidence that the accused committed the act with the knowledge of Justice Nirmal Yadav. In her response to the CJI, Justice Nirmal Yadav alleged that the cash packet was indeed meant for Justice Nirmaljit Kaur and that she was made a scapegoat because of the similarity in their names. On December 21, 2009, the CBI filed a closure report in the case in a Chandigarh court.

The CJI claimed that the CBI had not sought sanction for prosecuting Justice Nirmal Yadav in the case. The CBI, however, sought the sanction of the Union Law Ministry to register a case against Justice Nirmal Yadav and some others, including her relatives, in connection with a land deal in Solan, Himachal Pradesh. The CBI found that 18 people, including Nirmal Yadav, had purchased land at Rihun village in Solan. The Himachal Pradesh Revenue Department, thereafter, ordered an inquiry to find out whether the land deal was in violation of the Himachal Pradesh Land Reforms and Tenancy Act, 1972. The CJI denied sanction in this case because, as he claimed to *The Hindu*, no offence was made out. "How can I allow a sitting judge of the High Court to stand before a magistrate in a criminal case?" he asked.

The collegium's recommendation to transfer Justice Nirmal Yadav to the Uttarakhand High Court is pending with the President. If, indeed, the Supreme Court's collegium has given Justice Nirmal Yadav a clean chit while recommending her transfer, it could have made public the reasons for rejecting the Gokhale Committee report and the CBI's plea to prosecute her.