

FRONTLINE

Volume 26 - Issue 19 :: Sep. 12-25, 2009

INDIA'S NATIONAL MAGAZINE

from the publishers of THE HINDU

<http://www.hinduonnet.com/fline/stories/20090925261903300.htm>

THE JUDICIARY

Of accountability to the people

V. VENKATESAN

Interview with Prashant Bhushan, convener of the Campaign for Judicial Accountability and Reform.

R.V. MOORTHY



Prashant Bhushan, senior advocate of the Supreme Court.

THE Indian judiciary is considered the most powerful in the world by many observers. In terms of standards of accountability, however, the higher judiciary in India is viewed as the least accountable. The August 26 resolution of the Supreme Court's Full Court in favour of disclosure of judges' assets on the court's website is a result of a sustained campaign by various civil society groups and activists and the sheer force of public opinion, which viewed with suspicion the judiciary's reluctance to disclose judges' assets.

The Campaign for Judicial Accountability and Reform (CJAR) is one such civil society initiative, which has from time to time brought together on a common platform various grass-roots activist groups to seek judicial accountability and to mobilise public opinion on the demand for transparency in the functioning of the judiciary.

In this interview with Frontline, Prashant Bhushan, senior advocate of the Supreme Court and convener of the CJAR, answers a range of questions on the assets controversy and its impact. Excerpts:

The CJAR has won a major success with the Supreme Court's decision to place details of judges' assets on its website. What explains this success?

Well, initially this was not the major focus of our campaign. But we began to campaign on this issue because it was related to Right to Information (RTI). The RTI has already caught the public imagination. We understood early on that the demand for disclosure of judges' assets would also catch the public imagination.

It all started with an innocuous RTI application seeking to know whether the judges were indeed filing their asset details with the Chief Justice of India (CJI) in accordance with the 1997 Resolution. Despite the August 26 decision of the Supreme Court's Full Court, this application has not yet been answered. What is the truth?

Nobody knows. The Supreme Court has been contesting this whole issue right up to the High Court. The CJI has made it clear that the case before the High Court has not become infructuous because the Central Information Commission (CIC) has wrongly decided the case in favour of the RTI applicant saying, 'the CJI's office is under the RTI'. The CJI has held the view that his office handles sensitive information. Sensitive information that can cause any kind of harm to the public interest can always be withheld under one or two exemptions. But it is an absurd proposition to say that because an office receives sensitive information it is outside the ambit of the RTI. The Prime Minister's Office receives even more sensitive information. But the PMO is clearly under the RTI.

Does the case before the Delhi High Court become infructuous following the August 26 decision of the Supreme Court?

No. As you rightly said, the Supreme Court has not yet divulged any information about whether the judges have been complying with the 1997 Resolution or the Code of Conduct. Secondly, this issue – whether assets disclosure will be accessible under the RTI

– still needs to be decided. The Supreme Court has directly raised this issue saying, 'today the RTI applicant wants to know whether there has been compliance; tomorrow, they will ask for the actual assets disclosure'. Therefore, this issue will have to be decided.

Now that details of judges' assets will be on the Supreme Court's website, the question whether the RTI applicant will ask for asset details does not arise.

We don't know in what way this will be put on the website and whether every judge will file it or not. We are also not sure whether the High Courts will put it up on their websites. Therefore, this principle needs to be decided.

Despite the resolution, can judges refuse to declare asset details on the Supreme Court's website?

Yes, they can.

Will the Bill that is sought to be introduced in the Rajya Sabha be still relevant if the government agrees to delete the objectionable clause barring public declaration of judges' assets?

Of course. In fact, we have said that it should be a Bill not merely for judges but for all public servants above a certain level. Today, other civil servants are required to disclose assets to the government, not to the public. Not merely assets, even income tax. Unless you know the income statements, you can't compare their assets with their income to see whether the assets are disproportionate to their known sources of income or not.

The view that income tax returns filed with the Income Tax Department are exempt because they are personal incomes is certainly erroneous. If the assumption is that personal information or information that will cause unwarranted invasion of privacy has no relationship with the public interest, it is clearly wrong. Even if income tax returns can be considered to be personal information, certainly it is related to the public interest. The public interest requires that people know whether people are paying their taxes or not; whether their assets are disproportionate to their known sources of income or not. Not merely public servants but every citizen's income tax return should be available under the RTI Act.

How do you draw the line between unwarranted invasion of privacy and the public interest?

There is no privacy about income tax. That is the public duty of every citizen. In my view, any information required to be submitted by law to a public authority cannot be considered personal information having no relationship with the public interest. If there is no relationship to the public interest, then there will not be a law requiring you to submit information to a public authority. And it cannot be considered an unwarranted invasion of privacy. If you have to submit information to a public authority, what is the problem in declaring it to other citizens? Whatever invasion of privacy has to take place has already taken place when information is disclosed to a public authority.

The dialogue between you and Justice K. Kannan of the Punjab and Haryana High Court, who also declared his assets unilaterally, was interesting. One of the points made by Justice Kannan is that judges are not politicians, who are accountable because they are elected. What is your specific response to this.

The fact that you can choose politicians at least makes them accountable to public opinion. The fact that you cannot choose judges makes them unaccountable even to public opinion. Therefore, it is even more important that judges have some accountability towards the people. That is why the disclosure of their assets and income, to my mind, is absolutely essential for their accountability to the people.

