

# Transparency Review

Journal of Transparency Studies, Centre for Media Studies (CMS)

## *No Justice for Aam Aadmi*

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# AVOIDING ACCOUNTABILITY

**D**enial of the justice promised by the Constitution to the poor and under-privileged, the bulk of our people, is now recognised as a crucial failure of our democratic system. This was the theme of a National Convention on Judicial Accountability and Reforms in New Delhi last month. Noted jurists, including former Supreme Court Justice P.B. Sawant exposed the systemic deficiencies, some self-serving, responsible for the denial and for cases of perversion of justice. Among the victims was the writer, Arundhati Roy, who had been indicted for contempt.

In this issue of Transparency Review, we give glimpses of the presentations that set the tone of the convention and the statement issued at the conclusion. Articles and backgrounding on related issues relating to Contempt of Court and the Judges Inquiry Bill are also provided. We hope this will convey the range and seriousness of the demand for judicial accountability.

The demand for transparency and

accountability is also reflected in the on-going tussle between the Central Information Commission and key ministries and departments of the Government of India. Three recent decisions of the Commission indicate the high level of disagreement. They concern disclosure of the correspondence between the Supreme Court and Law Ministry on the elevation of a judge, making public disbursement details of the PM's National Relief Fund and giving the reasons for refusal to give a visa to a foreign national.

One department, the Department of Training and Personnel (DoPT), continues to defy the Commission's ruling that it amend the advice in its website that file notings need not be disclosed. This is cited by those opposing applications for disclosure, thus challenging the accountability promised by the Right to Information Act of 2005. Until the defiance ends, the intentions of the Government, which has gained much credit for pushing through the Act, will be suspect.

## Letters To The Editor

I have seen Vol 1 No. 6 of Transparency Review. Congrats! The new look is better and much more appealing. The content page as cover gives an idea of what is inside. I find newspaper coverage of RTI news is haphazard.

Nagasuri Venugopal,  
Vizag (AP)

The Jan-Feb issue is very enriching.

Uday Shankar,  
Raipur

The latest issue is a remarkable effort indeed.

Pradip Baijal  
New Delhi

(Letters to the editor maybe sent by email: [transparency@cmsindia.org](mailto:transparency@cmsindia.org), [info@cmsindis.org](mailto:info@cmsindis.org))

# TRANSPARENCY IN JUDICIARY

■ Transparency Studies

**A** well-represented Convention last month strongly criticized the judges (Inquiry) Bill, the main theme of the meeting, for failing to address the central question of accountability of judges. Other important aspects like the state of the Indian judiciary, whether and how far were the judges accountable under the present scheme of things, the reason for public perception that the judicial system is only for the rich, instances of judges acting against the interests of the poor and the growing corruption in the judiciary were also discussed. The Campaign for Judicial Accountability and Reforms, as it was called, was attended among others by well-known jurists, former judges, human rights activists, social scientists, representatives of Transparency International and a host of other public-spirited citizens.

Mr Justice Sawant, who led the debate, however, cautioned that whatever method one chose to seek to make judges accountable, it should not interfere with its independence. He said the Judges Inquiry Act was being politicized and criticized the manner of appointment of judges. While pointing to the growing arrears, he spoke of the paradox of 70% of the population being outside the judicial system. Arundhati Roy described the courts as the most powerful institution in the country and spoke of the way in which they micro-managed our lives. Dr Bhaskar Rao of the Centre for Media Studies highlighted the growing corruption in the judiciary and quoted a Survey's estimate of the extent of the malady to be more than Rs. 2,500 crores.

At the end of the two-day convention a campaign statement was issued.

Sometime before the Convention, a committee of eminent lawyers discussed the Judges Inquiry Bill and concluded that though there were some minor positive features, these were overshadowed by far more serious problems in the Bill which reduced whatever little accountability remained under the present Judges Inquiry Act. It recommended a complete overhaul of the proposed Bill.

## Convention on Accountability

### Justice P.B.Sawant

**J**ustice P.B.Sawant, former judge of the Supreme Court, appreciated the debate initiated by the Campaign for Judicial Accountability and Reforms, which would make people aware that they also have rights, responsibilities and they are not excluded. The impression

today is that the legal world has its own fraternity, with its own procedural laws, its own language coupled with the privileges of the judges. This world is outside the reach of the ordinary person. It is forgotten that these institutions are part of our democratic fabric and hence as much responsible

and accountable to the people as any other institution. In fact the 'rule of law' which is the foundation of our democratic system depends on the responsibility of the judiciary and responsibility of the lawyers who assist the judiciary in their function.

The manner of seeking accountability differ but it is one thing to say that there is no uniform method of securing accountability from all institutions and another thing to say that judiciary is a unique institution and should be immunized from all such process of accountability. The judiciary should rather come forward and offer its scrutiny to the people, but unfortunately it is increasingly receding.

Whatever method or manner in which one seeks judicial accountability, one must see that it does not interfere with the independence of the judiciary. In order to understand the independence per se, we need to see both administrative and judicial functions.

Functions like appointment of the judges, staff in the registry, the criminal or civil procedure of causes, files in the court and their journey till its final disposal are all administrative. So the transparency in these processes does not call for interference in the judiciary. It is only the process of hearings and decision making which constitutes the actual judicial process. That the Supreme Court asked the government to exclude it completely from the RTI Act 2005 is a very retrograde step. They have laid down a very bad precedent for all institutions in this country for taking a lead from them. The most unfortunate statement by Chief Justice of India in an interview was, "No self-respecting person will disclose his assets." This suggests that the CJI means to say that nobody other than CJI has self-respect and nobody should be asked to disclose his asset.

The Judges Inquiry Act is being politicized since the beginning. The inquiry report will be looked into by a committee consisting of sitting judges; so even if one judge disagrees the report is shelved. In case the judge is found guilty by the committee then the case goes back to the executive and has to be passed by 2/3rd members of the Parliament which again runs the high risk of politicization. If the motion is passed, the President is obliged to remove the judge.

The greatest lacuna in our Constitution is the manner in which the appointment of judges is

done. In India, we have a system adopted from English Judicial system, wherein appointments to the higher judiciary lies with Chief Justices of High Courts and Supreme Court, then the names are sent to the Central Government and the President. This process of appointment has no judicial review. But the American system takes into account the judicial review where a judge's name has to be announced 2-3 months before it is sent to the President; in the meantime he has to undergo an open interview which is telecast live.

As far as delays and arrears are concerned, it is occurring because 70% of the population is outside the judicial system, there is absence of legal aid, legal literacy, the time taken for proceedings which means loss of day's wages and the most important is the poverty as they are unable to pay the fees to lawyers or court. The geographical location of courts is also a problem. The Law Commission had suggested mobile courts which would hear the case, give the decision then and there. Lok Adalats system has been working properly in many areas, it can be made better.

The functioning of Supreme Court should also be decentralized which should have at least 6 branches. But this suggestion has been consistently resisted on the ground that it will break up the integrity of the court. A large section of the judiciary comes from the urban elite background. The right approach will be taking care at the time of appointment and appoint judges from all sections of the society.

## **Arundhati Roy**

The courts are the most powerful institutions in the country. They micro-manage our lives like what should we spit on the street, what fuel we should consume, whether the slums should be removed, whether the dams should be built, etc... As Justice Sawant says that the court has begun to accumulate power.

I don't think the judiciary is unaccountable but who is it accountable to? The most successful movement in this country has been the success of the rich, where they have taken the resources, the judiciary, the power and the media.

Why should we not ask for contempt for the court? I think we should understand what is meant by corruption. It is the power which the courts enjoy.

I don't think corruption is the only problem or

contempt of court clause is the only problem; it is the language used in judgments in court, lack of intelligence, lack of logic or any kind of intellectual integrity. In the newspapers, it was reported that Justice Katju had made a statement that the corrupt people should be hanged from the lamp-post. How can a judge talk like this? When the Chief Justice of India himself had observed that so many judges in higher judiciary are corrupt. Are we also saying that the corrupt judges should be hung from lamp-posts too?

One should also see how PILs have been twisted. For instance, in one of the NBA judgement the courts told the litigant that "you do not have the right to make any submission about big dams, you restrict to your own specific case." It was also observed by the courts that PILs should not be confused with 'publicity interest litigation' or 'private inquisitiveness litigation'. Does the court believe that the people who are losing their homes, their livelihood have private inquisitiveness in coming to court?

