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Editor's Note

The Centre is pleased to publish Volume 2 Issue 2 of NUJS Journal of Regulatory Studies. The present Issue focuses on a variety of matters and comprises seven articles circumscribing various legal themes. Out of the seven articles, five are on Right to Information, one is on transfer pricing and one is on Section 482 of CrPC. The five articles on Right to Information are an outcome of a National Conference that was conducted by the Centre at the West Bengal National University of Juridical Sciences (WBNUJS) on 22nd July, 2017. The other two articles were submitted by PhD scholars enrolled at WBNUJS.

I sincerely thank the members of the Centre who worked hard to bring out the present Issue, albeit late. We are also grateful to the University administration to facilitate the publication process.

To make the Issue a success, we extend our heartfelt wishes to all the contributors for their unflinching support during the course of the publication. I hope this Issue is liked by its readers.

Prof. (Dr.) T. R. Subramanya
Coordinator and Research Fellow

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Editor's Note

CONTENTS

RIGHT TO INFORMATION VIS-À-VIS RIGHT TO PRIVACY IN THE CONTEXT OF RIGHT TO INFORMATION ACT, 2005

Kaushik Chowdhury*

ABSTRACT**

It is quite an interesting crossroad in the Indian legal scenario where two strands of approach securing two most cherished rights, though marked by constitutional reticence, yet vociferously claiming their legitimate position in the order of things and in the scheme of legalism, underpinned by robust moral and ethical undertones, creates the much-needed substratum for confrontation marked by belligerent interaction with a conspicuous claim of superiority and it is here where lies the rub. The rights that are being alluded to in the preceding texts are none other than the 'right to know' and the 'right to privacy' – standing at opposite poles, their demeanor typified by contradiction and antagonism somewhere and somehow demanding a trade off, a via media or for that matter a compromise in the interest of stability and order in the society. The Indian Constitution speaks explicitly neither of the right to know nor of the right to privacy. But the various landmark verdicts of the Apex Court have been quite quick to acknowledge the efficacy of the right to know and the right to privacy as rights forming part of a broader regime of equality and right to life and personal liberty contemplated under Article 14 and Article 21 of the Constitution of India, respectively, which are considered to be the kernel of democracy and central to good governance. In this paper, an attempt is has been made to underline the stand-alone significance of the private and public domains and then to draw a comparative analysis of the relative appeal of both the domains and the probable key to the apparently insoluble problem of irreconciliation and patent disagreement between right to know and right to privacy.

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** The views expressed in this article are those of the author and do not reflect the official policy or position of the Centre for Regulatory Studies, Governance and Public Policy, WBNUJS, Kolkata.

1. The Right to Information Act, 2005: A Prologue

The Right to Information (RTI) Act, 2005, a transparency law, is a watershed in the history of Indian democracy.[1] It is often held to be an appropriate tool to control corruption, hold government accountable and restrain the arbitrary use of power. The logic behind the RTI Act is simple. The government is run on public money and, therefore, it is quite plausible that the general public as tax payers and as an integral component of democracy will have the right to inquire as to the various activities of the government departments in order to be better informed about their functioning. The higher degree of access of citizens to the governmental affairs is directly related to the level of responsiveness of the government in power. Alternatively, the more restricted the public access to such facts and information, the higher is the chance of an opaque system and a concomitant sense of disempowerment and alienation of the common man from the democratic process. Though the Constitution of India quite emphatically upholds the tenets of justice, liberty, equality and fraternity as the core of the Indian democratic polity, it took nearly more than half a century since Independence for our country to enact such a law that is perhaps the only effective and potent tool to fructify the lofty constitutional aspirations of a truly democratic nation. The fundamental objective of such a legislative enactment is to animate the processual component of a vibrant functional democracy. The RTI Act empowers the citizens of this country to actualise their right to know or receive information which is construed as their right to life under the expanded and dynamic interpretation of Article 21 of the Constitution of India by the Apex Court of India. By virtue of this Act, a person can seek information with regard to various government processes and database maintained by it so long such information serves public interest. Therefore, a culture of sharing knowledge and information pertaining to virtually all the aspects of functioning by the public authorities has been encouraged by RTI. Such a culture may seem alien in the background of colonial rule in India when secrecy was meant to be the rule and transparency an exception. But when India freed itself from the yoke of foreign bondage, the idea of a welfare state seemed to be the dominant theme of the framers of

[1] N. N. Mishra, Lisa Parker, V. L. Nimgaonkar, S. N. Deshpande, 'Privacy and the Right to Information Act, 2005' (2008) 5 (4) Indian Journal of Medical Ethics <http://ijme.in/articles/privacy-and-the-right-to-information-act-2005/?galley=html> accessed 5 July 2017.

the Constitution. True to its intent, the 'Founding Fathers' of the Constitution of India perceived the felt necessity of enhancing the social obligations of the state more like a benevolent ruler who has the onerous responsibility to set right the imperfections and inequities in the social structure that have kind of permeated every walk of our lives. The basic prerequisite of a welfare state is a climate of transparency, participation and engagement to give shape to the aspirations of a modern democratic India – all of which uphold the idea of participatory democracy. It is in tandem with such a spirit that RTI emerged as one of the most pragmatic piece of legislation having immense potential to mark the beginning of a new era of governance which celebrates the potency of transparency, interaction and participation as legitimate models of democratic governance.

2. Right to Privacy under the Indian Constitution and International Conventions– What does it Mean?

Right to privacy is not an explicit right under the Indian Constitution. Rather, it is implicit in the 'right to life' under Article 21 of the Constitution of India. Every individual has a private side and right to privacy aims to identify and confer the right to a person to be left alone, to indulge in certain activities either alone or with someone whom he/she considers to be his/her confidante (spouse). Right to privacy is a universal concept that finds eloquent manifestation in various international covenants. Article 12 of Universal Declaration of Human Rights (1948) states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence or to unlawful attacks on his honor and reputation." Article 8 of European Convention on Human Rights, 1950 states "Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of the rights and freedoms of others."[2] The Constitution, thus, recognizes the right to privacy as an implicit component of Article 21 and it has been further reiterated in Puttaswamy case that it is

[2] Hinailiyas, 'The Right to Privacy under Article 21 and the Related Conflicts' (*Legal Services India*, 2014) <http://www.legalservicesindia.com/article/article/right-to-privacy-under-article-21-and-the-related-conflicts-1630-1.html> accessed 5 July 2017.

doubtless that right to privacy is clearly a fundamental right, an intrinsic constituent of human worth and dignity. It is further stated in Puttaswamy that privacy has two roles: normative and descriptive. Privacy in the normative sense affiliates to moral principles, eternal values and essentials pertaining to human dignity, autonomy and self worth. In the descriptive sense, it refers to a bunch of entitlements and claims vindicated on the normative basis and rendered implementable being supported by constitutional mandate. If the State denies it to any person, he/she may approach the highest court of the land to vindicate and enforce the right. The Supreme Court of India felt it increasingly imperative to accommodate right to privacy into the fold of right to life and the judicial journey towards such a regime commenced roughly when A. K. Gopalan came for pointed consideration in Kharak Singh and finally culminated into a well-structured perspective based on integrative approach linking Articles 14, 19 and 21 of the Indian Constitution (popularly called the Golden Triangle) in Maneka Gandhi owing to the growing consciousness and acceptance of the idea of self-development of every human being. The human rights consciousness further fortified the growing realisation that creativity is best nurtured and honed in an atmosphere of privacy and seclusion. This is the developmental aspect of privacy which more than justifies the quick incorporation of the right to privacy into the broader embrace of right to life under the Indian Constitution. But if we fathom the other end of the spectrum which deals with the protectionist approach justifying the right to privacy, the rationale for holding this right fundamental under the aegis of the Indian Constitution seems impressive. When I say protectionist approach to privacy, I mean a way of looking into this right to privacy as a right which is intrinsically riveted to an individual's personality and denying which impedes the spontaneous behavior or conduct of an individual thereby impairing his right to freedom. For instance, when we speak about sexual freedom or romantic verbal or gesticular exchanges which are intimate in nature and can at best be visualised in an atmosphere filled with candor, we cannot think of a public display of such behavior or conduct given the ethical and moral prescriptions in the context of India. It is true that the very concept of privacy is quite complex the content of which has a strong moral, ethical, psychological and social bearing and perhaps this is the reason that privacy as a whole is a culture-specific social phenomenon, the limits of which are most of the time determined by the moral and ethical considerations in the immediate context. That is why the Apex Court of India through a series of judgments upheld the right to

privacy as so very foundational to individual freedom that it was conferred the status of fundamental right, though not nominate yet implicit.

3. Right to Privacy under the RTI Act, 2005

According to Section 8(1)(j) of the Right to Information Act, 2005, information which has been exempted from disclosure at the instance of a citizen of this country is defined as; 'information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies disclosure of such information'. The above statutory provision quite clearly lays down that private information respecting an individual which is lying with the government cannot be sought by a third party as such information is exempted from disclosure on the rationale of an individual's right to privacy. However, the applicant who seeks such information from the government may be allowed access to such information if it can be proved that such information warrants disclosure on public interest. When a citizen is seeking his own information, there is no potential breach of privacy as there is no intrusion into his privacy and, hence, Section 8(1)(j) does not apply. But when a third party seeks information about a person under RTI, he may be denied access to it unless such an application is justified on the ground of a larger public interest. The Central Information Commission defined 'Invasion of Privacy' as "One, who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[3] It is the most critical responsibility of the public authority receiving information regarding individuals to maintain a high degree of confidentiality and not to disclose such information unless such disclosure is warranted under exceptional circumstances owing to larger public interest. Personal information does not lose its privacy and confidentiality just because it has been shared with public authorities. But it becomes a matter of concern for if the public authorities share personal details of an individual with a third party

[3] Mukesh Shukla, 'What is Privacy under RTI' (*Right to information Wiki*, 3 May 2017) <http://www.righttoinformation.wiki/explanations/privacy> accessed 5 July 2017.

when such details have no reasonable nexus with public interest and there is every likelihood of such information being manhandled by unscrupulous elements resulting in mischief, harassment, reputational risk of the owner of such information. Besides, data integrity in this digital world is a very crucial factor which calls for due circumspection from the government authorities as the Supreme Court of India is quite emphatic in Puttaswamy of the need to properly preserve private data of the citizens with utmost care coupled with robust technological infrastructure. The urgency of data protection in today's world has impelled the apex court to import the idea of 'informational privacy' as a significant dimension of privacy.

4. The Right to Information and the Right to Privacy: The Paradox

The right to information and the right to privacy are both essential human rights in the modern information society. In most of the cases, both the rights complement each other in holding governments accountable to individuals. But there is a zone of conflict which emerges when there is a demand for access to personal information stored in a government database. It is an established fact that RTI Act is a vital piece of legislation which guarantees one and all access to public data or data pertaining to any activities of various public authorities. There is no conflict of interest so far as information relating to various aspects of governance is concerned since it is considered essential to allow the citizens of this country to seek information and know facts and figures of various government departments. In some cases, the citizens may also claim access to information kept in the database of private agencies provided such agencies are involved in activities related to governance of the nation or outsourced to function at the instance of certain public authorities and public departments. The citizens of India are taken as partners in the functioning of the wheel of democracy and progression and this philosophy caters to the justification of participatory democracy where transparency in its functioning is the truest hallmark. But when the two rights confront each other, the government needs to develop strategies and mechanisms to limit conflicts and to reconcile the rights as far as possible. Some structural and legislative means and modalities need to be explored to harmonise right to information and right to privacy.[4] When the question of harmonising the apparently conflicting

[4] David Banisar, 'The Right to Information and Privacy: Balancing Rights and Managing Conflicts' (The International Bank for Reconstruction and Development/ The World Bank , 2011)

rights is raised, a sense of compromise and accommodative culture needs to be promoted to ensure that the larger interest that needs to be nurtured under all circumstances is not compromised. It is quite understandable that so far as the genre of both the rights – the right to privacy and the right to information are concerned, they affiliate to the broader regime of human rights. The jurisprudence of human rights does not encourage implicit ordering or hierarchical stratum between two competing human rights.[5] But it is the doctrine of public policy which subsumes the idea of public interest that provides the enduring justification to consider one of the two rights as superior and the other as inferior under unfolding circumstances. There is no universal formula or mechanism to reconcile both the rights. Right to privacy is no doubt essential for an individual's satisfying sense of freedom which creates a conducive atmosphere for the fullest possible manifestation of one's personality but when public interest becomes a crying need, private interest must yield to the demands of public interest. Situational imperatives or urgency must determine the primacy of one right over the other.

5. Right to Information and Right to Privacy: The Managing of Conflict and Harmonisation Regime

As already stated above, right to privacy is not expressly given to citizens, but is the result of judicial review and court decisions.[6] Privacy essentially connotes the right of an individual to control circumstances and situations based upon individual autonomy under which he is to share his personal information and the extent to which he intends to share it. Right to Information on the other hand guarantees to the citizens of a nation the right to seek information about government activities from appropriate government sources. At the first inspection, it may seem that the right to access information and right to privacy are irreconcilable. But privacy law and right to information law are like two sides of the same coin – acting as complementary rights that encourage individuals' right to protect them and to promote government accountability. The conflict between these two rights needs to be reconciled and harmonised. One way to do it is

<https://openknowledge.worldbank.org/bitstream/handle/10986/23022/The0right0to0i00information0program.pdf?sequence=1&isAllowed=y> accessed 5 July 2017.

[5] ibid.

[6] Adv. Vishal K Vora, 'Fight between Right to Privacy and Right to Know: Who should win?' *(Legal Service India)* <http://www.legalserviceindia.com/articles/pri_r.htm> accessed 5 July 2017.

through adoption of a legislative model, which enacts a single RTI and privacy law. Such a model ensures common definitions and internal consistency thereby limiting conflict and establishing a balance from the start. The other model that can be adopted is to have two discreet enactments so that they may be interpreted in such a way that there is balance and harmony so far as their relation with each other and their operation in their respective domains are concerned. If the objective of harmony is ignored at the very outset, the laws will resultantly come into conflict with each other which in turn will call for further legislative efforts. The very idea of harmonisation may seem to be a conflict resolution strategy or rather a via media. But the concept of balance and harmony to smoothen the thorny angularities of conflict between the two rights may sound simple in theory but is quite difficult in practice. The regime of harmonisation which in majority cases becomes a constitutional challenge and which needs to be reconciled through the instrumentality of judicial process and creativity, has to grapple with a host of subtleties and subjectivities. Though Section 8(1)(j) of the RTI Act quite explicitly grants exemption from disclosure of personal information, there is a conditionality attached to it, that is, public interest may warrant disclosure of such information to an applicant by the public authority thereby granting no exemption and, if need be, disregarding the right to privacy. However, the challenge lies with demarcating the extent or limit up to which private information may be disclosed. Though there is no pedantic and state-of-the-art method to mark the line of demarcation of disclosure and non-disclosure, some kind of weighing of circumstances and contextual priority is necessary to ascertain how much of private information of an individual needs to be disclosed having regard to the broader question of public interest for the good of the society at large. The working of the RTI Act in India has touched several professions and multiple aspects of a person's personality and things which he prefers to keep a secret as a right. Medical jurisprudence and medical ethics, for instance, looks into the RTI law in India with circumspection and in times when medical profiles and details of various patients are kept in public hospitals and clinics in retrievable databases, an applicant seeking to know the medical profile of an individual under the RTI Act needs to first justify the public benefit if the information is disclosed and secondly whether the public benefit or interest is of such a stature or magnitude so as to vindicate disclosure of such private information infringing upon another cherished right to privacy of the patient – individual. The very idea of privacy inheres in the philosophy of individual autonomy. Several academic disquisitions have hinted upon the

foundational character of privacy as a basis of individual freedom but not necessarily as an unqualified ethical right particularly in the context of health care and medical ethics. The RTI Act may threaten the privacy of various patients and research subjects in public medical institutions.[7] It is quite understandable that medical information of an individual is highly confidential as callous disclosure of such information from trusted government sources may malign the reputation or disparage his social identity and position (more so in a country such as India) if the ailment is one which attracts ridicule, embarrassment or social ostracism. For instance, the medical information of a HIV+ patient needs to be zealously protected from unwanted disclosure. This is because the concerned patient has allowed himself to be examined by a medical practitioner in a public hospital on the basis of a trust borne out of the fiduciary relationship that develops between a doctor and a patient. The medical information of such a patient is very sensitive as disclosure of such information may ruin the prestige and personality of the patient making him psychologically wreck and leaving him more diseased and depressed. But if the applicant who has sought such information of the patient turns out to be a prospective bride of the patient, it is morally as well as legally incumbent upon the public authority to disclose such medical information in the larger interest of the applicant even if such disclosure amounts to risking the right to privacy of the patient – individual. Thus, the rationale to disclose or not to disclose private information is public interest. The true litmus test in this case is the fact that if the information is denied to the applicant, her right to life and marital bliss is utterly jeopardised. It is basic morality that one interest cannot be safeguarded at the cost of other. In this case, the man is already infected with HIV virus and this cannot be undone. But the non-disclosure of such crucial information to the applicant (who is not HIV infected) may result in her contracting the HIV virus and, thus, her right to life and decent living may get compromised. Therefore, harmonisation or reconciliation of conflicting interests or rights may depend upon several variables or models as afore-stated but the simplest possible strategy and yet the most effective one can be gauging of the relative appeal of the competing rights, viz., right to privacy and right to information and thereafter on the basis of ratiocination according primacy to one over the other taking the contextual urgency or appropriateness into account.