Justice Kannan has also said that if a litigant who is tried by a judge for disproportionate assets points out that the judge trying him also possessed disproportionate assets, it would compromise the judge's ability to decide that litigant's case fearlessly.

My answer is that it should not compromise an honest judge's ability. Anybody whose assets are transparent and honest would not be deterred by such scurrilous attacks. First, nobody would make such scurrilous attacks because it amounts to defamation and contempt. But let us assume that somebody does; why should an honest judge be affected by that? Yes, it will compromise a dishonest judge's ability to deal with that case. That dishonest judge needs to be off the Bench. He will cause a disaster in so many other cases. Therefore, the advantages of having him exposed far outweigh the possible disadvantage of compromising his ability to decide a case of a dishonest bureaucrat. That argument is like saying that a judge should not at all be accountable, because every accountability compromises the [judge's] independence to decide matters.

Supposing a judge is answerable to a judicial commission, to say that it will compromise that judge's ability to decide a matter involving a member of that judicial commission is not a valid argument. For that very small chance, you can't leave the judges totally unaccountable.

Can you bring a comparative perspective to this controversy? Are other countries equally concerned about ensuring judges' accountability through assets disclosure?

I think there are about a dozen countries, including the United States and South Africa, where assets disclosure by judges is mandatory. In the majority of the countries, it is still not mandatory, though countries are gradually moving towards that. This whole issue of right to information, transparency, disclosure of assets, and so on is all a relatively new phenomenon. Since India has one of the progressive Right To Information Acts in the world, we expect that even assets disclosure in India should be

available under it. That way, India is perhaps the only country where the Supreme Court mandated the disclosure of assets of candidates in elections. In line with all that India should also be more progressive and take the lead in such matters.

It has been reported that in their August 26 resolution the Supreme Court judges have decided not to entertain questions on assets disclosure.

I think it is fair enough. If somebody raises legitimate questions on disproportionate assets, by getting access to income statements of judges under the RTI Act, where the value of the assets declared is much less than their market value at the time of their acquisition, such questions can be examined by authorities like the Income Tax Department or the CBI [Central Bureau of Investigation]. But the judges themselves answering such questions may lead to harassment.

Are the income statements now available?

The income statements, right now, are not available. I am of the view that they should be available under the RTI Act.

If answering such questions can lead to harassment, then what is the very purpose of assets declaration? If you cannot question a judge against whom there is prima facie evidence, the very purpose of assets declaration is defeated.

If there is a legitimate basis, normally that judge should answer that. Otherwise, the judge's reputation will be at stake. Because anybody will be free to publish such allegations. The judge may take shelter under the resolution and refuse to answer the question, but that will be at the risk of ruining his public image and at the risk of being prosecuted under the Income Tax Act and the Prevention of Corruption Act because he will be shown to possess assets disproportionate to his income.

Is a watchdog body necessary to scrutinise the assets declaration?

Absolutely. There needs to be a national judicial complaints commission to entertain complaints against judges, to investigate them and take action. This commission should be independent of the government and the judiciary.

The government is proposing a National Judicial Commission, which is an in-house and ex-officio body. Judges are busy people and they cannot sit on this commission. It has to be a full-time body that can devote adequate time to these complaints. Besides, there are conflicts of interest. If there is a complaint against a brother judge, how could the judge on the commission decide a complaint if he is sitting with him every day in and out of the court?

You have said that the judiciary acts like a class, rather like an oligarchy.

In some respects, it does [act like a class]. Even on the assets disclosure, the majority of the Supreme Court judges were against it. It is the pressure of public opinion that has forced them to change their minds. There are a few judges who are not opposed to assets disclosure.

One important thing is the power of the Chief Justice of India. Unfortunately, the CJI has begun to wield enormous powers, far disproportionate to the fact that he is just a first among equals. Giving extraordinary powers to the CJI alone in the matter of appointments is not a healthy thing for the judiciary. Because it makes other judges subservient.

Even if it is assumed that all judges in the Supreme Court's collegium (comprising the CJI and the senior-most judges) to select judges act honestly, in the absence of a scientific, methodical system, the present method of selection of judges through consultation with the collegium may yield unfair and arbitrary results.

Following a system means preparing an eligibility list, having some way of comparing the merits of the candidates in the list. In the absence of such a system, the CJI names somebody, the No.2 judge in the collegium names somebody else, the Law Minister may name somebody, and that is how it goes. It is a free-for-all.

The time has come to put in place an independent judicial appointments commission.

Even the fact that the CJI decides Benches is not the proper way of dealing with court management. The CJI decides which case goes to which judge. He is empowered to do so under the Supreme Court Rules.

Parliament can certainly limit his powers to decide Bench composition. This overlordship of the Chief Justice in the courts has had a very baneful effect.

There may be many other judges who share the view expressed by the Karnataka High Court Judge Justice Shailendra Kumar [who wrote an article in a newspaper urging disclosure of assets by judges]. But they may be afraid to speak out openly. He was one judge who was not afraid to speak out, despite whatever consequences that could be visited upon him in terms of denial of promotion as the Chief Justice.

Therefore, this court needs to be more democratised, and not so heavily weighted towards the Chief Justice. Under the Code of Conduct, it is the Chief Justice who will decide whether cognisance will be taken on a complaint or not against a judge. Why should it be left to just one person?