Justice Kirpal, who called the slum dwellers 'pick-pocketers' of urban land, ordered closing down of small scale industries in Delhi, ordered the interlinking of rivers, etc. Is there not a kind of politics emerging from the courts? A recent decision given by Justice Ruma Paul was to remove a slum called Nagla Machi. When the petitioner requested the court for some time as the site of relocation was not ready to shift the population. Justice Ruma Paul said that there will never be any time for relocation and they need not come to the city if they cannot afford a living.

On one hand the courts are displacing people from the villages and also from the slums, so where will the people go in this country?

While you have a Vasant Kunj Mall case, at one place the courts are cleaning the city and removing everything illegal; why are the courts allowing the malls to come on the ridge when the slums are not being allowed? The Supreme Court says that the only option for the illegal construction is demolition but it does not apply in this case as it is a question of corporate institutions and private companies who have not indulged in any malpractice. In the days of Enron and GM, how can a Supreme Court Judge say that corporates do not indulge in malpractice?

In case of the Parliament attack case, everything was implicated and brought against the accused.

The trial court judge who has been promoted to High Court has opined that there is no reason to doubt the police action, as the police had no enmity at any point against the accused. Today we are fighting the way we had fought for freedom during British regime, where there was no hearing. This accused has been sentenced to death. Prashant Bhushan filed a case against the police official in Kashmir who was captured on camera and shown on TV, who accepted that he tortured Afsal brutally and has a history of torturing people. In that TV programme, there were senior police officials and journalists but no one had anything to say. When the case came up for hearing, the judge insulted Prashant by asking "Why have you come to court; why did you not file an FIR?"

What can we expect from judiciary? One of the favourite phrases of almost everyone in this country is the 'rule of law'. But the courts have been bowing down to the elite.

The first building block which has to be moved is contempt of court. We all must enter into a 'mass contempt of court', not in a hysterical way but continue to do it in our own way, write about it; if a judge is corrupt let us say he is. We do not need to voluntarily accept suffering, the way they sent me to jail. But with me it was a well thought-out decision, which became a high profile act.

The judicial system is a battering ram of the neoliberalism process. Neoliberalism cannot work in a democracy; India has to turn into a police or army state for it to work. People who believe that they cannot get justice, are fighting in their own way. How do you make democracy undemocratic? You promote the most undemocratic and unaccountable institutions: the courts, and the media to some extent.

## **Dr N. Bhaskar Rao**

Dr N. Bhaskar Rao, Chairman of CMS, drew the attention of the Convention to the many problems faced by the litigants, specially the poor, in getting justice at the door of the judiciary and the urgent need for reforms to rid this pillar of democracy of its many ills, including the bane of corruption.

One out of every eight to ten households in the country have perforce to encounter judiciary for one reason or another and what are they confronted with? A sluggish system and complex-

procedures forcing them to make several visits to the courts. No wonder, a vast majority of the poor, who are the most affected and vulnerable in the society, do not perceive judiciary as an instrument capable of giving them speedy justice.

A matter of serious concern for all is the element of corruption that has crept into the judiciary. A recent national survey by CMS in collaboration with the Transparency International India had shown that as many as three-fourths of those interacting with the judiciary believed that corruption was prevalent in the system. Hardly ten per cent thought otherwise. Of equal concern was the belief of the litigants that judiciary was not serious about fighting corruption. And two-thirds actually thought corruption in the judiciary had in fact increased in the last one year.

More than 60 per cent of them believed that the quality of judicial service was poor. More than half of the disenchanted opted for other means to get justice rather than getting their grievances addressed by the conventional judicial system, an ominous sign. The alternate route meant mostly paying bribe for some judicial service. Some confessed to having used influence to get their work done.

The Survey, which covered corruption in basic services that a citizen experienced, went a step further to get some more details. First, why do seekers of justice have to pay bribes? Of those interviewed, 23% said it was for getting a favourable judgement; another 23% said it was for speeding up judgments; 16% said bribes were

paid to get bail; 18% took this route in order to file affidavits and for registration, 13% for manipulating the prosecution, 11% for getting their cases listed and 5% to get witnesses to give evidence in their favour.

Who were the bribe takers? The Survey showed 59% were lawyers, 30% court officials, 14% were middlemen, 8% prosecutors and five per cent judges. In the lower courts, litigants resorted to corruption to get court officials to misplace files, for delaying cases, as an inducement to opposing lawyers, delaying execution of court orders, delaying judgments and for getting bail.

This was the first such Survey and based on this the CMS had estimated the extent of corruption in 2005 involving citizens at various levels of the judiciary to be Rs 2,630 crores.

As far as dealing with complaints against judges are concerned, the judiciary has evolved a mechanism which, in effect, makes them both the prosecutor and judge. They are so protective about themselves that even an FIR cannot be filed against a judge without the consent of the Chief Justice of India. On the other hand when it comes to criticism against them by any section of the media they are quick to take umbrage and deal with them severely even though the particular media reports may be specific and based on facts. The Contempt Law is often seen to be used to stifle criticism, says Dr Rao, pointing to the reluctance of the judiciary to let the Right to Information intrude into their portals. ◆ ◆

### **Cannot Disclose Assets, says CJI**

The Supreme Court Chief Justice K.G. Balakrishnan has ruled out the question of having any compulsory annual declaration of wealth and assets by judges of the apex court and high courts.

No self-respecting judge would accept the idea of such compulsory declaration or have any committee of lay persons to probe the conduct of the judiciary, Justice Balakrishnan maintained in an interview to a private TV channel.

Welcoming the proposed National Judicial Council intended for enforcing judicial accounta-

bility, the Chief Justice, however, rejected the idea of involving any lay persons in the Council.

"It is a question of independence of the judiciary. If any other person conducts such an inquiry about any judge, it will cause serious encroachment into the independence of the judiciary. I personally believe if anyone else inquires into the allegations against the judges and imposes punishment, I don't think any self-respecting judge would like it," Justice Balakrishnan observed. ◆ ◆

*(Courtesy: The Indian Express)*

# CAMPAIGN STATEMENT

*After discussing the various issues involved in the Judges Inquiry Bill, the Campaign for Judicial Accountability and Reforms put out the gist of the two-day meeting.*

**T**he judicial system of the country, far from being an instrument for protecting the rights of the weak and oppressed, has become an instrument of harassment of the common people of the country. In fact, it has become the leading edge of the ruling establishment for pushing through neoliberal policies by which the resources such as land, water and public spaces left with the poor are being increasingly appropriated by the rich and the powerful. While the system remains dysfunctional for the weak and the poor when it comes to protecting their rights, it functions with great speed and alacrity when invoked by the rich and powerful, especially when it is for appropriating the land and public spaces from the poor. The

courts are increasingly displaying their elitist bias and it appears that they have seceded from the principles of the Constitution which set up a republic of the people who were guaranteed "justice - social, economic and political".

The problems with the judicial system begin with the lack of access to the system for the weak and the poor, partly because of the procedurally complex nature of the system, which can only be accessed through lawyers who are unaffordable to the common people. On top of this the delays and lethargy of the system make justice a distant dream even for people who can afford access to the system.

Compounding this further is the problem of corruption in the system exacerbated by a total lack of accountability of the higher judiciary. The layers of protection from accountability afforded to judges include the lack of any effective disciplinary mechanism, the self acquired protection from even being investigated for criminal offences, the virtual immunity from

public criticism due to the law of contempt, and finally by the immunity from public scrutiny by another judicially created insulation from the Right to Information Act.

The most serious problem has however been created by the elitist and anti-poor bias of the judiciary. It has essentially become an instrument for protecting and furthering the interests of the

rich and powerful, both Indian and foreign. Thus, judges who have taken the oath to defend the constitutional principles of justice - social, economic and political - have ordered the bulldozing of the homes of lakhs of jhuggi dwellers, leaving them homeless on the streets. They have ordered the removal of lakhs of street vendors and rick-

shaw pullers from the streets of Delhi and Bombay, effectively depriving them of their livelihood. By their "creative reinterpretation" of labour laws they have effectively deprived citizens of the protection afforded by the laws. They have thus accomplished the corporate friendly 'labour reforms' which successive governments have not had the political mandate to do.