[7] Mishra, Parker, Nimgaonkar and Deshpande (n 1).

6. RTI and the Indian Judiciary

The RTI Act was enacted on 15 June 2005 and it came into force on 15 October 2005. The basic objective of this transparency statute is to bring about openness, transparency and accountability of the government functionaries. Various judicial decisions have been pronounced with regard to the RTI law in India to emphasise upon the significance of the RTI Act in bolstering the faith of the common masses in the right to know and receive information.[8] Right to information is the right of the general public to seek and receive information from government sources as to how decisions are taken, how the various expenditures are incurred by the various public authorities and as to the various aspects of functioning of the government departments. The very right to information draws inspiration from the constitutional basis derived from Article 19(1)(a) of the Constitution of India which states that 'All citizens have the right to freedom of speech and expression'. The Apex Court of India held that the right to information is an integral element of the purpose of Article 19 of the Indian Constitution.[9] The majority opinion held that freedom of speech and expression takes within its fold the right of all the citizens of India to read and be informed. In another case[10] the Supreme Court of India stated, 'In a government of responsibility like ours where the agents of the public must be responsible for the conduct there can be but a 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. They are entitled to know the particulars of every public transaction in all its bearings.' The judgment in *Manubhai. D. Shah v Life Insurance Corporation*[11] reaffirmed this point. The fundamental purpose in the right to freedom of speech and expression is to enable every person of this country to form opinions and beliefs and share them freely with others. In essence, the foundational principle involved here is the right to know. The Supreme Court almost a quarter of a century ago in S. P. Gupta & Others v. Union of India,[12] which is popularly known as the Judges Case, made an observation, "Now, if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage

[8] Pawan Reley, 'Expanding Right to Freedom of Speech and Expression: A Analysis in Relation to Right to Information'<http://www.academia.edu/11422466/EXPANDING_RIGHT_TO_FREEDOM_OF_SPEECH_AND_EXPRESSION_A_ANALYSIS_IN_RELATION_TO_RIGHT_TO_INFORMATION> accessed 6 July 2017.
[9] *Bennett and Co v the Union Of India* AIR 1973 SC 106, 1973 SCR (2) 757.
[10] *State of U.P v Raj Narain* 1975 SCR (3) 333.
[11] *Manubhai .D. Shah v Life Insurance Corporation* AIR 1981Guj 15, (1981) GLR 206.
[12] *S. P .Gupta v Union of India* AIR 1982 SC 149.

oppression, corruption and misuse or abuse of authority for it would be all shrouded in the veil of secrecy without any public accountability.' Unnecessary secrecy in government leads to arrogance in governance and defective decision making.[13] Open government always ensures greater transparency and efficiency in the matter of governance and administration. There is no gainsaying the fact that exposure to public scrutiny is the surest insignia of an efficient and effective government. It is truly said that open government is a clean government and a powerful shield against political and administrative opaqueness and incompetency.

7. 'Private Right' Yielding to 'Public Interest': A Pithy Analysis of the Rationale

The two rights around which revolve all the discourses and deliberations of my thesis actually affiliate to two distinct categories or domains – one private and the other public. The public-private debate essentially germinates from public and private interest. The right to know may apparently seem to be a private right of an individual and the right is neatly with regard to governmental affairs since the idea of a welfare state, which mandates to promote social welfare along with economic development, rests heavily upon the rudiments of participatory democracy as the true engine for proliferation of democratic consciousness among the masses. If the practice or operational reality of the working of the RTI law in India were only and exclusively in this line of theory, today there would not have been any discussion on the question of reconciling the public-private conflict. But the ground reality is a bit different and it is here that the real conflict of interest emanates. A classic example will ease our understanding even further. When a citizen of this country intends to know from the government how the Public Distribution System is functioning in some definite part of the country or to what extent the mid-day meal programme in government schools are ultimately reaching the intended beneficiaries, there is no conflict of interest because the applicant has the fundamental right to know and the public authority is under a constitutional obligation to provide such information as desired by the applicant through the RTI route. Here, one party has a right to know and the other has a duty to inform and, thus, no conflict arises. But if a citizen wants to know about, say, the Aadhaar details of an individual which contains his personal identity, it comes under exemption under Section 8 and Section 11 of the RTI Act and the public authority is not duty bound to disseminate such information. The

[13] John Macdonald & Cliven Jones, *The Culture of Secrecy Britain 1832-1998* (1st edn, OUP 2003) 3.

rationale for such exemption from disclosure of private information is the constitutional legitimacy and respect for the right to privacy. The exemption clause satisfies a particular legislative intendment and that is protection of the right to privacy of one and all by denial of personal information kept in the government database. However, the legislature has been quick to anticipate the possible circumstances where one right may claim primacy over the other owing to a larger interest being involved and that is why it has come up with a proviso which says that personal information may at times be disclosed where a greater public interest will be hampered if such personal information is not disclosed. If we analyse the provisions of the statute, we can well comprehend that both the rights are equal but situational exigency may in exceptional circumstances attach priority to one of the rights and in such cases, the compelling justification shall decide which right should give way to the other. So the conflict as such is not a permanent feature of the rights. Rather they complement and supplement each other. The conflict is only situational.

8. Philosophical Vindication Refuting the 'Right to Privacy' Regime

The nurturing of the cherished right to privacy is no doubt an ennobling task and should feature as a top-most priority in the agenda of any democratic nation. True to its object, even the Indian Constitution like the most other national constitutions of the world strongly supports and encourages the individual right to privacy. But philosophical discussions do not always follow the beaten track and always want to explore the untrodden path to find out what is best or optimum or ideal for a nation. This may seem a bit perplexing and weird to you for I intend to go against the sacrosanct right to privacy. All this while, in my discourse, I have been trying to assess the relative merits (or even demerits) of both the rights – right to privacy and the right to information. But now I intend to introduce an altogether different and unique strand of thought – how about refuting the very idea of right to privacy?[14] If we focus upon the flip side of right to privacy, we can find that along with upholding individual autonomy, it breeds hypocrisy.[15] I want to give a simple explanation which closely relates to human psychology. When right to

[14] Raymond Wacks, *Privacy: A Very Short Introduction* (OUP 2010).
[15] All Answers ltd, 'The right to privacy' (*Lawteacher.net*, April 2018) <https://www.lawteacher.net?vref=1> accessed 3 April 2018.

privacy is conferred upon us, we tend to demonstrate habits and conduct in public circle which we usually prefer not to follow in our private lives. According to Gabriel Garcia Marquez, we have three layers of personality – public, private and secret.[16] The moment one tries to establish a logic which breaks the barriers of conventional thinking, it immediately, more often than not, becomes a matter of disputation. The rhetoric against right to privacy may take away sleep of many social activists for it immediately seems to rob one of his natural right to privacy which inheres in him for being a human. But how many of us are aware of the fact that some degree of intrusive mechanism or encroachment into one's privacy may be salubrious? It may redefine democracy or support progressive authoritarianism for sure. For instance, the roads have CCTV surveillance cameras installed which enable the police to nab criminals or get an idea of any illegal or criminal activities being carried out in the open. Nowadays, the corporate offices in majority of the cases house CCTV cameras to keep a vigil over the working employees. The metro stations, the airports and the subways have cameras installed to check any criminal or aberrant behavior of persons among the commuters. In all these instances, privacy is compromised in the larger interest of security. Why is it that we need to breach privacy to keep a vigil over the wrong-minded persons? It is because intrusion is the best check to aberration. If I can extend this ratio to a level where virtually the state allows no privacy, it may no doubt help the state to create a much better, safer, crime-free society as all such acts which engender crimes will supposedly be regulated, if not, altogether stopped, administration will gain efficiency and governance will be more transparent and prompt. It is the veil of privacy which breeds crime, corruption and conflicts. Most often than not, we prefer to vociferously claim privacy so far as the precincts of marital home and relations are concerned and there is no fault in it. But it is my submission that if privacy both as a philosophy and as a practice is limited to the core area of bodily integrity without extending it to informational and decisional areas, in the long run, the government and the governed will definitely stand to gain out of such an arrangement. Even in the context of RTI law, communication is obstructed, free exchange of information is disrupted and right to know is to a certain extent vitiated under the shelter of the exemption from disclosure of information clause. The idea to attach conditionality to providing information under the RTI is not problematic since this alone seems to be the best possible scheme to ensure

[16] Prerana, 'Right to Information (RTI) and Right to Privacy: Need for Harmony' (*Legal Parley*, 28 November 2015) <http://legalparley.com/rti-and-right-to-privacy/> accessed 6 July 2017.

harmonious co-existence of both the rights. However, the discretion to weigh the competing rights in times of exceptions do not follow any fixed or precise standards and it is this imprecision or flexibility to tinker with or alter the boundaries of disclosure which breeds corruption and a culture of bribery and nepotism equally among the government officials and the applicants. Hence, we should progress towards a policy of transparency with uniformity and try to accommodate all possible dynamics so that the discretionary space is reduced or rendered void giving more space to standardisation and rule-based approach. I am quite aware of the fact that formulation of such a policy is extremely difficult both at the theoretical and applicative stages but this idea can be taken as a legitimate guidepost to convince ourselves that privacy is 'not' always good for the society.

9. Right to Information and Right to Privacy: A Prognosis

The entire discussion primarily has one motive - to decipher the relational dynamics between the two competing rights and to approach towards a regime of harmonising the patent incompatibility between them. Whatever models have been suggested in my discourse in the preceding paragraphs are aimed towards exploring mechanisms and strategies to bring about some kind of moderation so far as treating both the rights are concerned so that each right gets it's legitimate dignity. When we try to understand both the rights, we have to think of the implicit constitutional limits up to which the rights can be extended. It is quite interesting that both the rights do exist but the Indian Constitution remains reticent with regard to these rights. It is my humble submission that the Parliament should make an explicit right to privacy enactment like the RTI Act and the provisions should be such that some kind of integration with the present RTI Act is feasible through terminological consistency or purposive harmonisation. The Law Commission and the Supreme Court of India have an onerous obligation to provide the much-needed philosophical justification for a discreet legislation on right to privacy rather than keeping it within the bracket of a larger and broader right to life. Time has come to accord separate importance to right to privacy owing to the growing complexities so that it can emerge as an independent and complete statute yet drafted in such a fashion so as to ensure a happy marriage between RTI Act and the right to privacy statute. Such an attempt may do away with lots of conflicts and may bring out the vital complementarity between the two laws. I am not

denying that a new statute weaned away from right to life and personal liberty will not face the heat of critics but it is also true that such weaning away of an implicit right from a broader nominate (explicit) constitutional provision will not rob it of it's essential strength and vitality. What is more important which justifies and suggests such an arrangement or vision of an independent and complete statute on right to privacy is to substantiate and fortify the relative strength, efficacy and appeal of both the rights and to iron out differences and areas of disagreement between the two as much as possible and as far as practicable.

INTERNATIONAL TRANSFER PRICING – PEJORATIVE EFFECT ON REVENUE GENERATION

Shubhangi Bajaj Bag*

ABSTRACT**

The term 'transfer pricing' has been given a negative connotation and the cause for such pejorative attribution to the term is analysed in the present paper. This paper examines the effects of transfer pricing and its impact on revenue generation in a developing nation such as India. The endeavour in the paper is to understand the concept of transfer pricing and to explore how developing nations are drained of their legitimate revenue by multinational corporations. The journey of transfer pricing has been chronicled. The paper tries to know why transfer pricing has become a dominant factor in international taxation and why multinational corporations resort to transfer pricing. The rationale behind the need of multinational corporations to shift profits to low-tax jurisdictions has been analysed. The development of legislation to curb the phenomenon and adoption of methods to curb transfer pricing in Indian fiscal statutes has been analysed in the paper. The intention of the legislature in enacting such methods and the judicial interpretation of the phenomenon has also been considered. The paper seeks to find out whether the pejorative interpretation is justified and whether a developing nation such as India needs a stricter fiscal framework to curb transfer pricing. The methodology used in the paper is doctrinal and the method adopted in the paper is a combination of descriptive, explanatory, historical and analytical methods.

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1. Introduction

The twentieth century bears testimony to the integration of global economy on a scale which was unprecedented and that led to the emergence of a global economy where one nation and its finances or revenue could not be discounted from that of another. Development in the myriad fields of technology, speed and reliability in communication and transport catalysed this process of globalisation. To begin with, historically, international trade was mainly concerned with the import and export of raw materials and finished goods. However, with the passage of time and with the development of communication, as the movement of labour and capital became easier, it became more compelling, cost-effective and more viable for a business to undertake its activities in a location where labour and capital could be invested to earn the best possible return. Thus, the rise of Multinational enterprises (MNEs) with associates (both fully and partially owned) in different parts of the world was observed in the wake of booming trade and globalisation for carrying on business activities form different jurisdictions on a large scale which was till then, unknown. The growth of the MNEs cannot be catalogued to indicate the precise date of their emergence. It can be fairly estimated that with the advent of the European Colonial Trading Companies, the concept of trading through MNEs gained precedence.[1]

However, it is considered by some that MNEs evolved in the mid-nineteenth century as this was the period when modern technologies, manufacturing and management processes developed and with such developments, a possibility was created for a genuine international division of production by firms.[2] It was realised by the manufacturing and trading concerns that trading by MNEs with associated enterprises may be beneficial as the finances can be controlled to regulate the profits and in turn the liability for payment of taxes may be controlled.

In recent years, considering the factors which have provided an impetus to the MNEs, the MNEs have a dominant role in international trade, and account for more than half of the international transactions which are undertaken worldwide.

[1] Peter Muchlinski, *Multinational enterprises and the law*, (2nd edn, Oxford University Press, 2007) 1-20.
[2] Ibid.

Contemporaneous with the growth of MNEs, intra-firm trade has also increased. It is a striking feature that the graph of growth of intra-firm trade is on the rise and accounts for almost 60% of the total basket of international transactions.[3] It is no longer left to imagination that with the exponential growth of MNEs, the transactions between the MNEs and their associated enterprises are no longer guided by market forces. The forces which have replaced market forces are often the common interests of entities of the group.

