

JUDICIAL ACCOUNTABILITY

By Prashant Bhushan

With the string of Judicial scandals, erupting in quick succession all over the country, several journalists have asked me whether corruption in the judiciary is a new phenomena. If not, why are these skeletons tumbling out now? Corruption in the judiciary is hardly a new phenomenon, though it has certainly increased over the years. It is worthwhile however to examine the reasons for the sudden spate of exposures of judicial corruption. Having enjoyed enormous powers, including the power of contempt, without any accountability, the higher judiciary has over the years, tread on the toes of many persons and institutions, particularly the media. Not wanting to suffer criticism, the judiciary has used its power of contempt to stifle criticism. More than 50 editors, publishers and journalists have been issued contempt notices by the Karnataka High Court for having written stories about a judicial sex scandal, reportedly involving three judges of the High Court. Small wonder then, that the media is enjoying every bit of the juicy judicial scandals that have exploded.

That there has been corruption in the judiciary for many years, is clear from the famous case of K. Veeraswami who was virtually caught red-handed in 1974, while he was Chief Justice of the Madras High Court. His case however is to a large extent responsible for the lack of exposure of corruption in the judiciary till the recent scandals. In Veerasamy's case, the Supreme Court laid down that no criminal investigation of any kind against a judge could be taken up by any investigating agency without prior permission of the Chief Justice of India. This restraint, the court held, was necessary to protect the judges from harassment by the executive who control the investigating agencies. Over the last 12 years since the Veerasamy judgment, no Chief Justice has ever given permission to investigate a sitting judge of a High Court or the Supreme Court, obviously not because there has been no corruption in the judiciary. The judiciary might say that this is because no permission has been sought thus far by the investigating agencies to investigate any judge. The fact however is, that investigating agencies would be extremely reluctant to approach any Chief Justice for permission to investigate a judge, unless they already have good evidence against him. And how can they have any evidence, till they investigate the judge. This has led to the Catch-22 situation, whereby judges have escaped scrutiny altogether.

In Shamit Mukherjee's case, the CBI got the evidence against him by chance, though they were not investigating him. During the investigation of the DDA officials, they had tapped the phone of the middleman Dharamvir Khattar. While listening to his phone, the CBI found and recorded many calls to and from Shamit Mukherjee. The nature of the conversations left no doubt of a brazenly corrupt nexus between the two and other DDA officials. With this evidence, the CBI approached the Chief Justice of India. The Chief justice confronted Mukerjee with this evidence, who had little option but to resign since he had not yet been confirmed as a judge. After he ceased to be a judge,

there was no impediment to investigate or arrest him. It is learnt that the CBI has come upon some evidence involving other judges as well in the course of the same investigation. However, they are reluctant to approach the Chief Justice for permission to directly investigate the judges till they have a foolproof case against them. This obviously is not easy unless you're directly investigating the judges.

One reason why judges have been treated as demigods in this country is because of the power of contempt wielded by them. This is a jurisdiction in which a judge against whom an allegation has been made can himself act as the complainant, prosecutor and judge. The judge can even refuse to allow the maker of the allegation to prove its truth. The very existence of this power has been enough to silence the media and inhibit them from exposing judicial misbehaviour or corruption. The amendment recently moved in Parliament to make truth a defence in a contempt action is not an adequate safeguard for the citizens and the press. As the case involving the journalists who wrote about the Karnataka sex scandal shows, though the allegation may be made bona fide and on a reasonable basis, it may not always be possible to prove its truth. This could be because the witnesses are won over or the evidence disappears for some other reason.

In fact there is no reason for this power to punish for contempt for "scandalising the court", to be conferred on the courts. It does not exist in the US, where this power can only be exercised where there is a clear and present danger to the administration of justice. It is often argued that this power is required to deter scurrilous attacks on the judges. But the law of civil and criminal defamation is adequate to do that. There is no need for such extraordinary powers for judges.

The Ramaswamy case has demonstrated clearly that impeachment is not a practical remedy to discipline errant judges. The very initiation of that process involves drawing up charges against the judge which have to be signed by a hundred MPs. How can MPs signed the chargesheet without evidence, and how can evidence be collected without investigation, which is practically impossible in the present state of affairs. It was therefore clearly recognised immediately after the Ramaswamy case that we need another system for disciplining judges.

For a longtime now, people have talked of a National Judicial Commission which will have the power to discipline judges, but successive governments have failed to draft and bring that Bill. It is only now, faced with a string of highly publicised scandals, that the government has hurriedly introduced a bill for creating a National Judicial Commission. In the government's draft Bill however, this Commission would consist of the three senior judges of the Supreme Court, the Law Minister and a nominee of the Prime Minister. This is hardly the kind of independent body that is needed to bring accountability within the judiciary. This commission suggested by the government would be controlled by the judiciary and some of its power would be wielded by the

government. This neither has the merit of creating an independent watchdog body, but has the demerit of making the government an active player in controlling the judiciary. This proposal, would compromise the independence of the judiciary, without bringing the desired accountability.

The Committee on Judicial Accountability, had more than six years ago prepared a draft bill for the National Judicial Commission, which provides for a five-member commission consisting of five retired judges or senior advocates who will have security of tenure, which will make them independent of the government as well as of the judiciary. The chairman would be nominated by Collegium of all the judges of the Supreme Court. Another member would be nominated by Collegium of all the Chief Justice of the High Courts. One member would be nominated by the government. One, by the leader of opposition in the Lok Sabha. The last, by a Collegium of all the members of the Bar Council. However all members would function independently of the nominating bodies, since they would enjoy security of tenure, like judges of the High Court of the Supreme Court. Such a body exercising disciplinary powers over judges of the High Court and Supreme Court, could be expected to bring about some accountability in the judiciary without compromising its independence.

According to the draft bill of COJA, this commission would also select judges for appointment to the High Court and the Supreme Court. In order to bring about a measure of transparency in the system of appointment, it was proposed that before an appointment is finally made, the proposals would have to be notified for public information so that persons having any relevant information about the nominee's background could supply that information to the commission. This would in many cases, prevent appointment of dubious persons who are able to get through, because people who know their dubious past are unaware of their proposed appointment before it is actually made.

It is trite to say that the judicial system in this country is in a state of collapse. Many of the solutions necessary to remedy this problem have been suggested by the successive Law commissions and have been known to successive governments. However those in power have little incentive to reform the judiciary, since they do not need the judiciary to get justice. They have the power of authority. It is the poor and the weak and the helpless who usually need the courts to get justice, often against those who are in power. It suits a corrupt executive to have a corrupt judiciary. The corrupt judiciary is hardly likely to hold a corrupt executive to account. They would both be content with a system of loot and share. Unless there is a strong movement of citizens, who are the consumers of justice, for judicial reforms, we are hardly likely to see any serious judicial reforms in this country.