It is clear that the judicial system needs to be reclaimed and reinvented by the people of the country, so that it can come to function in accordance with the philosophy of the Constitution. The system will need to be cleans of procedural complexities and cobwebs so that it can be accessed by the common citizens without professional lawyers, who have become a part of the exploitative judicial system. It will need to be strengthened to deliver justice quickly, efficiently and honestly. Whatever additional financial allocation or additional judges are required must be done. For this, the various layers of protection created to shield the judges from accountability

## **Problems with the judicial system begin with the lack of access for the weak and the poor**

would have to be peeled away. To begin with, the clause relating to scandalizing the judiciary would have to be deleted from the Contempt of Courts Act.

The system of appointments of judges would have to be made transparent and such that the proposed appointees can also be scrutinized from the point of view of their sensitivity to the ideals of the Constitution. An independent Judicial Commission would be needed to examine complaints against judges and hold them accountable. The immunity from criminal investigation would need to be withdrawn. The Right to Information Act would need to be strictly enforced particularly for the judiciary. In fact, judicial proceeding in every court room must be video-taped and its record made accessible to the people.

None of these changes would however be made by the ruling establishment of the country without sustained public pressure from below. Both the executive and the judiciary are obviously happy with the existing state of affairs. The judiciary enjoys enormous power without accountability and the government is happy with a judiciary which enthusiastically promotes its neoliberal policies. The only judicial reforms that the government appears to be interested in is

market-oriented reforms such as increasing arbitration which is a form of privatized system of justice for the wealthy.

The judiciary has long been regarded as a holy cow that was considered out of bounds for people outside the select circle of lawyers, judges and government Commissions. It is increasingly clear that it would be suicidal for the common people to ignore it any longer. That is why several organisations, which work with common people came together to organize this convention. We hope and expect that this convention will kick-start a people's campaign and movement on this important issue. The contours and strategies of this campaign will be worked out, but one element would definitely be a concerted effort to keep a close watch on the actions and judgments of judges particularly from the point of view of class and communal bias, arrogance, corruption and non-adherence to Constitutional principles. The threat of contempt must be ignored and mass contempt will have to be committed if any attempt is made by the judiciary to use the contempt law to discourage this scrutiny.

This convention resolves to encourage people's organizations all over the country to initiate a sustained public campaign to reclaim the judiciary for 'We the people' of this republic. ◆ ◆

## System Needs To Be Refurbished

Former Chief Justice of India Y K Sabharwal has favoured detailed deliberations on the proposed Judicial Accountability Bill in Parliament but skirted concerns expressed by MPs about judicial activism that impinged on the sovereignty of the legislature.

Inaugurating a national law seminar on "Erosion of values in judicial system and its refurbishment" in Patna some time ago Justice Sabharwal said he did not find anything wrong in introduction of the Bill as it was within the ambit of judiciary. However, "if you cannot trust the President, Prime Minister, the Chief Justice of India, I can only say sorry", he added.

He wanted corruption level in judiciary to be zero. "Rampant corruption among the staff in the subordinate judiciary shatters the confidence of litigants in the judicial system," he said, stressing

(Courtesy: *Times of India*)

the need for transparency and accountability.

Justice B P Singh of the Supreme Court said unnecessary criticism of an institution harmed it. He attributed much of the criticism of judiciary to misunderstanding.

Another Supreme Court judge, Justice S.B. Sinha, said, "We must try to refurbish the image of justice delivery system."

Former CJI Jagannath Pattnaik underlined the importance of judiciary saying if the judicial system failed, democracy will fail. "If I say there is no erosion of the values in judicial system, it will be sheer hypocrisy," he said, adding accountability and transparency must be ensured.

He was equally critical of lawyers. "In the past, lawyers commanded respect but now they are demanding it," he said exhorting lawyers to restore the old glory to judicial system. ◆ ◆

# EMINENT LAWYERS' VIEWS

*A committee of leading lawyers discussed the Judges Inquiry Bill and found many shortcomings in the intended legislation. Calling for a complete overhaul of the Bill, the lawyers made valuable suggestions to make the Bill truly transparent. Extracts from their comments are reproduced below*

The problem of judicial accountability, or rather the lack of it, has been gradually increasing due to the progressive whittling down of whatever little accountability of the higher judiciary that existed earlier. This lack of accountability has been further accentuated by the increasing exercise of powers by the higher judiciary making inroads into others' domain by passing orders even on matters which are within the domain of executive policy such as interlinking of rivers, demolition of jhuggis from the Yamuna Pushta, laying down the policy for hawkers, cycle rickshaws etc. This increasing assertiveness of the judiciary coupled with an almost total lack of accountability has led to a situation where large sections of the judiciary have effectively sought to declare themselves above the Right to Information Act and claimed immunity from it.

The problem of judicial accountability is as follows:

The actions of the judiciary on the premise of independence of the judiciary while understandable cannot be at the expense of accountability. Accountability and independence are not mutually exclusive.

The disciplinary control via the process of impeachment is an impractical and extremely difficult process to pursue in practice.

**Impeachment is an impractical process and difficult to pursue in practice**

The additional immunity with which the judges have cloaked themselves in Justice R.Veerawamy's case, to the effect that even an FIR for any crime committed by a judge, cannot be registered against him without the prior permission of the Chief Justice of India

The failure to even make known/disclose the complaints against judges and the action thereon by the so-called in-house mechanism coupled with the exemptions/exclusion being sought from the RTI.

The persistent failure to recognize truth as a defense in an action for contempt of court proceedings and the exercise of the power of Contempt of Court which can be and has been occasionally used to punish even legitimate criticism of the judiciary. Even if the power of exempt has been rarely used, it is a sword which hangs over the neck of people, particularly that of the media, and has undoubtedly intimidated them from exposing the rot within the judiciary.

**Contempt of Court is a sword that hangs over the neck of people**

One change from the existing Judges Inquiry Act is the change of composition of the Inquiry Committee from a sitting judge of the Supreme Court, a Chief Justice of the High Court and one other jurist (to be selected by the Speaker as provided in the existing Act), to this ex-officio Committee of five sitting judges provided in this Bill. The other change is that the inquiry, apart from being initiated on an impeachment motion presented in Parliament, can also be initiated on a complaint made to the Judicial Council. The Bill further provides that the complaint must verify the complaint and also disclose the source of his information and if the complaint is found to be frivolous, or made in bad faith or with the intent to harass the judge, he shall be punished with imprisonment which may extend up to one year and also to a fine.

If, after the inquiry, the Council holds the judge to be guilty of misconduct, it can, if it considers the charges do not warrant removal of the judge, issue advisories, warnings, censure or admonition including requesting the judge to voluntarily retire or withdraw judicial work for a limited time. If it is, however, satisfied that the charges are so serious as to warrant his removal, it shall advise the President accordingly and the matter will

be laid in Parliament in accordance with the procedure for impeachment and removal provided in the Constitution. It also provides that the judge aggrieved by the order of removal of the President or from the final order of the Council imposing any other minor penalty or censure, etc., may file an appeal before the Supreme Court.

The positive features of the Bill are that it creates another statutory procedure for initiating an inquiry into the allegations of misconduct of a judge. While earlier it could only be done by an impeachment motion, it can now also be done against complaints made by individuals to the Judicial Council. The other positive feature is that the restatement of judicial values of 1999 adopted by the Chief Justices' Conference is given statutory status by this Bill.

However, the above relatively minor positive features of this Bill, are overshadowed by far more serious problems with the Bill which, in our opinion, is going to reduce whatever little accountability of judges remained under the present Judges Inquiry Act. This is for the following reasons:

(a) The Committee of three Judges/Jurists under the existing Judges Inquiry Act, 1968 are to be selected by the Speaker and at least one of these three could be outside the sitting judiciary. In the present Bill, the Judicial Council is an in-house Council of sitting judges which is similar to the Judicial Council proposed when the restatement of judicial values was adopted by the Chief Justices' Conference in 1999. This in-house body of sitting judges, hardly ever inquired into allegations against judges, much less recommend any action against judges in the last many years it existed.