The management of MNEs were aware that market forces would no longer guide the transactions between related or associated enterprises and as such, prices for intra-group transactions had to be fixed in such a manner that the incidence of taxation is lowered. The price which was fixed in the process by the managers of MNEs is known as 'transfer price'. 'Transfer Pricing' can be defined as the price at which goods or intangible properties are transferred or services are rendered between the related enterprises and which do not represent true, normal, natural and real market prices of the transactions.[4] The transfer pricing manipulation is done with the primary intention of enhancement of total after-tax profit of the MNEs (business profit and profit repatriated from subsidiaries) and reduction of before-tax declared profit, to enhance the real income of the MNEs.[5] In fact, transfer pricing is one of the most debated and contentious issues in taxation. The *Ruding Report, 1992* declared transfer pricing as the one of the most important areas for future in international taxation and the internal market (EU).[6]

The transfer price is usually compared with the market price which is guided by market forces or arm's length price which is the price of a similar transaction between unrelated associations which are guided by market forces and are not regulated transactions.[7]

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[3] Deloitte*, Transfer Pricing Law and Practice in India A fine print analysis* (CCH a Wolters Kluwer India Pvt. Ltd, 2008) 2.

[4] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, (2001) 3 <http://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm>accessed 16 March 2018.

[5] Walter A. Chudson, 'Intra Firm Trade and Transfer Pricing', Robin Murray (ed), Multinationals Beyond the Market, Intra-Firm Trade and the Control of Transfer Pricing' (The Harvester Press 1981) 17.

[6] European Commission, *Company Taxation in the Internal Market, European Commission,* (2002*)* 331 <https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/company_tax_study_en.pdf> accessed 15 March 2018.

[7] Brian J. Arnold and Michael J. McIntyre, *International Tax Primer* (2nd edn, Kluwer Law International 2002) 55.

Transfer pricing often includes transactions which involve, *inter alia*, transfer of tangible goods, capital assets and other such tangible assets, transfer of intangible property and property rights, rendering of services, provision of finance or revenue or income like property rental and from other sources, leasing arrangements, etc.[8]

2. The Concept of Transfer Pricing further Elucidated

The majority of transactions in international trade takes place between related entities within MNEs, which do not have the occasion of standing the test of market forces. This, in turn, enables such enterprises to fix internal prices of their goods and services according to their own convenience and motives in respect of transactions between themselves in order to maximise the profits after taxation. These prices, which are manipulated between related associates of the parent enterprises, are called transfer prices.

Let us now understand transfer pricing from a more pragmatic standpoint. For example, a multinational corporation has its base in country 'X' and earns a profit of 'A'. The corporation has another subsidiary in country 'Y'. Country 'Y' has a lower tax rate but does not have resources as country 'X'. In such a situation, the multinational corporation utilises the resources of country 'X' for development of its business but shifts the profits artificially to country 'Y' through its subsidiary, in order to increase its overall profit, after tax profit. Such shifting of profits could take place by various methods. In one case the shifting may be by selling in country 'Y', the product manufactured in country 'X'. The taxable income of the subsidiary would be determined by the reselling price of the manufactured product, expenses paid for the inputs and expenses incurred for purchasing the products. The corporation which would have had to pay tax to the tune of say (A/3) in country 'X' will have to pay tax at the rate say (A/10) in country 'Y'. In such a situation, the transfer pricing would erode the tax base of country 'X'. Transfer pricing in the instant example would be - [A/3 (-) A/10].

The United Nations' Practical Manual on Transfer Pricing for Developing Countries[9] is relevant and it is explained therein that 'transfer pricing' may be described as a

[8] Roy Rohatgi *The Basic International Taxation*, (Kluwer Law International 2002) 412-413.
[9] <http://www.un.org/esa/ffd/documents/UN_Manual_TransferPricing.pdf> accessed 14 March 2018.

phenomenon by which profits of a multinational corporation is shifted from a jurisdiction with higher tax rates to a jurisdiction with lower tax rates through associated enterprises by changing the policy of pricing at which the transactions amongst the related entities take place.

3. Rationale Behind Transfer Pricing

(a) Tax avoidance

Transfer of goods or services, as aforesaid, is not dictated by the market forces but is controlled by the consideration of shifting taxable profits or duties or of arranging the direction of cash flow to maximise the profits of the MNEs after deduction of taxes. Avoidance of tax is the most important factor behind transfer pricing. The artificial reduction of profits or losses caused in a specific country through manipulation is often the aim as well as the result of transfer pricing.[10]

(b) Exchange control and foreign investment

The developing countries have stringent restrictions in regard to remittances of profits from their jurisdiction to other jurisdictions. However, in order to secure access to foreign technologies, expertise, technical know-how, capital goods and components for their industrial development, they are often more liberal with respect to payments for these technologies and other benefits and make favourable and liberal exchange control regulations which facilitate tax avoidance. These so-called liberal regulations are often used and the restrictions in regard to such remittance of profits are often circumvented or dogged, when a foreign company charges a price which is not commensurate with the market prices but is more than the market value as consideration for imparting technologies, services and other tangibles. It is for such endeavours that transfer pricing is resorted to by MNEs.

(c) Withdrawal of profits in the form of royalties, etc.

The policies of the MNEs have changed in developing countries, where they have modified their investment and technical collaboration policies to control the ultimate profits. They drain off the profits and eventually reduce them through payment of excessive royalties,

[10] D. P. Mittal, *Law of Transfer Pricing in India: An Introduction* (4th edn, Taxmann 2014) 8-10.

high technical and management fees and over invoicing of imported components[11]. These expenditures result in reduction of profits earned by the associates of MNEs or related enterprises. The profits so earned are, thus, withdrawn before they are shared by the local participants, the revenue department and the MNE, through transfer pricing techniques which bordered in the boundary of tax avoidance.

(d) Hedging against political and economic uncertainties

Unpredictability about the political and economic stability of a nation may necessitate and warrant flight of capital or profit from a country with an unstable future to a country with a more stable fiscal or political regime. This is achieved by applying the myriad methods of transfer pricing.[12]

(e) Transfer pricing - characterisation of income

Transfer prices are not merely manipulated by shifting profits but also by placing incomes or revenues generated under various heads of income. Such manipulations in related transactions are difficult to be caught and established because the revenue authorities cannot investigate beyond its jurisdiction and the same can only be perused if the countries have such a treaty with the other country which seeks to gain from such transactions.

(f) Shifting of business profits from high-tax countries to low-tax countries

An MNE is at the helm of affairs of its subsidiaries or related enterprises. An MNE can modify its profit margins and that attributable to its subsidiaries through transfer pricing. Overpricing by an MNE results in high and low profit for the parent company and its subsidiaries respectively and it is so done depending on where does the subsidiary and the parent enterprise is situated. Under-pricing by the parent company has just opposite effect and would also be a part of transfer pricing. This enables an MNE to shift the profit to a country where rate of taxation is lower, resulting in reduction of overall tax liability without altering its overall business profit.[13]

[11] Ibid.
[12] ibid 10.
[13] Sylvain R. F. Plasschaert, *Transfer Pricing and Multinational Companies-An Overview of Concepts, Mechanisms and Regulations* (Saxon House 1979) 48-49.

4. Factors responsible for making transfer pricing a dominant issue in international taxation

Transfer prices are essentially set within a single enterprise as against market prices which are set in transactions between independent enterprises, in markets which are not guided by monopolistic measures, where only 'market' is the sole guiding factor. Some of the factors responsible for making transfer pricing a dominant issue in international taxation are as follows:

i. The associated enterprises within the structure of an MNE system are guided by the "group's objectives", which may differ from the objectives of the associated enterprises. This makes transfer pricing a complex exercise.

ii. Considering the complexities involved in intra-firm transactions, tax authorities often find examination of transfer prices a difficult exercise in the absence of concrete or crystallised figures.

iii. Transfer pricing provides enormous flexibility to a multinational corporation for shifting funds and profits from one tax jurisdiction to another for lowering the end tax payable by the corporation.

iv. Transfer pricing helps multinational corporations to avoid the restrictions on transfer of profits and other checks which are put in place by tax jurisdictions to avoid seepage of revenue.

v. It can be used to under-cut shares of local shareholders which is an after-effect of the shifting of profits to other jurisdictions.

vi. The cynosure which is garnered by huge profits and the unwanted attention from competitors is often hedged by transfer pricing and the obligation to pay dividends on such profits also shifts bases.

It would render to oversimplification of issues to explain that deviation of transfer prices from arm's length prices is done with the sole object of avoiding tax but the said reason stands to be the primary motive as the other reasons are an aftermath of the said process and the process would have domino effect which would be beneficial to the MNEs and its associated enterprises.

5. Transfer Pricing and Role of Developing Countries

In the last few decades, involvement of MNEs in the economy of developing countries has resulted in substantial improvement and strengthening of such economies-in terms of both quality and quantity. The developing countries are no longer seen merely as sources of raw material, but as big markets for the products of MNEs and there market presence, being substantial, can no longer be ignored by such MNEs.

(a) With the advent of globalisation, the developing nations of the world have undergone metamorphosis from being mere suppliers of raw materials to nations which attract substantial foreign direct investment. The advent of globalisation has rendered the world as a global village and the developing nations can no longer be ignored when it comes to development of trade and supplies. The tax regime of developing nations is favourable for multinational corporations as such nations provide cheap labour and also cheap raw materials.[14]

(b) The transfer pricing impacts the revenue generation of developing nations adversely although their impact on developed nations may not be substantial. The regulations which are in place to curb the menace of transfer pricing are often used and manipulated by the multinational corporations to find loopholes and are used to the advantage of the multinational corporations. This often creates a wide chasm between tax avoidance and tax evasion.

(c) The fiscal regime of a developing nation needs to be effective for controlling transfer pricing by multinational corporations. An effective statute can reduce the negative impact of transfer pricing in a developing nation. The dilemma which the developing nations often face is that a stringent tax regime would reduce investments and a tax regime which could be dubbed as lenient could be a catalyst for tax avoidance which would adversely impact the revenue generation of the nation.

(d) The relation between MNEs and a developing nation is symbiotic as the MNEs cannot ignore developing nations as it is in these markets that the highest transactions take place and ignoring these may force the MNEs out of the competitive markets. Nor can the developing nations ignore the foreign direct

[14] V. S. Wahi, *Transfer Pricing, Law, Procedure and Documentation- an Indian and Global Analysis* (6th edn, Snow White July, 2015).

investments which are brought in by the MNEs. The development of the Gross Domestic Product of a nation depends upon the balance between the two factors.

(e) The advent of liberalisation of the Indian Economy and lifting of compulsory controls catalysed the impetus for a comprehensive regime for regulation of transfer pricing. The opening of the Indian economy goaded fiscal changes which were necessitated to curb the tax avoidance practised through transfer pricing by MNEs and the development has been discussed herein below.

6. Development of Legislation to Curb Transfer Pricing Abuses

The phenomenon of transfer pricing has been practised since the days of inter-country trading. However, the fiscal statues of various nations were not aptly armed to deal with the problem till 1900s. In 1915, the first recorded piece of legislation against transfer pricing was introduced in the United Kingdom and suit was soon followed by the United States in the year 1917. These legislation were not complete success but were nevertheless a point of beginning which could determine the prognosis of future (laws on the subject) across the world.

Though transfer pricing, in the period till 1950s was more concentrated with overvaluing or under-pricing of cross-border transactions, to increase profit margins of associated enterprises or related entities, the phenomenon was never considered to be a real threat till 1960s.

Post 1960s, the growth of international trade increased many fold and there was a corresponding exponential growth of multinational corporations across the nations. The countries across the globe were alive to the fact of erosion of tax base due to such corporations and the methods under the garb of transfer pricing were well recognised. The artificial profit sharing was the moot point which had to be plugged to control the phenomenon. Article 9(1) of the OECD draft[15] which related to associate enterprises was at

[15] Article 9 of the OECD Model Tax convention reads as " where (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other contracting State, or
(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of Contracting State and an enterprise of the other contracting state,And in either case conditions are made or imposed between the two enterprises in their commercialor financial relations which differ from those which would be made between independententerprises, then any profits which would, but for those conditions, have accrued to one of theenterprises, but, by reason of those conditions, have not so accrued, may be included in the profitsof that enterprise and taxed accordingly.

the helm of the fiscal changes which the countries were looking at and aspiring to achieve. The draft provided the guiding light for nations which wanted to put in place an effective fiscal regime to curb transfer pricing. The fiscal provisions estimate the profits which a multinational company might have earned had the transaction been guided by market forces.

Globalisation posed new challenges for policy making in relation to transfer prices and also opened new opportunities for the multinational corporations as the said corporations, with their presence in jurisdictions with varied tax regimes, could shift their profits and base such profits in jurisdictions with lower tax regimes.[16] The International Monetary Fund cautioned that one of the effects of globalisation is the impetus to problems of taxation which would primarily involve use and misuse of transfer pricing.[17]

The developed nations were not hedged from the effects of transfer pricing and the effects were felt in the 1970s when substantial erosion of the tax base in developed nations were steadily observed.

In 1979, the Organization for Economic Cooperation and Development (OECD) published a report titled "Transfer pricing and Multinational Enterprises." The report is considered to be one of the early treatises on transfer pricing with thorough analysis of the provisions.

There has always been a debate on the approach which is more apt for arriving at the original price of a transaction which is not guided by market forces. The arm's length principle (ALP) was re-christened in the said report as a principle which was suitable for arriving at the original price of the transaction. It was in this report that the methods of arriving at the arm's length price were elucidated. The said methods are as follows:

(a) comparable un-controlled price method

(b) resale price method

(c) cost plus method

[16] Prem Sikka & Hugh Wilmott, "The Dark Side of Transfer Pricing: Its Role in Tax Avoidance and Wealth Retentiveness Critical perspectives on Accounting" (2010) 21(4) 342- 356 < http://repository.essex.ac.uk/8098/1/WP2010-1%20-%20PSikka%20Transfer%20Pricing%20Paper.pdf> accessed on 18 February 2017.

[17] Vito Tanzi "Globalization, technological developments, and the work of fiscal termites" (2000) IMF Working Paper WP/00/181<https://www.imf.org/external/pubs/ft/wp/2000/wp00181.pdf> accessed 17 February 2018.

The report cautioned about the dangers of using other methods for arriving at the arm's length price as the same could be faulty. The report did not advocate the cause of one of the methods in precedence to the other methods and opined that the methods could be used in conjunction with one another.[18]

In another report titled "Transfer Pricing and Multinational Enterprises Three Taxation Issues," published by OECD in 1984, the analysis of intra-bank interests was done as the same were often resorted to by multinational corporations for eroding tax base of a nation to its advantage.[19]

A new anti-avoidance legislation was introduced in the United Kingdom, in 1984, titled *"The Controlled Foreign Corporation (CFC) Rules"* with the objective to check the use of tax havens by corporations to shift their profits to such jurisdictions although the resources of nations with higher tax rates would be used by such corporations.

Thereafter, reports were published by OECD in the years 1987, 1988 and 1994 and a wide gamut of issues varying from thin capitalisation to taxation effects of gains or losses in foreign exchanges were analysed.

Subsequent reports were published by OECD in the years 1995, 1996, 1997 and 1999. This temporal frame was witness to the exponential growth of multinational corporations and as a result of which, many developed and developing nations started giving more attention to the issue of transfer pricing. The countries in wake of such growth of the phenomenon, introduced comprehensive legislations to curb the phenomenon.

