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Open Up The Supreme Court

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(This editorial is based on the article 'Open Up The Supreme Court' which appeared in 'The Hindu' on 9th April, 2019. The article talks about the opacity in the functioning of Supreme Court and the right steps required for bringing the desired transparency in judiciary.)

The Supreme Court and high courts are not only the final adjudicatory authority for the law but are also the upholder of the highest ideals of our democracy. It was in this sense the High Court of Delhi, 10 years back handed down a landmark judgment dealing with the fledgling Right to Information (RTI) Act.

It held that the Office of the Chief Justice of India (CJI) was a “public authority”, and therefore, subject to the provisions of the Act. Information held by the CJI — including, in the context of the case, information about judges’ assets therefore could be requested by the public through an RTI application.

However the judgement has not seen the light and has been stayed by the Highest Court itself. The issue of transparency has been a sticking point for the highest judiciary, especially with respect to the appointment of judges and administration of justice.

The recent judgement of Supreme Court therefore warrants us to understand the whole debate surrounding the questions of accountability and transparency in Judiciary.

Issues Affecting Judiciary

India is one of the few countries where judges have the last word on judicial appointments, through the mechanism of the Collegium. The Collegium itself is not mentioned in the text of the Constitution but it arose out of a judgment of the Supreme Court, in response to increased executive interference in judicial appointments, particularly during Indira Gandhi’s regime.

The Collegium started as a tool to secure and guarantee the independence of the judiciary.

In 2015, the Supreme Court struck down a constitutional amendment establishing a National Judicial Appointments Commission, which would have replaced the Collegium.

A majority of the five-judge Bench held that judicial primacy in appointments was the only constitutionally-authorised way of securing/ensuring judicial independence against an increasingly powerful political executive.

However appointments and transfers within the higher judiciary still remain a mystery. It is almost as though the Supreme Court Collegium has many paths to opacity that can exist in the appointments process. It is increasingly being perceived that judicial appointments have too often been made in an ad hoc and arbitrary manner.

The Collegium has immunised itself from any form of public scrutiny. The nomination process is secret and there is little information regarding how a person is selected. The deliberations are secret, the reasons for elevation or non-elevation are secret which creates an extremely unhealthy climate, in which rumours become staple and breeds anonymity between people working in the judiciary.

The Need for the Transparency

A combined reading of the principle of independence of judiciary and the provisions of the constitution gives the understanding that ensuring its accountability is the sole prerogative of the Supreme Court itself. No other institution can meddle with the functioning of the highest court of the land to achieve the desired goal.

The workings of the courts, as powerful organs of state, have to be as transparent and open to public scrutiny as any other body. The legitimacy of the courts rests on their ability to provide reasoned orders based on verified facts and principles of law.

Legal arguments are tested against preceding judgments of higher courts or larger benches of the same court. The judiciary consists of a hierarchy of courts. From courts of trial to those of appeal, and thus facts and law are tested at various stages.,

According to the Delhi High Court judgement all power including judicial power is subject to accountability in a modern Constitution. A blanket judicial exemption from the RTI Act therefore would defeat the basic idea of “open justice”.

The fear that bringing the judiciary under the RTI Act would destroy the personal privacy of judges is therefore unfound as the RTI Act itself has an inbuilt privacy-oriented protection, which authorises withholding the disclosure of personal information unless there is an overriding public interest.

The Hesitancy to Open up

The farmost fear in bringing the judiciary under the RTI Act is that it would destroy the personal privacy of judges impacting their non-partisanship and integrity.

For judges, their credibility and reputation is hugely important, and many feel that the slightest potential slight on this could be debilitating and prevent judges from doing their job.

Apprehensions have also been raised by people that few over-enthusiastic advocates might get their hands on dirt against judges that they can take it out of context and use for leverage in court, by asking for their recusal or otherwise, questioning their independence in hearing a case.

The Way Out

Judges, undoubtedly, require protection from being sued for their judicial decisions so as to be able to “do the duty with complete independence and free from fear” and hence require independence and supremacy in their functioning.

Meanwhile it is imperative to have a transparent system within the judiciary itself to deal with cases of judicial misconduct and to infuse the idea of judicial accountability.

The only way to salvage this is to open up the court. A judiciary that is confident of itself and of its place in the democratic republic should not be worried about subjecting judicial appointments to public scrutiny.

As Lord Woolf had aptly said, “the independence of the judiciary is... not the property of the judiciary, but a commodity to be held by the judiciary in trust for the public”.