



‘I cannot pretend that I’m not hurt. But it’s a closed chapter for me’

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Justice AP Shah, responsible for such landmark judgments as the one on consensual gay sex, retired as Chief Justice of Delhi High Court after being overlooked for promotion to the Supreme Court. In an interview with The Indian Express Editor-in-Chief Shekhar Gupta on NDTV 24x7’s Walk the Talk, he talks about the lack of transparency in the collegium system and the need for an inclusive society

Shekhar Gupta: It’s my privilege to have as my guest a judge who became famous for his judgments and who should continue to be heard as much after his retirement as during his service—Justice AP Shah, retiring chief justice of the Delhi High Court. After a distinguished career, you said you were retiring with a sense of hurt.

Justice AP Shah: The media repeatedly asked me whether I felt hurt. I said I cannot pretend that I’m not hurt. That sense of hurt is always there. But it’s a closed chapter for me. That’s in the past and I have no regrets.

Shekhar Gupta: That kind of honesty is unusual in this capital of hypocrisy.

Justice AP Shah: I think I was just a little candid but this is what, how I felt. And I’m really looking forward to life beyond judgeship. It was a very enlightening experience, these 17 years were very enriching and I laid down office with some satisfaction of getting an opportunity to preside over three most important courts in the country.

Shekhar Gupta: Well, not just that. Some of the most landmark judgments—legalising consensual gay sex, the very recent judgments on night shelters in Delhi, what you’ve done for the disabled. But let’s talk about systemic issues. You were honest enough to admit to a sense of hurt but that is individual. Is there a sense of hurt or sense of concern about the system? Particularly about judicial appointments and elevations?

Justice AP Shah: Yes, I have. I am just talking about my concern about the collegium system and I don’t mean any disrespect towards anybody. The basic flaw in the system is lack of transparency. There are no procedures. There are no parameters fixed for the elevations, either in the High Court or the Supreme Court. The system is very opaque. If I use the words of Justice

Krishna Iyer—very strong words—but he said that this selection process is carried in a secret and bizarre fashion. Not very open. So there is a need to change the system. And we can look beyond our jurisdictions.

Shekhar Gupta: But has the Indian system worked well, by and large?

Justice AP Shah: There are some complaints. I had not experienced any pressures from anybody but I have been hearing some disturbing stories. And that is really a matter of concern. For instance, it is said that a few Supreme Court judges interfered with the appointments of the High Court. This is happening too often now. So these are developments which have really raised some questions about the credibility of the system. And the time has come for us to change the system and have a broad-based committee.

Shekhar Gupta: The collegium system is less imperfect than what we had in the past.

Justice AP Shah: Now just see, prior to 1993, the primacy was with the Executive. By a nine-judge judgment, primacy was given to the Chief Justice of India, in consultation with his senior colleagues. This system is now in vogue for the last 17 years. But lately there is some criticism against the system.

Shekhar Gupta: The Dinakaran case is one.

Justice AP Shah: No, I do not wish to comment on individual cases. But lately some controversies have arisen about some names. But all this can be avoided by bringing a more transparent system.

Shekhar Gupta: Right. So transparency is more important than systemic changes.

Justice AP Shah: Yes, it's more important.

Shekhar Gupta: Transparency was what you were batting for when you made that judgment about bringing the CJI's office under RTI.

Justice AP Shah: No, I must explain this judgment to you. I mean, it is rather misreported. There were some important issues raised in this matter. One of the issues was whether the CJI comes under the purview of the Right to Information Act. Whether he falls within the definition of public authority under Section 2(J) of the Act, 2 (E) of the Act. In this issue, there was a concession given by the Attorney General that the CJI is covered by the Act. So really, that was not the issue before us. What was argued by the learned Attorney General was that the respondent has no right to information because this is not information held or under the control of CJI. The argument was that this '97 resolution, or free statement of the judicial life, and the 1999 resolution, they don't have binding force, they have got only moral force. And since there is no statutory provision, these declarations were merely voluntary, and therefore, this cannot be said to be information held by the CJI. This argument was negated by us. And then, one another very important issue was about the privacy.

Shekhar Gupta: We have a very learned Attorney General now. He's not a lightweight.

Justice AP Shah: No, of course, he's not a lightweight. He comes from the same court and we are good friends. And it was always a pleasure to hear Mr Vahanvati. But the other issue was about the transparency, about the privacy. So we held that the asset information is protected by exemption under Section 8 (J). People tend to mix up the declaration on the website and our decision under the Right to Information Act. The decision to put our assets on the website, by the

Supreme Court and by the three high courts—Delhi, Madras and Kerala—was taken as our promise to the people that we want to be transparent. And therefore, it's our voluntary decision.

Shekhar Gupta: Of your many judgments which are now hailed as landmark, the judgment on gay sex is a nuanced one. You set very stringent tests for what is consensual sex and because of that, it has become nearly impossible to challenge this now. But tell me a little bit more about what went on in your mind, how challenging did you find that case.

Justice AP Shah: I must tell you something very interesting. Actually one of the newspapers reported this. A German delegation had come in '97 or '98. The delegation had some legislators and a few gay activists were also there. One of the legislators asked me whether the Indian courts would strike down this law, Section 377. So my reaction was, it would be very tough for an Indian court.