7. Legislative Framework to Deal with Tax Avoidance Through Transfer Pricing

There are two broad approaches, applied worldwide, which deal with shifting of profits from one jurisdiction to another. The approaches are as follows:

(a) Global Formulary Apportionment method: Under this method, the global consolidated profit of a multinational group is distributed among the related enterprises which base out of in various countries on the basis of a formula. This

[18] V. S. Wahi, *Transfer pricing law procedure and documentation an Indian and Global Analysis* (5thedn, Snow White Publication 2013) 296.
[19] ibid *(*296).

formula takes into account costs of products, assets, salaries of employees, sales and the figures thereof, etc. Scope for manipulation by enterprises often increase exponentially and the same is achieved by shifting of factors, which include but is not limited to, manipulating capitals and sale figures to jurisdictions which have low tax rates The method may often turn out to be oblivious to market forces and practical facts which guide a transaction;[20] or

(b) Arm's Length Principle of transfer pricing Adjustments approach: This method, which has been elucidated in Article 9 of the OECD Model Tax Convention, supports avoidance of double taxation in transactions between nations. In terms of this principle, a transaction between two related entities should be treated at par with a similar transaction between unrelated parties where the transaction would be guided by market forces.

In the first method, the entire corporate group is taxed as a whole and the global profits are allocated amongst the associated enterprises in different countries on the basis of a pre-determined formula. In the other method, associated enterprises are taxed as separate entities as if they are at arm's length from one another. The second method is the most adopted method, because corporate laws recognise independent status. In *Iljin Automotive Private Ltd v The Asst. CIT*,[21] both the alternative legal approaches to deal with transfer pricing were discussed.

8. History of Transfer Pricing Legislation in India

(a) Development of transfer pricing legislation in India

There was no comprehensive provision in the Indian Income Tax Act, 1961 (IT Act), to deal with transfer pricing. The lack of comprehensive provisions would not, however, mean to suggest that there was no provision at all to deal with the issue. There were scattered provisions in the fiscal statute which if interpreted, would curb the menace of transfer pricing. These included Section 40A(2), which empowered the assessing officer to examine the propriety of expenditure incurred where the payment was made to specified related parties.

[20] [2001] 116 Taxman 251 (ART).
[21] [2012] 16 ITR(T) 481 (Chennai-Trib).

Moreover, Section 92 of the un-amended IT Act had provided for the calculation of profits which could be expected to be derived by a resident when such residents undertake cross-border transactions with related parties.

India has entered into various Double Taxation Avoidance Agreements with several countries and such treaties usually incorporate provisions which deal with cross-border transactions with related parties which are in line with OECD's or UN's Model Tax Convention Treaty. Article 9 of OECD guidelines usually addresses a wide gamut of transfer pricing issues, but the effect of such provisions was diluted by the then existing provisions of fiscal statute. As a result, an amendment was felt for by incorporating specific provisions in the fiscal statute.

An amendment was brought in by the Finance Act, 2001 by incorporating Sections 92, 92A, 92B, 92C, 92D, 92E and 92F in the IT Act to plug in the loopholes for dealing with transfer pricing. The amendment was effective from April 1, 2001 which related to the assessment years 2002-2003.

The draft Transfer Pricing Rules were issued by the Central Board of Direct Taxes on August 21, 2001. Rules 10A to 10E of the Income Tax Rules, 1962 and Sections 271 (1)(c), 271 AA, 271 BA and 271G of the IT Act are the relevant provisions for dealing with transfer pricing.

(b) Intention of the Legislature

The legislative intent behind the Amendment of 2001 is aptly captured in the following words:

> '*The basic intention underlying the new transfer pricing regulations is to prevent shifting out of profits by manipulating prices charged or paid in international transactions, thereby eroding the Country's tax base*.'[22]

The transfer pricing regulations of India are broadly based on the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ('OECD Guidelines'). The methods which are prescribed to be followed along with the penalties

[22] Para 55.6 of CBDT Circular No. 14/2001.

which are to be levied have an independent flavour though the essence is derived from the OECD guidelines.

The regulatory framework of transfer pricing encapsulates within its gamut: (i) the anti-avoidance provisions[23] and penalty provisions[24] (ii) provisions as incorporated in the Income-tax Rules, 1962[25] and (iii) departmental guidelines.[26]

(c) Transfer pricing Legislation through judicial interpretation

In *Gharda Chemicals Ltd.* v *DCIT*,[27] it was held that the rationale behind the transfer pricing provisions is to curtail the avoidance of tax in India. It was stated by the Tribunal that the intent and purpose of the provisions was to make certain that the transactions between the associated enterprises should not be artificially manipulated in a manner that the ultimate tax payable in India is reduced. In *Serdia Pharmaceuticals (India) Private Limited v Assistant Commissioner of Income Tax,*[28] it was observed that in situations where associated enterprises enter into a transaction which is not guided by market forces, the differences between the guided and the independent conditions in financial and commercial terms are attributed to their relationship and such impact is sought to be neutralised by the fiscal regulations. In *Iljin Automotive Private Ltd v The Asst. CIT,*[29] the Tribunal observed that Arm's Length Price has been conceptualised to hypothetically arrive at the price of transaction between unrelated parties to prevent evasion of tax.

(d) Analysis of the Pejorative Terminology

The term 'transfer pricing' is dominant in international taxation and has a pejorative connotation associated with its use. It is the phenomenon which robs nations of their legitimate revenue dues and affects the growth of nations. The phrase has rightfully earned its epithet of being pejorative as it is a method of tax avoidance which has crossed the boundary and is classified as tax evasion. If the phenomenon is not handled properly, transfer pricing disputes could become a major impediment in the growth of international trade by eroding

[23] Sections 92-92F of Income Tax Act, 1961.
[24] Sections 271(1) (c), 271AA, 271BA, 271G of Income Tax Act, 1961.
[25] Rules 10A to 10D of Income Tax Rules, 1962.
[26] CBDT Circular No. 12/2001, dated 23 August 2001 and Instruction No. 3 of 2003, dated 20 May 2003..
[27] [2010] 130 TTJ 556 (Mumbai).
[28] [2011] 44 SOT 391 (Mumbai).
[29] Supra n 21.

the revenue base of nations which fail to device appropriate and efficient measures for handling the menace.

Transfer pricing is a phenomenon which has now occupied a prime position in international taxation and the same has a domino effect on other nations. The effect of applying transfer pricing by multinational companies comes with a caveat. The phenomenon often runs the risk of invoking a catalytic effect amongst the various jurisdictions to come up with more liberal fiscal regimes for attracting foreign direct investments. Such incentives are dangerous and should be checked as the same are self-destructive measures.

9. Conclusion

The revenue generation and transfer pricing regulations are balanced delicately in a developing nation such as India. The balance needs to be delicately treaded upon so that the strict laws do not impact revenue generation of the Country or weak laws do not embolden mammoth manipulation of transfer prices to erode the tax base of the nation. The pejorative meaning which is attributed to transfer pricing is the effect of the artificial manipulation by overzealous corporations who seek to maximise their profits by depriving jurisdictions of their legitimate dues. Transfer pricing is often a misnomer and the term should have been transfer 'mis-pricing'. The artificial pricing results in erosion of tax base of a nation and have implications which are far and wide for a social welfare state like India. The effects of erosion of tax base are felt by individuals of the nation. The Government has lower financial capability to invest in welfare activities and the same is detrimental to the development of a developing nation. However, a strict regime against transfer pricing is detrimental to the development as the multinational corporations would then not invest in such jurisdictions. The same would mean lack of foreign direct investments which would, in turn, hurt the developing nations such as India. The challenge lies in curbing the transfer mispricing while catalysing the growth trajectory of the nation. Transfer pricing needs to be checked without harming the prospect of investment by multinational corporations. The fiscal framework of India is delicately balanced and aptly arranged to plug statutory loopholes and also to encourage investment by multinational corporations which paves the way for placing our nation in the league of developed nations of the world.

WHY POLITICAL ACTORS IN DEVELOPING COUNTRIES ENACT FREEDOM OF INFORMATION LAWS: A RATIONAL CHOICE APPROACH

Subrata Biswas*

ABSTRACT**

Control over critical information provides a breeding ground for corruption in the political system and granting ordinary citizens any access to such information is sure to neutralise such scope for corruption. Why even then political actors all over the world, especially in the developing countries in the recent past, took initiatives to enact freedom of information (FOI) laws? Is there any contradiction in terms that political actors who are normally resistant towards transparency initiatives should take the plunge in institutionalising transparency by way of bringing FOI laws? This paper argues that this behaviour of political actors can be best explained with the help of Rational Choice approach. A rational individual is always expected to determine his choices based on his perception of cost-benefit analysis. As a rational human being, he is expected to be tilting in favour of the scenario where his perceived aggregated benefits would be more than his perceived aggregated costs. This paper seeks to establish, FOI laws increase the political costs no doubt; but in certain circumstances that are associated with a deep sense of political uncertainty, their perceived benefits outweigh political costs. And it is mostly under those circumstances of significant political uncertainty that FOI laws have been passed where they have been passed in recent times. A study of political climate that prevailed at the time of passage of such FOI laws goes to establish this hypothesis. The research methodology adopted in this paper is doctrinal and essentially consists of a review of existing literature of political cost-benefit analysis in the backdrop of passage of such FOI laws in a number of developing countries in the recent past and subsequent testing of the same cost-benefit analysis framework in the Indian context without, however, any reference to regression models.

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1. Knowledge is Power: Why Share Inputs?

Information *per se* may not be power, but gaining access to information by an individual marks the significant first step towards empowering himself. In absence of relevant information about what the government professes to do vis-a-vis what it actually does, people's participation in the democratic process loses its significance. Getting to know about the good things that are done on the ground by a government instils a positive feeling in the popular psyche. Similarly, information about governmental shortcomings or deliberate derailments of declared deliverables is liable to galvanize the electorate into political action geared towards their own development. Inaccessibility to critical information in the politico-economic domain thus not only rids a system of its transparency which remains an essential and inescapable feature of good governance but also robs democracy of its pith and substance since the *demos* in such a case suffer from a sense of alienation.

Barring a few countries where Freedom of Information (FOI) laws had been passed much earlier (like in a number of West European countries), there was a spate of passage of FOI laws in nearly 70 countries between 1990 and 2005[1] and I shall restrict myself to considering them in this paper. Isn't it intriguing that so many countries—an overwhelming majority of them *'developing'* countries[2]—suddenly if not apparently systematically felt an urge to honour transparency and guarantee access to government information in favour of ordinary individuals? Isn't it that the political actors normally should find these FOI laws a thorn in their side?[3] In fact, the existing literature in this regard pointedly suggests that the political class normally has been resistant towards sharing of critical information about their

[1] David Banisar, 'Freedom of Information Around The World 2006: A Global Survey of Access to Government Information Law' (Privacy International 2006) <http://www.freedominfo.org/documents/global_survey2006.pdf.> accessed 14 February 2018.

[2] Only 12 countries out of 70 may be said to not have been structurally affected by LPG.

[3] Daniel Berliner, 'The Political Origins of Transparency' (2014) 76 (2) The Journal of Politics 479-491; In Nigeria, for example, the FOI law was passed in 2011, almost 20 years after the first civil-society advocacy on the issue started in 1993; Media Rights Agenda, 'Campaigning for Access to Information in Nigeria' (Lagos, Media Rights Agenda 2003) <http://www.mediarightsagenda.net/cain.html> accessed 12 February 2018; Obe, Ayo, 'The Challenging Case of Nigeria' in Ann Florini, *Right to Know: Transparency for an Open World* (New York, Columbia University Press 2007) 143-175; Passage was delayed for years and even vetoed by President Olusegun Obasanjo, despite his promises to combat corruption and despite his having been a founding member of Transparency International.

activities in office and civil society actors have had a stiff challenge to have access to such information[4]. Let us explore then if there exists any contradiction in terms.

I shall argue that there is no contradiction as such; that the political actors in all these cases adopted a *rational choice* approach to legislate FOI laws. It's not that such an act of exposing themselves to public scrutiny was devoid of political costs[5]. But their perceived benefits from such passage of FOI laws outweighed the perceived costs thereof[6].

2. Passage of FOI Laws: A Rational Choice Approach

Despite their broad differences, rational choice theorists basically argue that human beings are mostly guided by a cost-benefit analysis in terms of their own interests and preferences. Of course there can be situations like *Prisoner's Dilemma* where an absolute adherence to one's own benefit in the strictest sense of the term can veritably lead to disasters that mercilessly engulf such *rational* individuals as well and they suffer severely in the long run. In fact, the theory of *Bounded Rationality* as propounded by Herbert Simon unfailingly brings out the stark limitations of human rationality at the individual level and thereby highlighting the importance of collective responsibility in social life. But left to themselves, human individuals do remain mostly motivated in terms of maximizing their own payoffs measured in their unique utility scale.[7]I shall try to see how far this has been true in the context of passage of FOI laws in a number of countries ridden with political uncertainty in the recent past.

[4] Irma, John Ackerman and Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 (1) Administrative Law Review, 2006 85-130; Ann Florini, *The Right to Know: Transparency for an Open World* (New York, Columbia University Press 2007); David Banisar, 'Freedom of Information Around The World 2006:A Global Survey of Access to Government Information Law' (Privacy International, 2006) <http://www.freedominfo.org/documents/global_survey2006. pdf.> accessed 15 February 2018.

[5] J. G. Pinto, 'Transparency Policy Initiatives in Latin America" Communication Law and Policy' (2009) 14 (1) 41-71.

[6] Terry Moe, 'The Politics of Structural Choice: Toward a Theory of Public Bureaucracy' in Oliver Williamson, *Organization Theory: From Chester Barnard to the Present and Beyond* (Oxford University Press 1990) 116-153.

[7] Roger Myerson, *Game Theory* (1st paperback edn, Harvard University Press 1997).

My assumptions are that legislators too are *rational individuals*. They are expected to be weighing political options as to what course of action would be most beneficial[8] to them and they are expected to be acting accordingly. The more rational ones amongst them would be in a position to anticipate which way the political wind blows.

3. The Cost Benefit Analysis of FOI Legislation

Let's try first to understand in simple terms as to what could be the possible costs for the political actors to incur as they embark upon a process of institutionalizing transparency. We would grasp it better if we seek to delineate in the first place the benefits that political actors enjoy when they have a monopoly of access to information. What are those benefits? There are always significant segments of population who remain dissatisfied with the performance of the occupants of political office and exert pressure on the latter to perform more. There are also rival constituencies who are eager to see exit of current political actors from office so that favourites of the former can enjoy perks of power. In both the cases access to critical information plays a big role. How the present incumbents conduct themselves, how they are going back on their electoral promises, whether they are taking bribes for awarding contracts, what consideration they are accepting if they show undue favours while awarding contracts, what sort of institutional inaction is resorted to in the face of actionable complaints against those who flout rules just because they may happen to be cronies of powerful actors, whether there is any hypocritical hiatus between what the actors profess and what they practise, all these are liable to be fairly less unclear if critical information in this regard would reach the public domain.

FOI laws interestingly seek to ensure flow of such information into the public domain. They empower individuals towards eliciting critical information and create and strengthen rival constituencies. FOI laws have a structured framework within which it is fairly difficult to withhold flow of most information, i.e. barring in regard to a few exceptional areas such as

[8] When I say most beneficial, I assume the legislators are not absolutely blind to some costs associated with such passage of FOI laws but they are guided by the overall cost-benefit analysis where aggregated benefits would outweigh aggregated costs.

national security, etc. And once politically sensitive information comes out into the public domain, the same may be used by a number of interested stakeholders and not just by those who initially sought it. An average political actor is not expected to welcome this because in such an eventuality his political fortunes are liable to confront a threat of reversal.

The tricky question, thus, emerges as to why then important political actors would be interested in FOI laws getting enacted and exposing themselves to such a scenario where their own perks of power would face a prospect of being diminished.