(b) The in-house committee of judges is not an appropriate mechanism to inquire into the conduct of their brother judges with whom they sit in the court every day. It is common knowledge that the judges regard their brother judges as part of their judicial family and also find it very embarrassing to hold any of their brother judges guilty of any misconduct. It is, therefore, highly unlikely that they would be able to dispassionately decide allegations against their own brother judges with whom they are sitting in and out of courts day after day. It is in fact more likely that

the complaint would be structured and even sent to jail under the powers given to the Judicial Council under section 26 of the Bill.

(c) Even more objectionable is the provision in section 33 of the Bill for not disclosing any information relating to the complaint to any person in any proceedings except as directed by the Council.

(d) It is therefore absolutely essential that if any inquiry is to be conducted into the conduct of a sitting judge, it must be done by an Inquiry Committee or a Council which does not consist of any sitting judges at all. It may consist of some retired judges but it must have persons from outside the judicial family. What is really required

**Inquiry Committee should not consist of any sitting judges at all. It should be a five-member independent council.**

is a constitutional amendment to put in place a five member National Judicial Commission, consisting of persons in the following manner:

One member to be nominated by a collegium of all the judges of the Supreme Court; one member to be

nominated by a collegium of all the Chief Justices of the High Court; one member to be nominated by the Cabinet; one member to be nominated by a collegium of the Speaker, Leader of the Opposition in the Lok Sabha and the Leader of the Opposition in the Rajya Sabha and one member to be nominated by a collegium of the Vigilance Commission, Comptroller and Auditor General and the Chairperson of the National Human Rights Commission.

Thus, the National Judicial Commission will have five members nominated as above who would not be sitting judges and would be full-time members, having an assured tenure. They must have an investigative machinery under their administrative control through whom they can get charges investigated against judges. If they find any prima facie case against the judge, they could hold a trial of the judge and, if found guilty, recommend his removal after which his removal should be automatic.

The Committee on Judicial Accountability, therefore, recommends a complete overhaul of the proposed Bill and its replacement by a constitutional amendment for constituting a committee on the lines proposed above. ◆ ◆

# JUDGES (INQUIRY) BILL

■ Transparency Studies

## Main Features

**A** Bill, now under consideration of Parliament, seeks to establish a National Judicial Council to undertake preliminary investigation and inquire into allegations of misbehaviour or incapacity of a judge of the Supreme Court or a High Court and to regulate the procedure for each investigation, inquiry, proof, and for imposing minor measures.

The proposal envisages making the Chief Justice of India as the Chairperson, with two seniormost judges and two Chief Justices of High Courts, all to be nominated by the Chief Justice of the Supreme Court, as members. The composition could change according to the identity of the judge against whom allegations are made. If, for instance, allegations are made in a complaint by anyone or in a reference by the Speaker or Chairman (of the Rajya Sabha) as the case may be, against a judge of the Supreme Court, the Council shall consist of the Chief Justice of India and the four seniormost judges of the Supreme Court to be nominated by the Chief Justice of India.

If a reference is received from the Speaker or the Chairman and the allegations are against the Chief Justice of India, then the Chief Justice of India shall not take part in the proceedings of the Council and the President will nominate the next seniormost judge of the Supreme Court as the Chairperson and also another judge of the Supreme Court next in seniority to be the member of the Council.

The National Judicial Council will be obliged to inquire into allegations of misbehaviour or incapacity against a judge of the Supreme Court or High Court. But the Council will not entertain any complaint, made in writing, that pertains to any act or conduct constituting misbehaviour which has taken place before the commencement of the Act; similarly, no complaint which pertains to any action two years prior to filing of the application or against a person who has demitted the office of a judge.

A motion for removal of a judge on the ground of misbehaviour or incapacity can be moved in either House of Parliament; but in the Lok Sabha, the notice for a motion has to be given by at least 100

members and in the Rajya Sabha 50 members. The admission of such a motion is at the discretion of the respective chairperson.

The Council may also investigate and inquire into any act or conduct of any person other than the judge concerned in so far as it considers it necessary to do so for the purpose of its investigation into any such allegations and shall give such a person a reasonable opportunity of being heard and to produce evidence in his defence.

Any complaint has to be in writing and the complainant should verify at the foot of the complaint and also specify what he verifies of his own knowledge and what he verifies upon information and shall refer to the source of such information. If the Council, after examination of all relevant facts, is satisfied that the complaint is frivolous or vexatious or is not made in good faith, or that there are not sufficient grounds for inquiring into the complaint or if the complaint refers to the merits of a judicial pronouncement or procedural order the complaint will be dismissed.

The complaint should be accompanied by a statement to the effect that the complainant is aware of the fact that if the allegations in the complaint are found to be frivolous or vexatious or not made in good faith, he is liable to be punished with simple imprisonment of upto one year and also fine upto Rs 25,000.

If the Judicial Council finds that all or any of the charges in regard to misbehaviour or incapacity have been proved and is of the view that that the charges do not warrant removal of the judge it may impose all or any of the following minor measures: issuing advisories; issuing warnings; withdrawal of judicial work for a limited time including cases already assigned; request that the judge may voluntarily retire or censure or admonition in public or private.

If the charges are proved, it will recommend removal of the judge to the President who will place the evidence before Parliament. If it recommends dismissal, the aggrieved judge can appeal to the Supreme Court for review. ◆ ◆

# SCANDALIZING THE COURT

■ Mr. Justice Markandey Katju

*Through a recent amendment to the Contempts of Courts Act, Parliament has made truth a valid defense in contempt proceedings. This new provision has been widely welcomed. Mr. Justice Katju of the Supreme Court gave his view on the law at a recent lecture. Extracts are given below.*

**A**s a Judge in three High Courts (Allahabad, Madras and Delhi) I would often tell the lawyers in open court that they could criticize me as much as they liked, inside the Court or outside it, to their heart's content, but I would not initiate proceedings for Contempt of Court. Either the criticism was correct, in which case I deserved it, or it was false in which case I would ignore it. Some people deliberately try to provoke the judge to initiate Contempt of Court proceedings, their whole game being to get publicity. The best way to deal with such persons would be to ignore them, and thus deny them the publicity which they are really seeking. I would often say in Court: "Contempt power is a 'Brahmastra' to be used only on a 'patra' (deserving person), and I do not regard you as a 'patra'."

I also said that the only situation where I would have to take some action was if my functioning as a judge was made impossible e.g. if someone jumps on to the dais of the Court and runs away with the Court file, or keeps shouting and screaming in Court, or threatens a party or witness. After all, I have to function if I wish to justify my salary.

As the doyen of the Indian Bar, Mr. Fali Nariman, once said, the offence of "scandalizing the court" is a mecurial jurisdiction in which there are no rules and no constraints.

But whence comes this authority and dignity of the Court? In England it came from the king. The judicial function is a sovereign function. The king was the fountain of justice, and in earlier times he would himself decide cases. It was only subsequently when the king had many other functions (military, administrative, etc.) that he delegated judicial functions to his delegate, who began to be called judges.

Thus, in a monarchy the judge really exercises the delegated functions of the king, and for this he requires dignity and majesty as a king must have, to get obedience from his subjects. The situation becomes totally different in a democracy in which it is the people, and not the king, who are supreme. Here the judges get authority delegated to them by the people, and not by a king.

Hence, in a democracy there is no need for judges to vindicate their authority or display majesty or pomp. Their authority will come from, the public confidence, and this in turn will be an outcome of their own conduct, their integrity, impartiality, learning and simplicity. No other vindication is required in a democracy by judges, and there is no need for them to display majesty and authority.

Before concluding, I may refer to the book 'Judges' by David Pannick, in which he states:

"Some politicians, and a few jurists, urge that it is unwise or even dangerous to tell the truth about the judiciary. Judge Jerome Frank of the US Court of Appeals sensibly explained that he had little patience with, or respect for, that suggestion. I am unable to conceive... that, in a democracy, it can never be wise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions..... The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."

The new amendment to the Contempt of Court Act is in the right direction and was long overdue.



# INFIRMITIES IN TWO BILLS

■ Mr. Justice Rajindar Sachar

*Mr. Justice Sachar, former Chief Justice of the Delhi High Court, examines the Judges Inquiry Bill and the Contempt of Court Act with the new amendment and points out the many shortcomings in two measures.*

**T**he two bills the Union Government has come out with, one for constituting a National Judicial Committee for appointments and the other for a National Judicial Council for disciplinary matters regarding the higher judiciary, are seriously flawed.

