



Supreme but fallible

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Justice A.P. Shah's judgment in the Delhi high court on the applicability of the Right to Information (RTI) Act is as fine as any bench of the Supreme Court could deliver. This is not surprising because Justice Shah is one of the best judges in India today. What was at issue was the right to know information about "assets" officially reposed with the Chief Justice of India (CJI) pursuant to a resolution of the Supreme Court on May 7, 1997 and the chief justices conference of December 1999. If the Supreme Court needed to be reminded of the obvious, Justice Shah declared that these resolutions were binding on the judges. Not to accept their binding nature would have made a mockery of the solemnity of the resolution process. The thought that the Supreme Court and high courts are not bound by their own promise can only undermine confidence in the judiciary as an institution. Information about assets was to be placed with the CJI not in his personal capacity but in the institution of the CJI. Many CJIs have come and gone since the resolution was passed. None of them claimed the information was personal.

The Delhi high court took both a wide-angled constitutional view of the issue as well as a narrow view flowing from the RTI Act. The wide-angled constitutional view was that from 1973 the Supreme Court itself has recognised a right to know as part of free speech, election law and, indeed, in the judicial appointment case of 1982. It was on this basis that in 2002 the Supreme Court gave to the people the right to know about an MP or MLA's full background, including financial assets. How come judges were exempt from the very right to know under which parliamentarians had to make a full disclosure to the people? The right to know is a fundamental right following the free speech — Article 19(1)(a) — and life and liberty provision — Article 21 — and international conventions. The significance of this was insightfully acute in two ways. In the first place, even if there was no RTI Act, a citizen or subject could claim to know about things like the financial assets of those who rule us, including the judiciary. Second, that in interpreting the RTI Act a bold and expansive rather than a narrow interpretation would have to be given — even if it affected the judges who could not interpret themselves above the law.

As far as the RTI Act is concerned, it surely applies to all "public authorities" established or constituted under the Constitution — Section 2(h). Indeed, recognising this, the Supreme Court had appointed an Information Officer — Section 2(c). The right to information included all information right down to notes and diskettes "held under the

control of any public authority” — Section 2(j). The attorney general’s view that this information had to be held under some law is fallacious. Ninety nine per cent of information held by most authorities is not retained under a “law” but executive authority. The terms of the act are clear. Such an approach does a disservice to Parliament’s clear intentions.

All this being settled, the next question was whether the Supreme Court could hide behind any of the ten exemptions provided by the act (Section 8). The Supreme Court’s counsel concentrated on the fiduciary relationship clause — Section 8(1)(e) — and the personal information or “privacy” clause — Section 8(1)(j). Significantly the RTI Act overrode all legislations (Section 22). The “fiduciary clause” was really not relevant. Every law student knows that “fiduciary” relations have a special meaning relating to the administration of trusts including corporate management. To expand this further would swallow the act. This is equally true of the idea of “confidentiality”. No authority can get out of the RTI Act simply by marking information “confidential”. If so, the RTI Act would be ruined. The “privacy” exemption relates to personal information which has no relation to “public activity or interest”. Tax returns, medical information, private relations would all be protected, subject to the public interest. Once the Supreme Court (for itself and MPs) had declared that information about financial assets related to public duty and accountability, this did not invade privacy. Most judges in

India accept this, why should the Supreme Court argue otherwise as a litigant?

The Delhi high court rightly emphasised that disclosures about financial assets are part of judicial accountability including norms of transparency. Ironically, when the Supreme Court judges in 2009 decided in favour of disclosure, they cautiously added possible restraints — not yet elaborated. Taking a balanced view, the high court held that a judge’s notes and draft judgments not placed on record could not be disclosed. The efficient functioning of judiciary was protected but accepted international standards of information accountability were to be adhered to.

If at the attorney general’s behest the secretary general of the Supreme Court was before the court, the latter cannot but have been instructed by the chief justice. Having placed itself before the high court, the Supreme Court should not exercise its right to appeal, so that it sits in judgment over itself. The chief justice has declared that the full court will decide whether to appeal. If that happens, no judge would be entitled to hear the case as they would be both litigant and judge.

The RTI Act is clear. If the Supreme Court wants the act changed, this has to be done by Parliament not by one-sided judicial law-making. Until such a law is made (and it should not be) the Supreme Court should not allow itself to twist the law in its favour. The attorney general wants to appeal. Is this his view or that of his client, the Supreme Court, and perforce, the CJI? Forbearance is an option.

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