The answer lies in the fact that FOI laws bring not just costs, but also benefits. Just as a well-functioning, independent Central Bank or a robust judiciary actually goes to benefit—*despite certain inherent costs*—the rational political elite in a modern democracy accommodating multiple stakeholders, often with conflicting interests, similarly the very institutionalization of FOI laws provides the key to some political benefits for the calculative political actors.

The first is to gain greater support from constituencies evaluating promises of transparency, anticorruption and good governance since an FOI law entails more credible commitment. Ferejohn argues that greater accountability can project politicians in a better light and grant them greater public support. While the fact remains that political actors in general have a tendency to flout election promises of transparency, passage of an FOI law however makes this more difficult and thus makes promises of transparency at least look more credible. Moreover, positive evaluations of such commitments may come from the public at large or from specific constituencies, such as civil society, local political leaders, or the press, which a mass of less informed voters may look to. Thus, the more competitive the political environment, the more obvious the potential gains from offering a credible reform to such constituents, which can yield support or neutralise potential avenues of criticism.[9]

[9] Berliner (n 3).

Second, political actors who apprehend their days in office are numbered can go for certain legal or institutional reforms so that they can access critical information for political purpose in the wake of their exit from corridors of power. This is similar to insurance models in which political actors institutionalise independent judiciaries in order to protect their own future safety and property in case they lose office[10]. Similarly, civil service regulations, accounting offices and anti-corruption laws too may be seen as *''a way of constraining one's political opponents from exploiting state resources for their own gain''* in case incumbents lose power.[11]

Political office-bearers who monopolise access to information for ulterior motive are not expected to be completely disinterested in accessing such information when they are out of office. Institutionalizing transparency helps to ensure future access both as an end in itself *(and thus, garnering political support)* and as a means of future monitoring. Moreover, when these actors become more or less sure that their continuance in office will soon come to an end, they are interested in ensuring that their political opponents likewise are restricted by such costs of exposure forced by an FOI law. In a way, this goes to reduce the perceived costs of enacting FOI laws and at the same time heightens the perceived benefits thereof during their days of prospective political *unemployment*. As uncertainty over maintaining office in the future increases, this option becomes more attractive. By binding themselves to transparency, they likewise bind their opponents as well.

4. Case Studies

While standalone unique features of certain political environments may influence passage of an FOI law in individual countries, there are two unmistakable features which can be expected to result in greater political uncertainty: (i) when opposition parties are able to present themselves as veritable rivals to those in office and (ii) when frequent turnovers in

[10] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003); Brad Epperley, 'The Provision of Insurance? Judicial Independence and the Post-Tenure Fate of Leaders' (2013) 1 (2) The Journal of Law and Courts 247-278.

[11] Anna Grzymala-Busee, 'The Discreet Charm of Formal Institutions: Post-Communist Party Competition and State Oversight'(2006) 39 Comparative Political Studies 271-300.

office have taken place. It is in such circumstances where, all else equal, FOI passage should be more likely.

I refer to logistic-regression models presented by Daniel Berliner[12] based on Beck, Katz and Tucker[13] where two independent variables—*strength of political opposition[14] and duration of party control of political executive, i.e. turnover frequency*—were studied along with certain control variables like pressure from national and international civil society initiatives, robustness of media, strength of intervention by judiciary and the desire to be in league with other countries around passing similar FOI laws.

The regression results reveal that other factors remaining unchanged the factors representative of political uncertainty, i.e. strength of opposition parties and turnover frequency in political office remain the most significant factors associated with passage of FOI laws. The other factors can play a supporting role in this regard but theprobability of success of their support largely hinges on the perceived level of uncertainty prevalent in a given political landscape.

5. The Indian Context

The UPA-I government may have passed the RTI Act in 2005 at the national level but a number of states in the country had already passed their own FOI legislation much prior to such federal enactment. In fact, the first legislation of this kind was passed by Goa in 1997 followed by the government of Tamilnadu in the same year. Subsequently, this was emulated by states such as Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharshtra (2002), Assam (2002), Jammu and Kashmir (2004), etc., before the federal law rendered redundant

[12] Berliner (n 3).

[13] Nathaniel Beck, Jonathan N Katz & Richard Tucker, 'Taking Time Seriously' (1998) 42 (4) American Journal of Political Science 1260-1288.

[14] This was measured in terms of share of electoral votes garnered by the parties in major elections.

such provincial endeavours and exposed all government bodies alike across the countryto the demands of the RTI Act 2005.

A rough application of the same Barliner model, i.e., the one projecting political competitiveness as the most significant factor behind an FOI legislation would give us a strong reason to suspect that all these provincial initiatives had been embraced by the political actors in a desperate bid to minimise the apprehended losses in the event of being out of political office. Goa probably presents the most appropriate case study in this regard as the coastal state saw more than 10 Chief Ministers within a span of 10 years between 1990 and 2000!

Tamil Nadu too presented a fiercely competitive political field following the demise of Marudur Gopalan Ramachandran in 1987 when either of two parties— Dravida Munnetra Kazhagam or All India Anna Dravida Munnetra Kazhagam—ran the show and in extremely close succession. Whether it was in Rajasthan (2000) or in Delhi (2001) or in Maharashtra (2002) or in Assam (2002) or in Jammu and Kashmir (2004), there prevailed in all the cases a sense of acute uncertainty in the political milieu around the time of passage of FOI laws[15] and the political actors sought to institutionalise transparency by way of embedding these legislative safeguards in the political system.

And it would be extremely naïve to deny the tell-tale signs of acute instability that clouded the federal political environment in India in the years preceding the final passage of the RTI Act in 2005. The NDA regime had to go through its own initial tremors following the

[15] In Rajasthan, Congress (I) finally succeeded for just one term in 1998 after having conceded to BJP for nearly a decade since the late 1980s and was very unsure about its continuance in future. In 2003, it lost to BJP once again. In Delhi, Congress (I) ruled till 1990 when BJP took over and Congress (I) had to sit on the opposition till 1998 when it returned to office and enacted the law in 2001. The Maharashtra political landscape was perilously exposed to coalition politics since 1995 when the BJP-Shiv Sena combine formed the first coalition government while in1999 the state witnessed a new coalition government of NCP and Congress (I). None could be very sure about its political continuance. Assam presented a political landscape characterised by intense turf war between Congress (I) and Assom Gana Parishad since late 1980s and the FOI law was passed after Congress (I) returned to office in 2001. Similarly in Jammu and Kashmir, after years of dominance, the political fortunes of National Conference declined in 2002 when the People's Democratic Party and Congress (I) combine formed government. Naturally, the new government was not too sure about its political future.

1998 elections and the political environment was fraught with significant pressure from internal actors and uneasy nudges from the apex court at the turn of the millennium. In the wake of some strong civil society moves, the political actors at the federal level did come out with the Freedom of Information Act in 2002 but interestingly enough, it was never notified.

Why was it not notified? Did the NDA-II government foresee any signs of stability for itself? In fact, a study of the-then national media would provide an impression that the ruling actors had been almost very sure about the NDA-II being comfortably re-elected in 2004 and form NDA-III.[16] This provided a political opportunity to UPA-I to ratchet it up further in the form of RTI Act in 2005.

In contrast, the non-contemplation of such an FOI law in a State like West Bengal which had been far removed from any spectre of political uncertainty in electoral terms at least till 2005 was all too evident.

6. Conclusion

Thus, it remains to be said that despite the perceived high costs of rendering government information accessible to the people, the rational political actors have exhibited their calculative ability in recognising political benefits outweighing the accompanying costs. And such perceived benefits are at their highest when the political certainty is at its lowest. In other words, the probability of passage of FOI legislation varies in direct relation to the degree of perceived political uncertainty and in inverse relation to the perception of political stability. The other socio-political factors too may have their bearing on such passage but in subservience to the original factors of political uncertainty or the lack of it. This has been vindicated here not only in the context of country studies but also in relation to a number of Indian provinces that had taken such FOI initiative even prior to the federal legislation in India.

[16] I wonder if this over expectation of NDA-II could be responsible for such non-notification and suppression of the FOI Act passed in 2002; Prabhu Chawla, 'Face Off' India Today (26 January 2004).

Of course, this paper has not studied as to what the political actors do to minimise the costs of FOI implementation as and when it hurts them or what they do when such laws face them in a political environment which does not smack of political uncertainty. There may be cases ranging from accommodating multiple restrictive provisions in the legislation to rendering monitoring bodies deliberately weakened by way of understaffing them or imposing on them excessive political controls. I have not looked at those issues here since my point of concern was to study the politics which remains primarily responsible for the *genesis* of FOI laws if one would choose to study the issue from the rational choice perspective.

GIRISH: AN IRON WALL BETWEEN RTI AND PUBLIC INFORMATION

Madabhushi Sridhar Acharyulu*

ABSTRACT**

There is one order of the Supreme Court of India preceded by two decisions of the Central Information Commission (CIC) followed by another CIC order, supported by an Office Memorandum, which damaged the objectives of RTI Act, 2005. Whatever little was achieved through a continuous struggle (of people) to make public authorities accountable was almost defeated by this order. Girish Ramachandra Deshpande was the single-most pocket-pistol decision that shot dead millions of RTI applications and thousands of second appeals all over the country. Because of this decision, government employees are resisting the disclosure demands with the help of the exemption clause under Section 8(1)(j) of the RTI Act. This paper tries to underscore the critical (ir)relevance of the decision in light of the provisions and operative frameworks governing transparency laws vis-a-vis privacy laws. The paper makes an attempt to analyse the pros and cons of the ratio of Deshpande's case and draws certain inferences on the basis of the analysis of the case and related cases governing the same matter. It is a doctrinal study and employs analytical and descriptive methods to reach at conclusive findings.

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** The views expressed in this article are those of the author and do not reflect the official policy or position of the Centre for Regulatory Studies, Governance and Public Policy, WBNUJS, Kolkata.

1. Introduction

The privacy of a public servant is becoming a highly contentious issue since the advent of the Right to Information Act, 2005 that has enabled Indian citizens to seek information about public authorities and their officers. An employee of the state is legally defined as a public servant and every citizen is a virtual employer of such a public servant in the electoral democracy. Can privacy hamper the regime of transparency and scrutiny of public conduct of a public servant? If government employees' privacy is limited, up to what extent does it restrict? The conflict between the right to privacy and the need for transparency is the centre of controversy in many cases before the Information Commissions and the Constitutional courts, more so in light of the *Girish Ramachandra Deshpande's* case. As it travelled from the second appeal in Central Information Commission (CIC) to the Supreme Court it had set a controversial standard for 'personal' information causing serious damage to the right to information. The Apex court's order of dismissing the Special Leave petition (SLP) in *Girish Ramachandra Deshpande* is being very frequently used as the Apex court's judicial declaration of law to deny any information about the memos, complaints, disciplinary action or conduct of a public servant.[1]

The conflict between the right to privacy and the statutorily recognised need of transparency of persons involved in the administration is the premise of decision in *Girish* case. This case revolves around Section 8(1)(j) of RTI Act, which says: "information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information: Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person."

Section 8(2) of the RTI Act states: "Notwithstanding anything in the Official Secrets Act, 1923 (Act 19 of 1923) nor any of the exemptions permissible in accordance with

[1] K. S. Radhakrishnan & Deepak Mishra JJ in *Girish Ramchandra Deshpande v Central Information Commissioner & Ors* Special Leave Petition (Civil) No. 27734 of 2012 along with 14781/2012 (rejected on 3 October 2012) (2012) 9 SCALE 700.

sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests."

A closer examination and analysis of Section 8(1)(j) and 8(2) would legally mean that information can be exempted from disclosure only if two essential components exist: (a) where the information requested is (i) a personal information; and (ii) the nature of information requested has apparently no relationship to any public activity or interest; (b) where the information sought is (i) a personal information; and (ii) the disclosure of information would cause unwarranted invasion of privacy of the individual concerned. There can be seven exceptions in which information can be parted even if the information sought is personal. The exceptions are as follows:

(a) The information relates to public activity
(b) The information relates to public interest
(c) The information disclosure will not cause unwarranted invasion of privacy of the individual concerned
(d) Though information is personal, and not related to public activity or interest, larger public interest justifies such disclosure
(e) Though information is personal and its disclosure can cause unwarranted invasion of someone's privacy it can still be disclosed if larger public interest so justifies
(f) Though information is personal, not related to public activity or interest, disclosure causes unwarranted invasion of privacy of the individual, no larger public interest involved, yet it can be given to a citizen if it can be furnished to the Parliament or State Legislature [Proviso to Section 8(1)]
(g) Though information is personal, not related to public activity or interest, disclosure causes unwarranted invasion of privacy of the individual, it can still be given if public interest in disclosure outweighs the public interest in its non-disclosure [Sec 8(2)].

2. Privacy of a Public Servant: Girish Orders

Mr. *Girish* submitted an application on 27th August 2008 before the Regional Provident Fund Commissioner (Ministry of Labour, Government of India) calling for various details relating to the third respondent. The response[2] of the public authority was:

[2] The response is quoted verbatim with minor copy corrections.

(a) Copy of the appointment order of Shri. A. B. Lute is in three pages. You have sought the details of salary in respect of Shri. A. B. Lute, which relates to personal information the disclosure of which has no relationship to any public activity or interest; it would cause unwarranted invasion of the privacy of individual, hence, denied as per the RTI provision under Section 8(1)(j) of the Act.

(b) Copy of the order of granting Enforcement Officer Promotion to Shri. A. B. Lute, is in 3 Number. Details of salary to the post along with statutory and other deductions of Mr. Lute are denied to provide as per RTI provisions under Section 8(1)(j) for the reasons mentioned above.

(c) All the transfer orders of Shri. A. B. Lute, are in 13 Numbers. Salary details are rejected as per the provision under Section 8(1)(j) for the reason mentioned above.

(d) As to Point No. 4: The copies of memo, show cause notice, censure issued to Mr. Lute, are not being provided on the ground that it would cause unwarranted invasion of the privacy of the individual and has no relationship to any public activity or interest. Please see RTI provision under Section 8(1)(j).

(e) As to Point No. 5: Copy of EPF (Staff & Conditions) Rules 1962 is in 60 pages.

(f) As to Point No. 6: Copy of return of assets and liabilities in respect of Mr. Lute cannot be provided as per the provision of RTI Act under Section 8(1)(j) as per the reason explained above at point No. 1.

(g) As to Point No. 7: Details of investment and other related details are rejected as per the provision of RTI Act under Section 8(1)(j) as per the reason explained above at point No. 1.

(h) As to Point No. 8: Copy of report of item-wise and value-wise details of gifts accepted by Mr. Lute, is rejected as per the provisions of RTI Act under Section 8(1)(j) as per the reason explained above at point No. 1.

(i) As to Point No. 9: Copy of the details of movable, immovable properties of Mr. Lute, the request to provide the same is rejected as per the RTI Provisions under Section 8(1)(j).

(j) As to Point No. 10: Mr. Lute is not claiming for TA/DA for attending the criminal case pending at JMFC, Akola.

(k) As to Point No. 11: Copy of Notification is in 2 numbers.

(l) As to Point No. 12: Copy of certified true copy of charge sheet issued to Mr. Lute – The matter pertains with head Office, Mumbai. Your application is being forwarded to Head Office, Mumbai as per Section 6(3) of the RTI Act, 2005.

(m) As to Point No. 13: Certified True copy of complete enquiry proceedings initiated against Mr. Lute – It would cause unwarranted invasion of privacy of individuals and has no relationship to any public activity or interest. Please see RTI provisions under Section 8(1)(j).

(n) As to Point No. 14: It would cause unwarranted invasion of privacy of individuals and has no relationship to any public activity or interest, hence, denied to provide.