The first bill renames the collegium that chooses judges as judicial committee and also provides that the President shall make the appointments "from amongst a panel of names suggested by the committee." This is a deft move by the executive to have the last word, unlike the present situation where the judiciary has the final say. This permits the executive to play politics. If the committee of judges allows the executive to make the choice, the judiciary's independence, a basic feature of the Constitution, will be undermined. Only one name for each vacancy should be sent by the committee.

The next inadequacy is that both the Judicial Council and the Judicial Committee consist exclusively of judges. This defeats the very rationale for these bills. The public at large has a legitimate stake in insisting that questions concerning judicial integrity cannot be the preserve of a small in-house group. It is, therefore, absolutely essential that the committee and the council include at least one layperson as member. He or she could be selected by the Prime Minister in concurrence with the leaders of the Opposition in both Houses of Parliament. A retired judge of the Supreme Court could be the full-time member because sitting judges may not have the time. Such a provision exists in other Commonwealth countries. For example, New Zealand has a judicial conduct panel that consists of two judges and a layperson. In Canada, a judicial council was established in 1971. Australia has a Parliamentary (Judicial Misbehaviour or Incapacity)

Commission consisting of three members, two of them appointed by the Senate and the Speaker of the House of Representatives on the recommendations of the Prime Minister, and one appointed jointly by the President of the Senate and the Speaker of the House on the recommendation of the Leader of the Opposition. At least one of the members has to be a judge or a retired judge of the Supreme Court. The fear that a layperson will interfere with the independence of the judiciary is misplaced. A large number of public men, academicians, and intellectuals inspire the same confidence as judges themselves.

The bill for constituting the National Judicial Council to look into various disciplinary measures against High Court and Supreme Court judges suffers from similar infirmities. Section 7 of the bill does not provide for the investigating agency to be appointed independently by the council. It repeats the deficiency pointed out by human rights activists for decades with regard to the powers of the National Human Rights Commission.

Why should the appointment of the investigating agency require the government's consent?

There is a bar on filing complaints against judges who have retired, obviously aimed at discouraging frivolous complaints. But rather than a total ban, there could be a time limit. For example, alleged misdemeanours committed up to three months before the date of retirement could be investigated. For sitting judges, the previous two years could be the time limit.

Section 14, which says the enquiry shall be held in-camera, is against all principles of fairness. A representative of the Bar must be allowed to watch the proceedings, because no agency is more concerned with the honour and impartiality of the Bench. An enquiry into a judge's conduct

cannot be held in a sealed conclave. Judges' conduct should be an open book and they should not fear public scrutiny, though with all dignity and respect.

Another flaw is that Section 20 requires that the charges must be proved beyond reasonable doubt. This test of proof is misplaced when dealing with the integrity of the higher judiciary. The test should be of probabilities, as in a civil case. In Australia, the question of proof is on the balance of probabilities. Surely, judges must not be demeaned by applying the test of a criminal complaint? The judge's chair is too sacred to be allowed to be occupied even if there is a slight whiff of suspicion regarding integrity.

The next serious drawback is that the bill provides that Supreme Court judges can be impeached by a simple majority of those present and voting in both Houses of Parliament, as

against the present constitutional provision of a two-thirds majority. For High Court judges, this applies to the State Assemblies concerned. This means the threat of impeachment will hang over judges like the sword of Damocles. Section 30 of the Council Bill provides for an appeal to the Supreme Court against an order of removal by the President, which follows after each House has held that misbehaviour has been proved. Nowhere in the world is there an appeal against the verdict of Parliament. This provision should be deleted to preserve the delicate balance between the judiciary and Parliament. It is to be hoped that Parliament, while passing these bills, will simultaneously clear the Lok Pal bill, in cold storage for a decade and a half. That would send out the message that both the executive and legislature accept that the real sovereign in our democracy is: "We the people of India." ◆ ◆

## Reform Has No Takers

■ Mr. Justice R.C. Lahoti

The falling standards in the judiciary and legal profession are a matter of concern for every right-thinking person. Every system, however good, needs to be reviewed and updated from time to time. The article, 'Just advice' (IE, March 8) by Fali S. Nariman, which stressed the need to revive our rather moribund legal system, prompts me to share through your paper what little spadework I tried during my tenure at the apex court of the country. During the last nearly 60 years of independence, there has been no serious effort to study the system in depth, analyse its working and make suggestions for improvement, followed by implementation.

After assuming the office of Chief Justice of India, in my first meeting with the then Prime Minister, I impressed upon him the need to appoint a high-powered commission/committee headed by a former CJI for the purpose of studying the Indian judicial system and making suggestions to tone it up by simplifying procedural formalities and making it more people-friendly so as to achieve the cherished goal of quick and cheaper but quality justice.

We have to devise a system which ensures qualitative appointments. I strongly felt that the commission/ committee should include expert members drawn from the fields of management, adminis-

tration and technology. The Bar should also be represented. The terms of reference should be as wide as possible. The whole idea is to achieve reform by remodelling, if necessary. The Prime Minister felt convinced. It seems that the matter was referred to the Union Law Ministry. However, there were no signs of any actual initiatives from the government; the idea has remained just wishful thinking till date.

On commencement of my tenure as CJI I had, against all odds, also got an e-committee appointed which acted at super speed. After collecting all the relevant data and analysing it within a record time of seven months - after working day and night - the e-committee prepared a 'Five Year Plan' for the total introduction of IT in the judiciary. The PM launched the Five Year Plan which needed a meagre amount of Rs 800 crore only for the total computerisation of the judicial system, interlinking the lowest court in any corner of the country with the high courts and Supreme Court. After demitting my office, I note that not much headway has been made. Very recently, I learnt that the project has been shelved by the bureaucracy. It was destined to meet this bureaucratic end. I feel very sorry. If only the things had moved in the right direction, we could have had paperless courts at the end of five years. ◆ ◆

*(Courtesy: The Indian Express- Mr. Justice Lahoti is a former Chief Justice of India)*

# *Right to Information*

## LANDMARK DECISIONS OF CIC

### ■ Transparency Studies

**T**he Central Information Commission has made some path-breaking decisions recently penetrating the hard bureaucratic shield of the Prime Minister's Office, the Law Ministry and the Ministry of External Affairs. In the case of the Prime Minister's office, it had refused to share information under RTI on how the funds accumulated in the Prime Minister's Relief Fund had been disbursed, claiming that the Fund was not a public authority, that parliamentary privilege was involved since even Parliament had been refused this information. The officials who managed it were all public servants and hence the plea of the PMO was untenable, ruled the CIC, opening the door of the Fund for public scrutiny for the first time. In the other landmark case, the CIC dismissed the plea of secrecy concerning the correspondence exchanged between the Law Minister and the Chief Justice of India in regard to the elevation of an acting chief justice as chief Justice and directed that the relevant correspondence, including the views of the colloquium of judges, should be open to anyone seeking such information under RTI Act. In the third important order, the Commission held that Indian Missions abroad were covered under the Right to Information Act and that an applicant was entitled to be told the reasons for denying a visa to a foreign national assigned to teach in an Indian University.

### The Decisions

**I**n the first case, the Commission directed the Ministry of Law and Justice to provide the applicant, Mr. S.C. Agarwal, a copy of the file containing details of the correspondence between the Chief Justice of India and the Law Minister on the recommendations for appointment of Mr. Justice Virender Jain as the Chief Justice of the Punjab and Haryana High Court.

On behalf of the Government, it was pleaded that the letter sent in July last by the Chief Justice of India conveying the decision of the collegium contained views of third parties in the matter and that none of them were parties to the present proceedings, the CIC said that the third parties be asked whether they would like their opinion in this regard to be made

public and, in case there was valid reason for objection to such disclosure, the applicant could be supplied the information required, excluding the objectionable portion.

The appointment of Mr. Justice Jain, who was Acting Chief Justice of the Delhi High Court as Chief Justice of Punjab and Haryana High Court, had been delayed because the President, whose signature had been sought on the relevant file, had returned it to the Ministry to re-examine the issue in view of the lack of unanimity in the collegium on the decision. However, the Government, after obtaining the opinion of the Apex Court on the President's notings, had re-submitted the file reiterating its earlier decision on elevating Mr. Justice Jain.