Shekhar Gupta: In The Indian Express, if I may say so.

Justice AP Shah: Yes, it was quoted in your paper. I never realised that the case would come before me after 10 years. The peculiar feature of this case was that the two wings of the government took diametrically opposite stands. The Health and Family Welfare Ministry took a stand that continuance of Section 377 was creating hurdles in the HIV-AIDS prevention programme. And the stand of the Home Ministry was that this Section should be retained on grounds of public morality. According to me, this was the biggest challenge. I think ours is the first judgment on constitutional morality. We said, for instance, that public morality, public perceptions, differ from time to time. For instance, 'sati' was largely approved by the majority, untouchability was approved.

Shekhar Gupta: They all had social sanction. In fact, all awful social practices survived because they had social sanction. And somebody had to challenge it.

Justice AP Shah: Correct. So we said that the test to be satisfied is that of constitutional morality and not public morality. Then there were various issues, but what we stressed was about the underlying theme of the Constitution, that is inclusiveness.

Shekhar Gupta: Right. But were you also pleasantly surprised by how little opposition—besides some noises—the judgment faced from the political class?

Justice AP Shah: This issue was pending for a long time. The judgment was awaited anxiously. And really, I was surprised by the reaction of the vernacular press. Mostly they welcomed the judgment.

Shekhar Gupta: You talked about inclusiveness. This is one aspect of inclusiveness. The other aspect of inclusiveness in which you've worked very aggressively was for disabled people. Tell us a bit about some of those judgments.

Justice AP Shah: The Disabilities Act was brought in 1995 but for many years it remained a dead letter. It is only due to the intervention of the judiciary that the Act has achieved its true potential. Before I came here, the Delhi High Court had passed several orders for enforcing provisions of the Act. What I really dealt with was the lack of special teachers in schools. The data produced before us showed that nearly 10,000 disabled children were taking education in state-run schools but there was not a single special teacher. This was very disturbing and we issued directions to the state government to appoint special teachers, provide the infrastructure.

Shekhar Gupta: And the timing was right because public opinion was also moving in this direction. Also through popular culture—Taare Zameen Par, now My Name Is Khan.

Justice AP Shah: Yes. I had an occasion to deal with a dyslexia case while I was in the Bombay High Court. That was a case of a small child. He was failed in the third standard three or four times. And then a writ petition was filed, questioning the decision of the school administration to keep him in the same class. And when I asked the parents to bring the boy to my chamber, I realised this was a case of dyslexia. My wife is a psychologist. She has worked in this field for a long time. After I consulted her, I realised that this was a problem of dyslexia and I issued directions to the state government. It is very necessary to bring such children into the mainstream. We need not have any special schools for dyslexic students, they should be in the mainstream. Disabled should be in the mainstream. The Maharashtra government accepted our decision and there is a rule now in the state that each class must admit—I'm not sure of the exact number—at least four or five dyslexic students. There is a sort of a reservation created for dyslexic students. It's a very welcome move. There should not be any special schools for anyone.

Shekhar Gupta: And the third element of inclusivity which you addressed was of the very poor in this city. The most recent judgments have been about the need to build more night shelters in Delhi. Tell us a bit about those cases.

Justice AP Shah: Yes, let me begin with some background. The phenomenon of PILs started in the late '70s, early '80s.

Shekhar Gupta: The Bhagalpur blindings case.

Justice AP Shah: Yes. The court intervened on the basis of some petitions. Really, in SP Gupta (case), the court said that in the case of those who are marginalised, if they are unable to come to court on account of their helplessness, their financial inability, then any member of the public can put a petition on their behalf. So, a series of orders were passed and it had a tremendous humanising effect on the Indian population. The Supreme Court was regarded as the people's court. But in course of time, we lost our way somewhere.

Shekhar Gupta: That's also because, do you agree, that PILs were overused?

Justice AP Shah: Yes, it was overused.

Shekhar Gupta: And too many special interest groups started using the PIL?

Justice AP Shah: PILs are used as a weapon to remove the poor from the city. I mean, it's very sad that on PILs, the courts passed orders for demolition of slums. So a perception was created that the courts are anti-poor. That was an unfortunate development in the recent past. For instance, in the division bench case which we overruled, several orders were passed against rickshaw-pullers. And the orders were passed without hearing them. Neither rickshaw-pullers nor their representatives appeared before the court. Same with those whose slums were removed. So that is one aspect which really is very disturbing. A PIL should be used as a powerful weapon to give relief to the poor and vulnerable sections and not used against them.

Shekhar Gupta: I don't think we can conclude this discussion without a mention of the clamour these days about corruption in judiciary. And I know that you've maintained that in the higher judiciary, corruption is minimal, although it's getting a bad name.

Justice AP Shah: I'd say marginal. I mean this is my perception. I cannot say that corruption doesn't exist. But it is marginal.

Shekhar Gupta: But sir, let me say this. You may have missed the elevation to the Supreme Court, but what you've done and what you've written will be remembered for much longer than a lot of the work done by many others who went higher on the hierarchical ladder.

Transcribed by Rajkrishnan Menon