(o) As to Point No. 15: Certified true copy of the second show-cause notice – It would cause unwarranted invasion of privacy of individuals and has no relationship to any public activity or interest, hence, denied to provide.

Deciding the second appeal on 18th June 2009,[3] the CIC said, "the question for consideration is whether the aforesaid information sought by the Appellant can be treated as 'personal information' as defined in clause (j) of Section 8(1) of the RTI Act. It may be pertinent to mention that this issue came up before the Full Bench of the Commission in Appeal No.CIC/AT/A/2008/000628 (*Milap Choraria v Central Board of Direct Taxes*) and the Commission vide its decision dated 15.6.2009 held, "the Income Tax return have been rightly held to be personal information exempted from disclosure under clause (j) of Section 8(1) of the RTI Act by the CPIO and the Appellate Authority, and the appellant herein has not been able to establish that a larger public interest would be served by disclosure of this information. This logic would hold good as far as the ITRs of Shri. Lute are concerned. I would like to further observe that the information which has been denied to the appellant essentially falls in two parts– (i) relating to the personal matters pertaining to his services career; and (ii) Shri Lute's assets & liabilities, movable and immovable properties and other financial aspects. I have no hesitation in holding that this information also qualifies to be the 'personal information' as defined in clause (j) of Section 8(1) of the RTI Act and the appellant has not been able to convince the Commission that disclosure thereof is in larger public interest."

Aggrieved by the CIC order, the petitioner filed a writ petition,[4] which was dismissed by a Single Judge of Bombay High Court, Nagpur Bench. Then he filed a Letters Patent

[3] CIC Decision in *Girish R Deshpande v Ministry of Labour and Employment & EPFO* No 1989/IC(A)/2008 in F. No. CIC/MA/A/2007/00825, 863 (decided 21 February 2008).

[4] Mr. Justice B P. Dharmadhikari of Bombay High Court, Nagpur Bench in *Girish R Deshpande* No. 4221 of 2009 (decided on 16 February 2010).

Appeal (LPA)[5] before the Division Bench, Bombay High Court at Nagpur and that also was dismissed. The appellant then filed an SLP before the Supreme Court. He contended that some documents sought for were pertaining to the appointment and promotion, assets and liabilities and gifts received by the third respondent, and the disclosure of those details would not cause unwarranted invasion of privacy. He argued that the meaning of privacy under Section 8(1)(j) of the RTI Act widens the scope of documents warranting disclosure and if those provisions are properly interpreted, it could not be said that documents pertaining to the employment of a person holding the post of an enforcement officer could be treated as documents having no relationship to any public activity or interest. He also pointed out that in view of Section 6(2) of the RTI Act, the applicant making request for information is not obliged to give any reason for the requisition and that the CIC was not justified in dismissing his appeal.

The appellant did not find any remedy in the Supreme Court either. Not heeding to the arguments put forward by the appellant, the Apex court judges, Mr. K. S. Radhakrishnan and Dipak Mishra, JJ dismissed the SLP on October 3, 2012 saying, "We are in agreement with the CIC and the courts below that the details called for by the petitioner, i.e., copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment, etc., are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression 'personal information,' the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right. The details disclosed by a person in his income tax returns are 'personal information,' which stand exempted from disclosure under clause(j) of Section 8(1) of the RTI Act, unless it involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information. The

[5] D D Sinha and A P Bhangale, JJ of Bombay High Court before the Division Bench of at Nagpur in *Girish R Deshpande* LPA No. 358 of 2011 on 21 December 2011.

petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act. We are, therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, we are not inclined to entertain this special leave petition. Hence, the same is dismissed."

Thus, the Division Bench (DB) of the Supreme Court agreed with the conclusions of the DB of the Bombay High Court. Naturally, the decision assumed great significance and Public Information Officers (PIOs) started using it to deny information about complaints filed against public servants and also about action taken, if any. The decision also had significant effect on CIC. In a second appeal by Mr Manoj Arya, RTI Activist versus PIO Cabinet Secretariat, Learned Commissioner Shri. Satyanand Misra, the then Chief Information Commissioner,[6] refused to provide the copies of complaints and other related information about a public servant quoting the Division Bench order of the Hon'ble Supreme Court in *Girish*.

The Supreme Court order had its way to the executive as well. On 14th August 2013, the Department of Personnel and Training (DoPT) issued an Office Memorandum (OM) No. 11/2/2013-IR (Pt.) on disclosure of personal information under RTI Act, quoting the operative part of the order of the Supreme Court in *Girish*. The Memorandum stated, "The Central Information Commission in one of its decisions has held that information about the complaints made against an officer of the Government and any possible action the authorities might have taken on those complaints, qualifies as personal information within the meaning of provision of Section 8(1)(j) of RTI Act, 2005."

The impact of this OM was tremendous and widespread among public authorities as any request for information about assets/income, service book details, complaints against public servants during their service and action taken thereon were being refused. With three orders of CIC (two before and one after *Girish*), the order of the Bombay High Court

[6] *Shri Manoj Acharya v Central Public Information Officer* CIC/SM/A/2013/000058 (decided on 26 June 2013).

(through a Single Judge and a Division Bench) at Nagpur, the dismissal of the SLP by the Supreme Court and the OM from the nodal agency DoPT, it is natural that such information is totally denied by PIOs across the country. Therefore, citizens who are filing RTI applications and seeking information (about public servants) like certified copies of complaints filed against, and action taken on disciplinary proceedings under Civil Servants Conduct Rules, their Income Tax Returns, Annual Property Statements, Annual Confidential Reports (ACRs), etc., are hitting the iron wall erected by *Girish*.

Legally, the matter of seeking copies of Income Tax Returns filed by public servants is settled as the Apex court and the Commission declared they were 'personal information.' There is clarity in ACRs, as the Apex court declared that every public servant had a right to know the remarks about his performance through ACRs and also a right of appeal against adverse remarks.[7] However, the court held that citizens or other parties cannot seek the ACR of another public servant. Regarding the annual assets statements, the hide and seek game is continuing though the Parliament made its intention obvious that every public servant has to declare the assets every year under the Lokpal Act. The only point remained in *Girish* is whether the copies of complaints and action taken thereon in any disciplinary proceedings over the charges framed under Civil Service Conduct Rules could be shared with the citizen or be secured as personal information under Section 8(1)(j) of the RTI Act.

3. Landmark verdicts of the Apex Court on Privacy

The main contention of the public authority and respondent in *Girish* case was that the information was personal to the public servant, unrelated to public activity and its disclosure would cause unwarranted invasion of his privacy. The expressions 'privacy' and 'personal' were defined and explained by a Division Bench of the Supreme Court consisting of B P Jeevan Reddy and S C Sen, JJ in *R Rajgopal v State of Tamilnadu.*[8] The Supreme Court was required to balance the right of privacy against the right to free speech in this case, where the petitioner was a Tamil news magazine which had sought directions from the Court to restrain the respondent State of Tamil Nadu and its officers to not interfere in the publication of the autobiography of a death row convict–'Auto Shankar' which contained details about the nexus between criminals and police officers. The Supreme Court framed the questions in

[7] *Dev Dutt v Union of India & Ors.* (2008) 8 SCC725.
[8] *R. Rajgopal v State of Tamil Nadu* (1996) 6 SCC 632.

these terms: "Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed under Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances?" While answering the above questions, a bench of two judges of the Supreme Court, for the first time, directly linked the right to privacy to Article 21 of the Constitution but at the same time excluded matters of public record from being protected under this 'Right to Privacy.'

4. **What is a Public Record Then?**

Public record as defined in the Public Records Act, 1993 is any record held by any Government office. The Rajgopal order is clear as to the areas of privacy – such as family, marriage, procreation, motherhood, child bearing and education among other matters. Issuance of memos, initiating disciplinary action or imposing penalty does not fall in any of these categories and, thus, it cannot be said to be the personal or private information of the employee.

5. What is Personal? Conflict with Section 8 of RTI Act

This rule is similar to Section 8(1)(j) of RTI Act, which says the information which is related to public activity is not private information. The order in *Girish* is contrary to both the express provision of law and the laid down ratio by the Apex court in Division Bench. The order in *Girish* does not even mention *R Rajgopal's* proposition and there was neither any analysis nor its overruling. When compared and analysed, the ratio in *Rajgopal* was in full-fledged writ appeal which was heard on merits was not overruled by the order of dismissal of SLP in *Girish.* The *ratio decidendi* in *Rajgopal* is in tune with Section 8(1)(j) while the dismissal of SLP in *Girish* is in conflict with that express provision of the law. The *Girish* order does not explain why the provisions of RTI Act are not the laws and by what rule of interpretation the new principle that employee-related information is personal information has been evolved? Without overruling the ratio in *Rajagopal,* it is not jurisprudentially possible to establish a different principle of law, that too in conflict with express provisions of law. As it was not a writ appeal, there was no opportunity to bring the ratio in *Rajagopal* to the notice of the Division Bench of the Supreme Court. Another vital point is that the memos, complaints or disciplinary-action-related information is not unconnected with public activity,

which was also not discussed in the order. It might have happened because it was not a full writ appeal but a hearing on SLP only.

6. Privacy & Domestic Enquiry Against a Public Servant

In stark contrast with the order in *Girish* wherein the Bombay High Court opined that the copies of all memos issued to a public servant, show cause notices and orders of censure/punishment, etc., are qualified to be personal information under Section 8(1)(j) of the RTI Act, a Division Bench of the Kerala High Court in Centre for Earth Sciences case[9] opined that disclosure of information regarding domestic enquiry against a public servant was not prohibited under Section 8(1)(j) of the RTI Act. This order of the Kerala High Court (DB) sets off the Bombay High Court (DB) order in *Girish* to the extent that disclosure of information is about domestic inquiry. The Delhi High Court gave a significant judgment on the privacy claims over the complaints-related information in UPSC v R. K. Jain**,** in which Mr. R. K. Jain sought the following information from UPSC:

(a) inspection of all records, documents, note sheets, manuscripts, records, reports, office memorandum, part files and files relating to the proposed disciplinary action and/or imposition of penalty against Mr. GSN, IRS, Central Excise and Customs Service Officer of 1974 Batch and also inspection of the records, files, etc., relating to the decision of the UPSC thereof Mr. GSN who is presently posted as the Director General of Inspection Customs and Central Excise.

(b) copies of all the note sheets and the final decision taken regarding imposition of penalty/disciplinary action and decision of UPSC thereof.

This information was denied by the UPSC but the CIC allowed the information to be disclosed. The UPSC filed a writ petition before the Delhi High Court. The single member Bench of Justice Vipin Sanghi held that the UPSC filed an LPA and the Division Bench of the Delhi High Court in Union Public Service Commission v R K Jain[10] by Chief Justice and Justice Rajiv Sahai Endlaw, on 6th November 2012 reversed this in LPA citing the order of SC in *Girish*.

[9] Kerala High Court Division Bench *in Centre for Earth Sciences Studies v Anson Sebastian* 2010 (2) KLT 233.
[10] *Union Public Service Commission v R K Jain* LPA 618 of 2012 (decided on 6 November 2012).

The Delhi High Court in THDC India's case,[11] agreed with CIC that an employee could be given his own ACR. But it held that minutes of the departmental promotion committee were exempt under 8(1)(e) and 8(1)(j), then the matter was referred back to the CIC to determine whether there was larger public interest justifying their disclosure.

7. Right to Know the Transaction of a Public Servant:

The Apex court referred to its own decision in *Raj Narain's case*,[12] wherein a Constitution Bench considered the question - whether privilege can be claimed by the Government of Uttar Pradesh under Section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareli, Uttar Pradesh? The Court observed that "the right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. The Court further observed "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. - They are entitled to know the particulars of every public transaction in all its bearing..."

8. RTI Act: Definition of "Information"& "Record"

The information sought by the appellant in *Girish* and most of other cases will fall under the purview of definition of 'information' or 'record'. Of course it is subject to Section 8. 'Information' under Section 2(f) means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. 'Record' includes "any document, manuscript and file....."

[11] Justice Manmohan of Delhi High Court in *THDC India Ltd v R. K. Raturi* WPC 903 of 2013 (decided on 8 July 2014).
[12] *State of Uttar Pradesh v Raj Narain* (1975) 4 SCC 428).

As per the above definitions, a memo issued to a public servant for misconduct or any other reason is part of 'information' as per Section 2(f). The disciplinary proceedings taken up against the public servant, if resulted in report, i.e., 'information', and the entire file containing the proceedings is the 'record.' It is subject to Section 8, of course.

9. Rules of Interpretation and Section 8(1)(j)

A statute's expression and its primary meaning should be given effect to by the executive and the judiciary. They have to give importance to the plain meaning, unless that leads to absurdity. When the words of a statute are clear, plain and unambiguous, i.e., they are reasonably susceptible to only one meaning the courts are bound to give effect to that meaning irrespective of the consequences.[13] Lord Atkinson puts the point starkly in the House of Lords, in the case of *Vacher and Sons Ltd v London Society of Compositors*:[14]

> *"If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this subsection be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous."*

It may look somewhat paradoxical that the plain meaning rule is not plain and requires some explanation. The rule that plain words require no construction starts with the premise that the words are plain, which is itself a conclusion reached at after constructing the words. It is not possible to decide whether certain words are plain or ambiguous unless they are studied in their context and construed.[15] In the context of RTI Act, the exception on

[13] Chief Justice Nicholas Conyngham Tindal in the *Sussex Peerage* Case (1884) 11 C1 & F 85 said: "…The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver." See also Justice G P Singh, *Principles of Statutory Interpretation* (14th edn, Lexis Nexis 2016) 55.

[14] *Vacher and Sons Ltd v London Society of Compositors* 1913 AC 107.

[15] *Dr. Saibaba v Bar Council of India* AIR 2003 SC 2502.

personal information under Section 8(1)(j) is simple and plain enough to say that if the disclosure of information has any relation with public activity or interest, it cannot be denied.

10. Three Plain Rules of RTI Act, 2005

(a) Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual [Section 8(1)(j)].

When Section 8(1)(j) of the RTI Act, 2005 is so unambiguously clear, how can a court draw a different meaning? If the complaints or disciplinary action details of a public servant are concerning the public duty or functions or responsibilities in a public organisation or a Government department, it has relationship with public activity and also public interest. The PIO cannot deny the disclosure if it causes any invasion of privacy, if so, whether it was a warranted invasion?

(b) Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person.

The second plain provision, which says all that information that could be given to the legislator, shall be accessible to a citizen. To give effect to this provision, one has to examine whether the information sought, i.e., complaints, memos, disciplinary action reports, etc., could be given to a legislator and discussed in the legislative house. If the answer is yes, it has to be given to a citizen also.

(c) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that section.

This means if the information sought, i.e., complaints, memos, disciplinary action reports, etc, is 20-years old, as per this proviso, it is subject only to three exceptions mentioned in (a), (c) and (i). It is not subject to exception 8(1)(j) at all.

All these three statutory expressions are unambiguous and obvious, which do not give rise to more than one meaning, hence, the intention of the Parliament to get this information to the citizen cannot be altered by a court of law, including constitutional courts. A study of the contents of the judgments in *Girish* shows that these points were neither raised nor answered.

11. Conclusion

Thus, on facts and law, the information sought cannot be straight away denied. The following inferences can be drawn from the above discussion and analysis.

(a) There is no legal basis for considering the conduct of public servants in the service of public or public authority as his/her 'private' or 'personal' information. The legal boundaries of personal or private were specified by the Division Bench of the Supreme Court in *R Rajagopal*, which remain in force as precedent as it was not specifically overruled. It is neither logical nor legal to say that the public conduct of a public servant has no relation with public activity or public interest. He cannot sit in that position if he is not performing public activity. The decision of the Supreme Court in *R Rajagopal* on the privacy and personal information was clearly defined and the information about conduct of a public servant in his public office will not fall under the categories of information defined as personal information in that case.