Mr. S.C. Agarwal had applied to the President's Secretariat seeking a copy of the complete file regarding Mr. Justice Jain's appointment together with all file notings and opinion of the Supreme Court collegium members on the appointment file. He had also asked for the correspondence between the President and Prime Minister in this regard.

This information was denied by the Law Ministry on the ground that correspondence between the President and the Prime Minister was covered under Section (i)(e) of the RTI Act and Article 74 (2) of the Constitution (which held such exchanges between the dignitaries confidential). His appeals to the appellate authorities resulted in the reiteration of the Law Ministry's earlier objections on such disclosure.

Mr. Prashant Bhushan, said that a judge and Chief Justice functioned in their official capacity and referred the Commission to a ruling in an earlier (S.P.Gupta's) case by the then Chief Justice of India, Mr. Justice Bhagwati, which dealt extensively with the question of correspondence between the Law Minister, the Chief Justice of Delhi High Court and the Chief Justice of India. Mr. Justice Bhagwati, on the question of correspondence between the Law Minister, Chief Justice of Delhi High Court and the Chief Justice of India, had said that immunity against disclosure "should be only under severest compulsions and that in the context of our commitment to an open government with the concomitant right of the citizen to know what is happening in the government, the court should be reluctant to expand the classes of documents to which immunity may be granted."

In the case pertaining to non-appointment of an Additional Judge for a further term and transfer of a High court was challenged, Mr. Justice Bhagwati also said disclosure of the views expressed by the Chief Justice of Delhi and the Chief Justice of India should be disclosed and such disclosure would "do no harm to the public interest."

The Law Ministry contended that this decision had been superceded by a subsequent Supreme Court order.

The CIC said "we find on examination (of the documents) that while all the records cited do indeed examine in detail the procedure for appointment and transfer of Chief Justices and Judges of

the High Court and determine primacy of the Chief Justice of India in recommending appointments, majority opinion in S.P.Gupta's case was overruled insofar as it was in conflict with the view relating to the primacy of the opinion of the Chief Justice of India in matters of appointment, transfer and the justifiability of these matters as well as in relation to judge strength; but we do not find that the decision in the case of S.P. Gupta on the question of disclosure was overruled."

The Commission then ruled that it did not find grounds to exclude disclosure of the correspondence of the nature in question between the Chief Justice of the Supreme Court and the Law Minister on the recommendations for appointment of judges. Nor did it fall under any exclusion specified in the RTI.

The Commission was also shown in confidence the letter conveying the decision of the collegium to the Law Minister by the Chief Justice of India and a point was made that this letter contained reference to a number of third parties who were not a party to the current proceedings. The Commission directed that the third parties be asked to submit in writing or orally whether the information in respect of them should be disclosed. If there was valid ground for objection to disclosure, the information asked for by the applicant may be supplied excluding the objected portion.

In the second case relating to National Relief Fund details, Mr. Shailesh Gandhi of Mumbai had filed an application under RTI seeking information on the number of institutions that had received funds from the Prime Minister's Relief Fund, in particular, those institutions that had received more than Rs50,000 in the last two years. The Prime Minister's Office refused to give the information on the ground that the fund was not a public authority.

The PMO also quoted the Rules and Procedures of the two Houses of Parliament to say that no Parliament question was allowed on the PM's Relief Fund. It also referred to the opinion that was given to it by the Union Law Ministry that the Fund was not a public authority and was not dependent on the government for its funds. On the contrary, it was a private fund created out of

## **Justice Bhagwati's earlier order on showing correspondence between law Minister and Supreme Court was not overruled**

voluntary donations and hence not covered under the RTI Act (which concerned public authorities).

The CIC did not accept this argument. It said that "information concerning the fund was under the control of the Prime Minister's Office - the Joint Secretary to the PM and an officer of director rank from the PMO discharged the duties of the fund. Even the section, which maintained the relief fund, was a part of the PMO."

Thus, the Commission ruled that information on all institutions that had benefited from the Fund ought to be disclosed. However, it said that information regarding disclosures to individuals were not within the purview of its order.

In the third case, after intense discussion with the Ministry of External Affairs and other concerned ministries CIC decided that Indian Missions abroad are also covered under the Right to Information Act.

The decision follows an application by an

educationist in Ahmedabad asking the Ministry reasons for denying visa to French national to join a university faculty. After hearings done through video-conferencing, Information Commissioner, O.P. Kejriwal said that since Indian Missions were set up by the External Affairs Ministry they too came under the RTI.

During the exchange of views the Mission in France said that "it was taken for granted that missions abroad were not covered by the RTI Act."

Later another meeting chaired by this the Chief Information Commissioner Mr. Wajahat Habibullah, unanimously decided that Missions were not exempt under the RTI Act. The order also said that though the Missions come under RTI "the mode of payment to be made by RTI applicants seeking information has not been clarified in the existing rule. Missions will not have the right to reject applications on this ground till such time as the necessary amendments are made." ◆ ◆

## RTI To A Disabled's Rescue

The Central Information Commission has slapped a Rs 25,000 fine on the government and ordered compensation for a disabled civil service candidate who had been deprived of a prestigious job despite clearing the examinations.

The Commission also wondered if the government's "inhuman" decision had something to do with a RTI request that Kumar Avikal Manu had filed.

The penalty was imposed by the Commission on the public information officer at the Department of Personnel and Training for his failure to respond to Manu's request under the Right to Information Act asking for the status of his appointment.

Manu had cleared the UPSC exams in 2004 but was never appointed at the first instance presumably due to his disability. Manu moved under the RTI law last June but did not get a response.

Days after his case up for hearing at the CIC in December 2006, the commission's order noted, he was finally told that he could not be appointed "for

(Courtesy: *The Hindutan Times*)

want of the vacancy in any government department".

The DoPT action has "resulted in the deprivation of right to work/job of a physically handicapped person. This action is inhuman, besides being arbitrary and illogical," Information Commissioner Prof MM Ansari said, wondering if the denial was linked to his RTI application.

"Unfortunately, the information-seeker has been victimised... Is it because he resorted to the provision of the RTI Act for seeking information about the allotment of cadre?," Ansari asked, dismissing explanations for the six-month delay put forth by DoPT.

Three disabled candidates were last year allotted a service at the intervention of Prime Minister Manmohan Singh; Manu's name did not figure in this list either.

The Commission also ordered compensation, equivalent to the salary and allowances already paid to the last candidate from his date of appointment till December 21, 2006 when Manu was informed that there was no vacancy for him. ◆ ◆

# A COMMISSION UNDER SIEGE

■ Vidya Subrahmaniam

**E**IGHTEEN MONTHS ago, Parliament passed the Right to Information Act (RTI Act), 2005. Hailed as a democratic coup, the United Progressive Alliance Government's showpiece legislation ventured where none dared to go - into the dark and forbidding world of India's secrecy-obsessed bureaucracy. The Act took practical shape with the constitution of the Central Information Commission - the final appellate authority vested with the powers of a civil court under the Act. It was clear from even a cursory reading of the Act that an autonomous, proactive CIC - able independently to interpret its provisions - was the life source of the Act.

Yet currently the CIC is fighting two paradoxical battles. On one side, the Commission is up against RTI activists with whom it supposedly shares a common passion - for uncensored, unfettered information. The rights activists accuse the CIC, mandated by the Act to promote openness, of behaving instead "like a government." It might have been an obstructionist GoI department they were taking on instead of a free and transparent Information Commission judging by the charges: a general air of indifference, unacceptable delays in holding hearings, refusal to invite appellants to hearings, deliberate and repeated misplacement of applications, summary disposal of cases, reluctance to penalise erring Public Information Officers, gross misbehaviour with appellants, and so on.