(b) When the employer is 'the State' (public in democracy) its relation with the employees, i.e., public servants is totally different from the relation with private employees. And the information about service and service-related conduct of the public servant during his employment in public authority may be public information and may not be personal information of that employee. This question has to be decided in each and every case based on facts and circumstances of that case. The information about disciplinary action, memos, reports, etc., against that public servant is part of 'information' as defined under Section 2(f) of RTI Act, 2005, and it can be disclosed subject to Sections 8 and 9 of that Act.

(c) As far as the assets-related information is concerned, the Supreme Court's order in *PUCL v UoI* and *ADR v UoI* besides the Lokpal Act 2003 laid down the law that a public servant's assets-related information is *not personal information* but has to be disclosed under a statutory obligation and, thus, could be disclosed under RTI Act.

(d) In view of several other decisions of the Supreme Court quoted above and the objectives of the Right to Information Act, 2005, the information about disciplinary action taken against a public servant can be shared as per the Act.

The privacy of public servants is strictly limited to his personal affairs, while his conduct in public service cannot be considered inaccessible to a citizen under RTI Act. The relationship between public servant's conduct in office and public is an inevitable relationship. The citizens are, however, not concerned with family members and issues pertaining to them, except when they later were accused of receiving the corrupt gains of the public servant. Their service records, leave records may have to be disclosed depending on their relevance to the 'public money', public conduct and 'misconduct.' Complaints of corruption, sexual harassment, disobedience, destruction of records, misbehaviour, non-performance, penal actions like suspension, dismissal or cut in increments or admonition, transfer, salary or pension-related information appears to be personal but cannot be prevented from disclosure. For instance sexual harassment complaints against a teacher or an officer are matters straight away connected to the public conduct of a public servant and, hence, members of public in general have a right to know. It is a part of governance or administration or performance of public service or implementation of schemes for public, implemented with public money.

DEEMED GOVERNMENT COMPANIES – ARE THEY AMENABLE TO RIGHT TO INFORMATION ACT, 2005?

Ujjwal Kumar Bose*

ABSTRACT**

While the applicability of the RTI Act, 2005, an empowering legislation enabling the common people to access information held by the government authorities, largely depends on the touchstone of interpretation of the expression 'public authority' and in most of the times deemed government companies have a narrow escape. Though such deemed government companies had survived the crucial transformation from the Companies Act, 1956 to the Companies Act, 2013, information locked under them still enjoy the warmth of protective hand of their in-house counsels and advising law firms in keeping safe distance from the RTI applications. Such pretexts range from 'not substantially financed by the Government' to 'no control in day-to-day management by the Government' en route 'Government is only an investor/share holder'. Thus, deemed government companies, a legal creature begotten by the erstwhile section 619B of the Companies Act, 1956 remained an eternal fugitive even after a decade of enforcement of the RTI Act. Significantly, as per a CAG Audit Report, as on March 2014, equity participation by the central and state government entities in a total of 144 deemed government companies in India is more than Rs. 16,000 Crore. This paper dwells deep into the formative significance of the deemed government companies vis-a-vis the efficacy of the RTI Act, 2005, particularly from the eligibility aspect of 'public authority' as defined under section 2(h) of the RTI Act, 2005. Certain judicial pronouncements have been analysed in order to reach up to the very root of the issue. Ultimately, the author has suggested some sharp features for the decade-old protagonist so that its reach to the corporate ventures of the government does no more remain a futility.

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1. RTI ACT, 2005 – A Brief Introduction and Analysis

India follows the model of participatory democracy and in a democracy it is most essential that the citizen must know about the activities of their Government, on whom they repose trust through electoral mechanism. In a democracy, citizens deserve transparent and accountable governance and one of the very rudimentary pillars of such accountability is free and unbiased information about the nature of functioning of the Government. Success of democracy, thus, largely depends on fair functioning of the Government, which undoubtedly casts a reciprocal obligation on the citizens to act responsibly. Thus, it goes beyond saying that free and unbiased public information or in other words the 'right to know' by the public at large paves the road for an accountable governance and meaningful democracy.

Significantly, such right to know is a part of the fundamental right of freedom of speech and expression guaranteed under Article 19(1)(a) of Constitution of India, though subjected to reasonable restrictions as prescribed under Article 19(2) thereof.

Democracy recognises 'freedom of speech' as its lifeline and an essential element of social justice. In England, freedom of speech is treated as a safety valve to check abuse of power in the hands of the Government. Thus, empowerment of the common people at large vis-à-vis the freedom of speech and expression got a real momentum in India when the Right to Information Act, 2005 ('RTI Act') was enacted by the Indian Legislature thereby substituting the erstwhile Freedom of Information Act, 2002. Under the RTI Act, any citizen may request any public authority to disclose a particular information, when such public authority would be under a statutory mandate to reply expeditiously within 30 days. Such speedy response, that too by public authorities, unequivocally requires digitalisation of such data, which may also be treated as a positive outcome of enactment of the RTI Act. Various Government and public sector companies largely dealing with public money are now acting under the framework of the RTI Act, thereby, keeping the relevant information handy for access by the common people, on a case-to-case basis, which was unthinkable earlier, as Government officials had found to be inherently reclusive in answering the questioning public. Such data and statistics lying with Government, at times, appear to be critical for completing project documentations/policy papers for various people-centric social endeavours. Thus, in such a backdrop introduction of RTI Act was the need of the hour.

While analysing the anatomy of RTI Act, it appears that much efficacy of this Statute depends heavily on the key definitions and provisions, casting statutory obligations on public authorities in particular. In the definition segment (Chapter I), important terminologies such as 'information', 'public authority', 'right to information', 'competent authority,' etc., have been carefully defined whereas in Chapter II obligations cast upon public authorities vis-à-vis maintenance of proper books of records and procedure relating to request for information have been elaborately dealt with. In order to maintain a balance regarding information which are not desired to be disclosed to the public, certain exceptions have also been captured, which are mentioned hereunder as a ready reference for the readers.

Information, disclosure of which may affect –

(a) Sovereignty and integrity of India;
(b) Prohibitory order passed by any competent Court of Law;
(c) Breach of privilege of Parliament or State Legislature;
(d) Intellectual property, commercial confidence, competitive position of a third party unless the competent authority opines otherwise;
(e) Fiduciary relationship unless the competent authority opines otherwise;
(f) Confidence of Foreign Government;
(g) Individual information critical from law enforcement or security perspective;
(h) Investigation or prosecution of offenders;
(i) Cabinet, Ministerial and Secretarial records;
(j) Invasion in the private space of an individual.

The above exceptions clearly spelt out in the RTI Act, not only enables the public at large to make queries relevant to the mode of functioning of public bodies, but also makes functioning of the public information officers (PIOs) of the Government bodies less complicated.

While the RTI Act prescribes an elaborate procedure for obtaining information from the concerned public body and in turn public bodies are under an obligation to appoint a PIO, who is required to act as the interface between the answering public body and the querist individual. The application should precisely mention the querist individual's name, contact

details and relevant query. In the event of absence of PIO in a particular public body, the querist can exercise option to file the application either with the Central Information Commission (CIC) or State Information Commission (SIC). RTI Act sets certain specific timeline for reply to the query, same are mentioned herein below for ready reference of the readers.

- In case an application is filed with the PIO, reply time is 30 days from the date of receipt of the application;
- If the application is filed with the Central/State Assistant PIO, reply time is 35 days from the date of receipt of the application;
- In case of information pertaining to Life or Liberty of a person, reply time is 48 hours from the time of receipt of the application;
- In the event of transfer of the application by one public authority to another public authority, the reply time is 30 days from the date on which the transferred application is received by the concerned or second public authority;
- Any information pertaining to human rights violation or corruption by any Schedule II listed agency, the reply time is 45 days, subject to prior approval of the CIC.

RTI Act has also been taken to the digital platform so that people may invoke the same with much ease with the help of information technology. In spite of making paper application to the concerned RTI authority, similar application may be done online through the designated Government portal by creation of an user account and payment of fees as nominal as INR 10/-. Such online government portal may be accessed at https://rtionline.gov.in/

At the above backdrop, certain thumb rules of making a proper RTI application may be summarised as below:

- The querist must be a citizen of India;
- The query should be specific with material particulars;
- Proof of fee payment should accompany the query;
- The correct address of the querist must be clearly mentioned.

The fact remains that human beings are manipulative by nature and it's no wonder that individuals entrusted with various Government functions would exercise such skill either individually or at times jointly, unless an effective monitoring window is kept wide open.

Successful implementation of the RTI Act may lead to the opening of such window for setting the vigilant eyes of the common people on functioning of various Government or public bodies. Corporate ventures enjoying Governmental patronage, either through equity participation or by substantial financial support, should also not escape the radar of the RTI Act.

A country such as India which has to fight, round the clock, against natural calamities, abject poverty, illiteracy, inadequate health services, 'Freedom of Expression' and more particularly 'Freedom of Speech' of the people at large undoubtedly holds an iota of hope for its success as one of the emerging democracies. It goes beyond saying that in infusing such hope to the people, RTI Act is a welcome move, particularly from the aspect of empowering people with their right to know about the functioning of various wings of the Government and diverse public bodies. While state largesse and public money are operated principally through the Government and its diverse wings, the public at large can become a vigilant guard of such public wealth through the successful implementation of the RTI Act.

2. Public Authority – The Acid Test or Midas Touch:

From the above discussion, it goes unsaid that the most crucial aspect on which the applicability of RTI Act to an organisation depends is on its distinct characteristics akin to a 'Public Authority.' Thus, the scope of the term public authority is synonymous with the larger right of the Indian population towards public information.

Section 2(h) of RTI Act defines public authority as follows:

Public authority means any authority or body or institution of self-government established or constituted

(a) by or under the Constitution;

(b) by any other law made by the Parliament;

(c) by any other law made by the State Legislature;

(d) by notification issued or order made by the appropriate Government, and includes any—

(i) body owned, controlled or substantially financed;

(ii) non-government organisations substantially financed, directly or indirectly by funds provided by the appropriate Government;

Further the expression 'appropriate Government' has also been defined under Section 2(a) of the RTI Act, which reads as follows:

Appropriate Government means in relation to a public authority which is established constituted, owned, controlled or substantially financed by funds provided directly or indirectly—

(i) by the Central Government or the Union Territory administration, the Central Government;

(ii) by the State Government, the State Government;

Undoubtedly while playing a crucial role in making an entity amenable to RTI Jurisdiction, the terminology 'public authority' has undergone the scanner of judicial interpretation time and again.

In this regard it is important to consider the observations of Supreme Court on the formational aspect of the definition of 'public authority' as discussed in *Thalappalam Service Coop. Bank Ltd. v State of Kerala*[1].

In *Thalappalam Service Coop. Bank Ltd.,* (which may be considered as an umbrella ruling of the Hon'ble Apex Court on identification of public authority vis-à-vis RTI Act) the Apex Court went on observing that the legislative intent while defining the terminology 'public authority' under section 2(h) was quite unique. Categories of specifically included entities mentioned under section 2(h) have been qualified both under 'means' and 'includes'. Interestingly, when 'means' in its usual connotation is 'restrictive' but 'includes' makes any definition prima facie extensive. Thus, in case both 'means' and 'includes' are being used conjointly, the categories mentioned therein would exhaust themselves. For the meaning of the expressions 'means' and 'includes' assistance was sought from another Apex Court Judgment in *DDA v Bhola Nath Sharma*[2] where it was observed that in case of usage of such expressions, they may make an exhaustive case specific explanation of the purport of the words to be qualified, in alignment of the Act itself.

[1] *Thalappalam Service Coop. Bank Ltd. v State of Kerala* (2013) 16 SCC 82.
[2] *DDA v Bhola Nath Sharma* [(2011) 2 SCC 54.

Further, from the definition of 'public authority' in sec 2(h) of the RTI Act, Apex Court gave much stress on the control aspect vis-à-vis eligibility of an entity to be considered as a public authority. Hon'ble Court observed that while a body owned by the appropriate Government clearly falls within the four corners of the definition of public authority, a body controlled by the appropriate Government has certain vacillating traits.

The Hon'ble Court extensively considered various aspects of such control aspect by the appropriate Government on an entity. While neither of the expressions 'control' or 'controlled' are defined under the RTI Act, the Hon'ble Apex Court remained solely dependent on various judicial observations on such terminologies, however, keeping safe distance from the Constitutional aspect of 'control' which is critical for identification of an entity as 'State' under Article 12 of the Constitution vis-à-vis amenability of such entity to writ jurisdiction under Article 226 of the Constitution.

Furthermore, the Apex Court tried to gather more clarity into the understanding of the expression 'controlled' from its specific usage (like whether placed before or after) vis-à-vis two other expressions 'body owned' and 'substantially financed.' The Apex Court placed reliance on the observation relating to control as made in its earlier Judgment passed in *State of WB v Nripendra Nath Bagchi*[3] where while interpreting the scope of Article 235 of the Constitution of India, which deals with control of High Court over District Courts, the Apex Court observed that the terminology 'control', inter alia, includes the power to initiate disciplinary action. Another very significant observation in *Nripendra Nath Bagchi* was that the terminology 'control' is also at times used synonymously with superintendence, management or authority to direct, restrict or regulate by a superior authority in exercise of its supervisory power.

Thus, the meaning of the expression 'controlled' which figures in between the words 'body owned' and 'substantially financed' in Sec 2(h), the control by the appropriate Government must be a control of a substantial nature. The mere 'supervision' or 'regulation' as such by a statute or otherwise of a body would not make that body a public authority within the meaning of Section 2(h)(d)(i) of the RTI Act.

[3] *State of WB v Nripendra Nath Bagchi* AIR 1966 SC 447.

The Hon'ble Apex Court also consulted the dictionary meaning of the expressions 'questions of law' and 'substantial questions of law' from Black's Law Dictionary (6th edn), where the word 'substantial' is defined as

> "Substantial.— Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. … Something worthwhile as distinguished from something without value or merely nominal. … Synonymous with material."

Thus, merely providing subsidies, grants, exemptions, privileges, etc. as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding by the appropriate authority either directly ot through its instrumentality was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist.

To summarise, while 'control' of the appropriate government enabling the application of the RTI Act is clearly 'instance specific,' it is intrinsically linked 'with body owned or substantially financed' by the appropriate Government. The next hurdle that comes is that the expression substantially financed is also not defined under the RTI Act and, hence, there is hardly any alternative but to borrow judicial observations on that aspect.

Evidently, the test of public authority appears neither an 'acid test' for the organisations enjoying financial or other support from the appropriate Government nor a 'Midas Touch' for the public at large, who are reasonably in necessity of information about such organisations. On the other way round, each instance of such public authority needs to pass through the touchstone of adequate control and financial supervision by the appropriate authority.

3. Formational Significance of Deemed Government Companies

Deemed Government companies have not been defined either under the Companies Act, 1956 or under the Companies Act, 2013. Section 619B of the Companies Act, 1956 has indicated deemed Government companies as companies whose ownership or control lies with two or more Government companies or corporations, etc., in the manner written in Section 619B. The most significant aspect of deemed Government companies is that they are subject

to audit by the Controller of Auditor General of India (C&AG). Section 619B of the erstwhile Companies Act is set out herein below for ready reference:

619B. Provisions of section 619 to apply to certain companies

The provisions of section 619 shall apply to a company in which not less than fifty-one per cent of the paid-up share capital is held by one or more of the following or any combination thereof, as if it were a Government company, namely: -

(a) the Central Government and one or more Government companies;

(b) any State Government or Governments and one or more Government companies;

(c) the Central Government, one or more State Governments and one or more Government companies;

(d) the Central Government and one or more corporations owned or controlled by the Central Government;

(e) the Central Government, one or more State Governments and one or more corporations owned or controlled by the Central Government;

(f) one or more corporations owned or controlled by the Central Government or the State Government;

(g) more man one Government company.