If this seems an irony, consider who the Commission is fighting on the second front: the very government that created the RTI Act, and by implication the CIC. At the core of the CIC-Government turf war is a key question: who will interpret the Act? The Government's case, expressed repeatedly and emphatically by its nodal RTI Ministry, the Department of Personnel

and Training (DoPT), is that the CIC's role is essentially clerical, further that the Government must and will have the last word on anything and everything to do with the Act. In the course of a recent hearing at the CIC on the issue of file notings, Additional Solicitor General P.P. Malhotra argued that section 12(4) of the RTI Act, which empowered the Chief Information Commissioner and other Information Commissioners to act autonomously, was limited to executive functions such as "fitting coolers and air-conditioners or buying of furniture or stationery." Mr. Malhotra made it clear that the Central Government was not obliged to take instructions from the CIC even if this was meant to secure compliance with the provisions of the Act (section 19). Far from it; under section 30, "the Central Government and not the Central Information Commission" had the powers to "remove difficulties in giving effect to the provisions of the Act." Plainly put, the

Government was not only appropriating the right to interpret the Act as it saw fit, it was asserting its superiority over the CIC by virtue of being the Government. The CIC is not amused.

If the situation calls for a spirited fight back, RTI activists are not obliging. Rights activists, who lined up behind the CIC in August

2006, when the CIC-DoPT face-off over file notings began, no longer empathise with the Commission. Activists Arvind Kejriwal and Manish Sisodia have instead taken their fight right into CIC territory by setting up a kiosk, a sort of alternative CIC, outside the Commission's office in the Capital. The kiosk is a natural attraction for RTI appellants returning empty-handed from the CIC. Over the past month, the kiosk has collected some 200 complaints, 99 per cent of them accusing the CIC of deliberate inaction, some even insinuating a collusion between the

**Rights activists  
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with the government**

CIC and the bureaucracy. An astonishing case they cite is of Pramod Gupta who was directed to file his appeal in the prescribed format. When he did that he was told to present four copies of the appeal. When he did that the CIC returned all four copies to him, admitting later that this was mistake and so why does he not go back where he started - to the same PIO who rejected his complaint. RTI activists have filed two cases against the CIC in the Delhi High Court, and plan to drag it to the court in at least 15 other cases.

A major grouse of the complainants as well as rights activists is that the CIC is loath to impose penalties on defaulting PIOs as compulsorily required by the Act. Says Mr. Arvind Kejriwal, "What distinguishes this Act and makes it enforceable is the penalty clause. In the initial days PIOs furnished information for fear of incurring the dreaded penalty. Today they no longer fear the Act thanks to the CIC's leniency with the penalty clause. If the bureaucracy is defying the RTI Act with impunity, the reason is the CIC." Commission officials admit that so far they have imposed penalties only in a small fraction of cases but say that these are early days, and soon they will be stricter with erring PIOs.

It does not help that the CIC has to contend with a hostile Government. The issue of file notings, over which the two sides took opposing positions, continues to fester. Through the CIC's first year in office, several division benches of the Commission had ruled in favour of file notings much to the chagrin of the DoPT, which insisted that notings fell outside the RTI Act and going on to explicitly state so in a posting on its website.

In August 2006, the confrontation enlarged into a full-scale war with the CIC's repeated instructions to the department to remove the

*(Courtesy: The Hindu)*

"misleading" website posting. In response, the DoPT's legal department questioned the validity of decisions taken by individual commissioners, holding that the Commission's full bench must hear every case that came before it.

The CIC responded to the challenge by constituting a full bench, which on January 29, 2007, reiterated its long-standing position that the Act as it existed allowed file notings. At the hearing, the DoPT mounted an all-out offensive, questioning the CIC's power to interpret the Act, disputing its authority to issue directions to a department of the government, and insisting that it had acted within

rights in putting up a website posting that contradicted the CIC's ruling on file notings. The website posting reflected the DoPT's view, the department's counsel said, adding, "It (CIC) cannot ban a public authority much less the Central Government from holding a certain view."

The DoPT's website posting continues to this day. Asked if it was the Government's case that file notings were a secret, Satyananda Mishra, secretary, DoPT, told The Hindu that this was indeed so. Mr. Mishra maintained that too much fuss was being made of file notings, which were irrelevant in the larger scheme of the RTI Act.

It is anybody's guess how this will go down with RTI activists who, in August 2006, successfully battled a proposed Government amendment to exclude file notings.

The pity is the CIC, bound hand and foot as it is, has taken some far-reaching decisions. Its principled position on file notings aside, in a landmark decision this week, it lifted the veil of secrecy surrounding the appointment of judges. The CIC ordered the disclosure of facts relating to the appointment of Justice Virender Jain as Chief Justice of the Punjab and Haryana High Court.



# RTI AND JUDICIARY

■ Prashant Bhushan

There was a time when the Courts in India, particularly the Supreme Court waxed eloquent about the "Right to Information", being a part of the Constitutionally enshrined right to speech and expression. Thus, while rejecting the government's claim of privilege on the Blue Book containing the security instructions for the Prime Minister in Indira Gandhi's case, the Court said, "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything, that is done in a public way by their public functionaries."

Thereafter, while rejecting the government's claim of privilege on the correspondence between the Chief Justice and the Law Minister on the appointment and transfer of judges, the Court said, "Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy."

It was on the basis that the Right to Information is a fundamental right of people, that the Court ordered that even candidates contesting elections would be obligated to publicly disclose information about their criminal antecedents and their income and assets etc. Yet, though the court's

general pronouncements on the right to information have been very liberal, its practices have often not been in conformity with the declared right. Thus, for example, the courts often follow the practice of asking the government and public authorities to file reports in sealed covers in court. These reports are then perused only by judges and often not given to the opposite parties or their lawyers. Often the orders and judgements of courts are based on their perception formed on the basis of these "confidential reports", which is not only a violation of the right to information of the opposite party, but also in violation of the principles of natural justice, considered to be sacrosanct.

The double standards of the courts on right to information have become even more obvious after the Right to Information Act has come into force. Though the Act clearly applies to courts which are obviously included in the definition of Public Authorities, most High Courts did not even appoint Public Information Officers (PIOs) even months after the Act came into force. Some have still not appointed them, thus effectively denying the right to information to the people about the courts. Moreover, many of even those which appointed PIOs have framed their own rules which effectively deny information about administrative or financial matters. Thus, the Delhi High Court Rules provide that:

"(5) Exemption from disclosure of information- The information specified under Section 8 of the Act shall not be disclosed and made available and in particular the following information shall not be disclosed:-

(a) Such information which is not in the public domain or does not relate to judicial functions and duties of the court and matters incidental and ancillary thereto."

## **Most High Courts have framed their own rules effectively denying information about administrative or financial matters**

Thus, information sought regarding the appointment of Class 3 and 4 employees by the High Court, who are reported to have been appointed on extraneous considerations, without any public advertisement or selection, was denied by the High Court, citing this rule. This rule means that no information will be given about the expenditures incurred by the High Court (from public funds) or about any appointments or transfers. This is in total violation of the RTI Act which allows exemption from disclosure only on certain grounds specified in Section 8 of the Act and on no other ground. No public authority can refuse to disclose information which does not fall under the exemptions permissible under Section 8 of the Act. Rule 5 of the Delhi High Court rules clearly violates the Act and is thus liable to be struck down.

Not only this, the High Court rules have increased the application fees from the normal 10 Rupees to upto 500 Rupees. And the penalty for non-disclosure has been reduced from the maximum of 25,000 Rs. as provided in the Act to Rs. 500, which is hardly likely to deter any information officer from wantonly denying information. Thus every attempt has been made to dilute the Act and make it as difficult as possible for citizens to access information about the courts. They have been emboldened to do all this in the secure knowledge that to challenge such illegal rules, the citizen would have to approach the same courts.

The Supreme Court has recommended to the government that, so far as the Supreme Court is concerned, the decision of the Registrar General of the Court should be final and not subject to any independent appeal to the Central Information Commission. They have further recommended that the Chief Justice should have the unfettered right to interdict the disclosure of any information which, in his opinion, might compromise the independence of the judiciary. The Chief Justice has already gone on record to say that even the disclosure of income and assets by judges or the formation of any independent disciplinary authority over judges, would compromise the independence of the judiciary. Going by this, it is obvious that no information about complaints against judges or about their incomes and assets would be available under the Right to Information. Thus while the Supreme Court decrees that even candidates

aspiring to become public servants (MLAs or MPs), would be required to disclose their assets, when it comes to sitting judges, such disclosure would violate the independence of the judiciary! There cannot be a more glaring case of double standards.

The track record of the courts on cases arising out of the RTI Act is also not very inspiring. Even the occasional progressive orders of the Central Information Commission ordering various public authorities to disclose information have been stayed by the Delhi High Court and the matter remains pending for months and years thereafter. Thus, even the order of the CIC to merely peruse the correspondence between the then President and the Prime Minister on the Gujarat genocide of 2002 has been stayed by the High Court, though the Act specifically provides that no information will be withheld from the CIC. Similarly, the order of the CIC asking the UPSC to disclose the marks obtained by candidates in the preliminary examination has also been stayed by the High Court, as have various other orders of the CIC.

All this shows that while the courts have been liberal in making pronouncements about the citizen's right to information in a democracy, and have also in cases implemented it with regard to others, they have been very reluctant to practice what they preach. The dictum appears to be that transparency and accountability is good for others, but the courts and judges are *sui generis*, and in their case transparency would compromise their independence. The wand of "Independence of the Judiciary" has always been waved by the judiciary to shield themselves from accountability, going to the extent of saying that not even an FIR can be registered against judges for any offence without the prior written permission of the Chief Justice of India. On top of all this, they enjoy the power of contempt, where they can send any person who accuses any judge to jail.

It is not surprising then that the voices to make the judiciary accountable are growing louder and are now beginning to take the shape of a public campaign. The common people are beginning to realize that they are the main stakeholders in the judicial system and they must bring grassroots pressure on the authorities for them to reform the system.



# **RTI NOTINGS**

## **Passport Officer Fined**

The laxity of a passport Officer in Delhi has cost her a penalty of Rs16,000. Information Commissioner, Mr. O.P. Kejriwal, imposed the fine on the officer, Ms Gloria Kumar, for delay in giving information to a passport applicant, 90-year-old Krishna Devi Jhalani, a resident of Jorbagh in New Delhi who had applied for renewal of her passport. The Ministry of External Affairs also ordered an inquiry into the working of Delhi's Regional Passport Office.

In March last year, Jhalani had applied to get her passport extended but there was no response from

*(Courtesy: The Hindustan Times)*

the RPO even after three months. She then filed an application under RTI to know the status of her application. This also did not elicit a reply which prompted her to apply to the Central Information Commission. When the Passport Officer did not respond even to the notice issued by the CIC, Mr. Kejriwal directed the Ministry of External Affairs to take strict action against the RPO, saying "could there be a more callous and apathetic attitude of a government servant towards not only a member of the public but also a statutory body like the Information Commission?" ◆ ◆

## **IFS Officer Invokes RTI**

Mrs. Veena Sikri, a foreign service officer of the rank of Secretary and a former Indian envoy in Bangladesh, has filed an application under the Right to Information to know from the Government the reasons why her claims to be Foreign Secretary were ignored in preference to someone who was junior not only to her but also 15 others. She also wanted to know whether there was a gender bias in the decision.

*(Courtesy: The Hindustan Times)*

Mrs. Sikri returned from her position as India's High Commissioner to Bangladesh in November last in protest against her supercession. The appointment of a comparatively junior-level IFS officer to the post of Foreign Secretary resulted in two aggrieved officers quitting the service in protest and several others, including Mrs. Sikri, waiting to hear from the government how their services will be utilized by the government "after more than three decades of service." ◆ ◆

## **Farmer Beaten Up**

A farmer was allegedly beaten up by the agriculture department officials in Yavatmal district in Maharashtra. The farmer had reportedly gone to the department to seek details about the Prime Minister's relief package.

Sandesh Rathod of Gawli Heti village (Yavatmal) wanted to know whether electrical agriculture pumps were included in the PM's package or not.

*(Courtesy: Times of India)*

Rathod also claimed that despite there being a provision for agriculture pumps in the PM's package, the farmers were yet to get Rs 5,000 as subsidy to install the same on their farms.

The farmer got into an argument with an employee for not providing details of the scheme. Later, he was allegedly beaten up by officials. The police have registered an FIR. ◆ ◆

## Tamil Nadu Experience

Even a year after the Right to Information Act was enacted, Tamil Nadu had little idea of what it meant. The State's departments would have continued living in ignorance if it weren't for 22-year-old Dharmesh Shah. He petitioned the State Information Commissioner, and managed to get not only names of Principal Information Officers (PIOs) and Appellate Authorities (AAs) of all departments of the state secretariat but also of every taluk in Tamil Nadu. The information will now soon be available in digital format on a public domain.

But getting this information took many months and many petitions. Dharmesh had spent months pouring over the Act and trying to understand its provisions. But when he actually tried to put it to use, he came up against a brick wall.

Most government departments had no clue about the Act and its implications. "We had to run from pillar to post to seek simple information. We ended up educating several senior government staff about the RTI," says Dharmesh, who started off as a student activist with the People For Animals.

When Dharmesh asked for the information, Government officials demanded he pay Rs 50 for  
*(Courtesy: The Indian Express)*

every name of a PIO and AA. "I pointed out to them that the Act mandated government departments to proactively disclose the information." But they were unmoved.

Finally, he sent an appeal and a letter to the AA of the state Public Department - even though he didn't know his name! That didn't work either. The letter was not accepted, as "there was no such post" and returned.

Dharmesh filed a petition before the State Information Commissioner S.Ramakrishnan.

In a stinging order on October 17, 2006, the Commission said "it was a tragedy of extreme proportions" that the Public Department, which is the custodian and administrator of the Act "had exhibited such abysmal ignorance". "We have entered into second half of October and even the basic administrative department right under the custody of the Chief Secretary himself has not moved," the Commissioner said.

He was 'pained' to see the scant respect and interest shown to this landmark legislation. The Commission said: "Ignorance of law is not bliss, but is punishable and punishment has to be in proportion to the gravity of offence." ◆ ◆

## Relief For Tribals

Acts of official high-handedness by the forest and home departments in Orissa came to light when an activist invoked the Right to Information Act.

According to what was revealed, forest officials slapped cases on tribals for stealing a fruit or other minor offences that cost the State a mere two rupees. The cases as per the record were lodged in the eighties and early nineties.

Around 8,949 such cases were withdrawn following the intervention of the Chief Minister, Naveen Patnaik.

Activist Biswa Priya Kanungo, who got this information, said: "In some cases forest officials had even seized bullock carts and bicycles for these offences". An information sheet with the forest department contained names of "offenders" and the  
*(Courtesy: The Hindustan Times)*

"cost of seized material involved". A tribal was booked for stealing forest material worth Rs. 2!

Initially the public information officers of the forest and home department did not disclose this information to the activist. They also were unwilling to give Kanungo any information on the Chief Minister's directive to withdraw minor forest cases against tribals.

It was only after Kanungo lodged a complaint with the Chief State Information Commissioner, D.N. Padhi, that he was allowed access to the information that he had sought from the two government departments.

Once the Scheduled Tribes (Recognition of Forest Right) Act comes into effect, hopefully such harassment of tribals would stop. ◆ ◆

# TRANSPARENCY STUDIES

The Right to Information Act 2005 represents a historic breakthrough in recognising the citizen's democratic rights to monitor measures affecting the public good. Following adoption of the Act by the Parliament of India, the Centre for Media Studies (CMS) set up a Transparency Studies wing to document, examine and publicise the interrelation between governance and society in all its aspects. It facilitates dissemination of relevant material, confers with experts and field workers and networks with the media to promote implementation and awareness.

## ***The functions of Transparency Studies include:***

- Publishing and distribution by electronic mail of *Transparency Review*, a journal designed to publicise news, articles and documentation concerning developments in Right to Information and the overall interface between governance and society. Priority is given to right to education, especially of children; right to work; right to justice and associated human and social rights, especially at the grassroots.
- Operating Transparency Features to disseminate articles and information on the above.
- Linking with civil society groups to further common objectives like exposing corruption, monitoring elections, improving civic services.
- Arranging discussions on emerging issues and problems between specialists and mediapersons.

## **CENTRE FOR MEDIA STUDIES (CMS)**

Centre for Media Studies (CMS) is an independent professional forum engaged in research, policy advocacy, advisory services and programme evaluation. CMS promotes accountability, responsiveness and transparency in policy-making in public systems and services. CMS debates and dialogues on important public issues are appreciated nationally.



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