Deemed Government companies are corporate ventures by Central or State Governments where public money are invested in suitable corporate entities, generally not directly by the Central or State Governments but through Public Sector Enterprises (PSEs) or nodal authorities such as Industrial Promotion Bodies. In most of the cases, it is seen that these deemed Government companies are companies where such PSEs are either Promoters or Joint Venture (JV) Partners or Portfolio/Strategy Investor or holding a Public Private Partnership (PPP) with some significant private business group. These companies operate in almost every sectors of the economy including manufacturing, finance and infrastructure.

Some very significant instances of such JV are one between National Thermal Power Corporation (NTPC) and Nuclear Power Corporation (NPCIL) for development of Nuclear Reactors. Similarly JV between State run Oil Major Indian Oil Corporation (IOC) and NTPC for production of bio-diesel and lubricants. On the other hand, in the coal sector, similar JV between Coal India Limited (CIL) and NTPC & others for acquisition of coal assets in India and abroad. Significantly though a State run company is regulated by the DPE, the entity formed out of a JV, often called a deemed government company, does not come under the department.[4]

As mentioned in the above newspaper reporting, though state-owned companies, e.g., Government companies (ref. section 617 of the erstwhile Companies Act, 1956 or section 2(45) of the Companies Act, 2013) are regulated under the Department of Public Enterprises (DPEs), forming a part of the Ministry of Heavy Industries & Public Enterprises, Government of India, but deemed Government companies do not fall under the control of DPEs. In the past, initiatives were made to bring such deemed Government companies under DPEs, but it appears that till date the same did not materialise.[5]

As mentioned in the above newspaper reporting, though State-owned Companies, e.g., Government Companies (ref. section 617 of the erstwhile Companies Act, 1956 or section 2(45) of the Companies Act, 2013) are regulated under the Department of Public Enterprises (DPE), forming a part of the Ministry of Heavy Industries & Public Enterprises, Government of India, deemed Government companies do not fall under the control of DPE. In the past, initiatives were made to bring such deemed Government companies under DPE, but it appears till date same did not materialise.

[4] Shruti Srivastava, 'JVs of public sector firms may come in govt ambit' *Financial Express* (24 June 2010) <http://archive.indianexpress.com/news/jvs-of-public-sector-firms-may-come-in-govt-ambit/637848/> accessed 5 March 2018.

[5] Gunjan Pradhan Sinha, 'Deemed govt companies likely to come under DPE ambit' *Financial Express* (17 December 2010) <http://www.financialexpress.com/archive/deemed-govt-companies-likely-to-come-under-dpe ambit/554556/> accessed 6 March 2018.

The list of deemed Government companies as available on internet is quite back-dated, i.e., List of Deemed Central Government Companies for the year 2003-04 as a part of CAG Report No. 2 of 2005 (PSU).[6] The CAG report on Financial Performance of Central Public Sector Enterprises,[7] significant data are reproduced as ready reference:

In total, 144 deemed Government companies, share capital of

- **Central Govt., Central Govt. Companies & Corporations: Rs. 12,344 Crore**
- **State Govt., State Govt. Companies & Corporations: Rs. 3,727 Crore**

Now the question arises whether these deemed Government companies would be treated as public authority vis-a-vis the control and supervision, exercised by the appropriate Government commonly by equity participation. Thus, admittedly, the mute question which arises here is whether deemed Government companies being corporate venture by the appropriate Government, that too by investing public money through Government agencies, will fall under the four corners of the definition of public authority under the RTI Act, 2005 or not. Significant to note while both under Section 619B of the Companies Act, 1956 and Section 139(5) and Section 139(7) of the Companies Act, 2013, audit by C&AG had been made mandatory for the deemed Government Companies but no appropriate provisions have been made in the RTI Act to bring those corporate ventures with the Government within the ambit of RTI Act.

4. If CAG Audit for Good Governance then why not RTI Applicability for Transparency in Deemed Government Companies?

While from the aspect of public authority as discussed above, deemed Government companies, having Government Equity participation of at least 51% will not, ipso facto, become public authority, however, undoubtedly there will be a very strong presumption in that regard. However, significantly, a deemed Government company may not be a State under Article 12 of the Constitution but might become a public authority within the meaning of the RTI Act.

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[6] Report no 2 of 2005 (PSUs), Appendix II < http://www.cag.gov.in/sites/default/files/old_ reports/union/union_compliance/2004_2005/Commercial_Audit/Report_No_2/App_II.pdf> accessed 17 March 2018.

[7] Report of Comptroller and Auditor General of India for the year ended March 2014, ch 7 <http://www.cag.gov.in/sites/default/files/audit_report_files/Union_Compliance_Commercial_2_2015.pdf> accessed 17 March 2018.

The submission made on behalf of Securities Exchange Board of India (SEBI) in this respect before the CIC in *Raj Kumari Agrawal v Jaipur Stock Exchange Ltd*[8] is very significant and same is reproduced hereunder for ready reference.

"……it has been submitted on behalf of the SEBI that the term 'public authority' is broader and more generic than the word 'state' under Article 12 of the Constitution of India. Every authority or institution which is a 'state' has to be a public authority under Section 2(h) of the Right to Information Act, 2005. Even a non-governmental organisation if substantially financed directly or indirectly by funds provided by the Government may be a public authority. Even a private institution substantially financed by an appropriate Government can also be a public authority but such non-governmental bodies or such private institutions or bodies may not be categorised as 'state' but they would be public authorities within the meaning of Section 2(h) of the RTI Act. There is enough merit in these submissions and the Commission agrees that an authority or an institution or a body if it is a 'state' within the meaning of Article 12 of the Constitution of India, it cannot claim that it is outside the purview of the Right to Information Act, 2005."

Now post repeal of the Companies Act, 1956, it appears that Section 139(5) and section 139(7) of the Companies Act, 2013, deal with such deemed Government companies, in line with the said repealed section 619B of the 1956 Act. Now for ready reference above referred section 139(5) and 139(7) of the Companies Act, 2013 are set out hereunder:

"(5) Notwithstanding anything contained in sub-section (1), in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, the Comptroller and Auditor-General of India shall, in respect of a financial year, appoint an auditor duly qualified to be appointed as an auditor of companies under this Act, within a period of one hundred and eighty days from the commencement of the financial year, who shall hold office till the conclusion of the annual general meeting.

(6) ……..

[8] *Raj Kumar Agarwal v Jaipur Stock Exchange Ltd*. 2007 SCC OnLine CIC 1816, [2017] CIC 1816.

(7) Notwithstanding anything contained in sub-section (1) or sub-section (5), in the case of a Government company or any other company owned or controlled, directly or indirectly, by the Central Government, or by any State Government, or Governments, or partly by the Central Government and partly by one or more State Governments, the first auditor shall be appointed by the Comptroller and Auditor-General of India within sixty days from the date of registration of the company and in case the Comptroller and Auditor-General of India does not appoint such auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next thirty days; and in the case of failure of the Board to appoint such auditor within the next thirty days, it shall inform the members of the company who shall appoint such auditor within the sixty days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting."

In the meantime, the Ministry of Corporate Affairs, Government of India vide General Circular No. 33/2014 dated July 31, 2014[9] has clarified certain significant aspects of the deemed Government Companies under the 2013 Act.

Two most important clarifications offered by the above General Circular dated July 31, 2014 are set out hereunder:

"2. …… it is clarified that the new Act does not alter the position with regard to audit of such deemed Government companies through C&AG and, thus, such companies are covered under subsection (5) and (7) of Section 139 of the New Act;

3. Further, it has also been observed that the words "any other company owned or controlled, directly or indirectly …… by the Central Government or partly by one or more State Governments" appearing in sub-sections (5) and (7) of section 139 of the New Act are to be read with the definition of control in section 2(27) of the New Act. Thus, documents alike articles of association and shareholders agreements, etc., envisaging control under section 2(27) are to be taken into account while deciding whether an individual company, other than those referred in paragraph 1-2 above, is covered under section 139(5)/139(7) of the New Act."

[9] Clarification with regard to the applicability of provisions of section 139(5) and 139(7) of the Companies Act 2013 (General Circular No. 33/2014) <http://www.mca.gov.in/Ministry/pdf/General_Circular_332014_310 72014.pdf> accessed 16 March 2018.

Significantly, above referred control being a newly introduced definition under section 2(27) of the Companies Act, 2013, says as follows:

control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

From the above definition of control under section 2(27) of the Companies Act, 2013, additional parameters signifying control (besides equity participation, shareholding or voting rights) of the appropriate Government on a corporate entity, which might led the same to a deemed Government company as follows:

(a) right to appoint majority of the directors; or
(b) to control the management or policy decisions;

It is beyond any iota of doubt that this 'control' under the Companies Act, 2013 in case of a deemed Government company will bring it more closer to the presumption of a public authority within four corners of the RTI Act.

To summarise while for a deemed Government company, the presumption of same being a public authority under the RTI Act will be very strong, but the same will ultimately depend on a case-to-case basis, however, with weightage on the following control elements of the appropriate Government:

(a) Equity participation;
(b) Shareholding;
(c) Voting rights;
(d) Right to appoint majority of its Directors on the Board;
(e) Management control;
(f) Ability to take policy decision;
(g) Deep and pervasive financial control.

5. An Anecdotal Illustration:[10]

Mr. A, an individual RTI querist formally approached X Ltd., a deemed Government company asking for the material details of equity participation of the appropriate Government in X Ltd. Such appropriate Government infused equity in X Ltd. through one of its nodal agencies namely Y Ltd. and holds shares of X Ltd. issued in favour of Y Ltd. X Ltd. opposed to such RTI application on the pretext that it is not a public authority under the provisions of 2(h) of the RTI Act and, hence, replied to Mr. A that his application cannot be entertained. Being refused by X Ltd., Mr. A approached Y Ltd. with the same query. While Y Ltd., being one of the nodal agencies of the appropriate Government and a public authority, had no other alternative but to answer Mr. X against his query. Therefore, Mr. A out of his sheer intelligence and awareness on the RTI Act, could access the desired information in spite of the denial by X Ltd. And, thus, objectives of RTI Act were achieved.

6. Strengthening the Decade-old Protagonist, RTI Act

While RTI Act is undoubtedly a much coveted democratic strength in the hand of public at large, making the same a time-tested social tool is the responsibility cast upon each and every citizen of India. Applying this democratic tool in case of deemed Government companies, which are much ambitious commercial ventures of the Central and State Government bodies with investment of public money, is the need of the hour, particularly when the stake of public money involved is quite substantial.

While both 'control' and 'substantially finance' need to be specifically defined under the RTI Act, elements of such control should also include the parameters as laid down under the above referred definition of control under section 2(27) of the Companies Act, 2013. This is essential, in the greater interest of creating an empowered RTI regime across the nation.

Deemed Government companies, which all through remained a borderline case vis-à-vis the presumption of they being construed as public authority under the RTI Act, though operating in all critical commercial sectors of the Country with huge investment of public money, need not be provided with any statutory seepage, particularly when its near-relative Government companies (ref. section 617 of the erstwhile Companies Act, 1956 and section

[10] While the author takes assistance of 'anecdotal illustration' to narrate a fictional incident related to request for information made to a deemed Government Company, it is clarified that such illustration is merely in aid of explaining the subject and not intended to mean or indicate anything otherwise.

2(45) of the Companies Act, 2013) are public authorities under the RTI Act. More so, in not-so-distant past, initiatives to bring such deemed Government companies under the Department of Public Enterprises, Government of India, cannot be lost sight of.

RIGHT TO INFORMATION AS AN ANTI-CORRUPTION TOOL

Gopika Nambiar*

ABSTRACT**

There is not an iota of doubt that the cancerous growth of corruption is a serious threat to the institution of democracy. India, being the world's largest democracy, has an added responsibility to nip this disease in the bud. To some extent, Right to Information (RTI) Act has been used by the citizens of India to throw light on corruption in public services. However, the fact remains that even the provisions of the RTI Act have not been able to address the issue of institutional corruption properly. Adding to this, a general lack of awareness on the part of the citizenry as to how to effectively use the RTI Act to curb corruption, adds to the nation's woes. The objective of the paper is to let the reader know that various forms of corruption that are plaguing the Indian system may be curbed if RTI is used effectively. The paper tries to decipher the shortcomings of the RTI Act and puts forward certain recommendations that may help to reduce corruption and to enhance transparency and accountability among public authorities. The paper is based on a doctrinal study and employs descriptive and analytical methods to reach at summarised findings.

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"The World will not be destroyed by those who do evil, but by those who watch them without doing anything" – Albert Einstein

1. Corruption in India – A Reality Check

On February 14th, 2017, when a Division Bench of the Supreme Court held the late Chief Minister of Tamil Nadu, Ms. J. Jayalalitha, guilty under Sections 13 (1)(e) and 13(2) of the Prevention of Corruption Act, 1988,[1] there was both a sweet scent of victory as well a deep sense of shame in the hearts of the public, especially the anti-corruption crusaders. When the head of the Government of a state, the *parens patriae* of the citizenry, is convicted for criminal misconduct, not only is the name and reputation of the world's largest democracy tarnished, but the trust and faith of the people in their elected representatives is also broken. The fact that the offence committed by her goes back to the period of 1991-96, which was her first tenure as the Chief Minister of Tamil Nadu, and by the time the verdict was delivered, she was sworn in five times as the Chief Minister, sprinkles salt in the wounds of the common man.

The governing class in different spheres of public administration has kept alive the legacy of the British; we were looted by the colonial masters for over 200 years and now the public money is being mishandled and misappropriated by our own governing class. Monetary corruption is of course only one facet. All this has culminated in India being ranked 79th among 176 countries in the Corruption Perception Index 2016 released by the Transparency International. The organisation has used data from the World Bank, the World Economic Forum and other institutions to rank countries by perceived levels of corruption in the public sector.[2] India had the highest bribery rate among the 16 Asia-Pacific countries that have been surveyed. Nearly seven out of 10 Indians, who have accessed public services, had paid a bribe; all this, despite the fact that many states have the Right to Public Services Act. This is in contrast with the least corrupt country – Japan, where 0.2% of the respondents have been reported paying a bribe.[3] In India, it was found that the highest bribery incidents were in

[1] *State of Karnataka v Selvi J. Jayalalitha & Ors.* Criminal Appeal Nos. 300 – 303 of 2017.
[2] Corruption Perception Index, Transparency International <https://www.transparency.org/news/feature/corruption_perceptions_index_2016 >(25 January 2017) accessed 7 June 2017.
[3] ibid.

procuring government healthcare services and even identification-related documents. About 59% of the respondents paid a bribe for such services. About 58% respondents were reported to have paid bribes for education.[4]

In India, political parties are bound to be the most corrupt institutions with corruption rate being 4.4 on a scale of 5. The highest amount of bribes are received by the police (62%), followed by the Registry and Permit Department (61%) and then educational institutions (48%).[5] The people surveyed globally regard corruption as something which is not just limited to paying bribes – almost two out of three people believe that personal contacts and relationships help to get things done in the public sector of their country.

The Indian Judiciary has also not remained immune from this taint – it has contributed to 36% of the number of bribes.[6] Retired Chief Justice of India V. N. Khare said in an interview that "corruption in lower courts is no secret", and recommended a team of 'dedicated judges' (mostly retired) to monitor and arrest its further spread.[7]

2. Concept of Corruption

Though there have been attempts to define corruption, it is considered that defining it would mean narrowing its scope. In our attempt at simplification, the definitions often miss out on a great deal of complexity, multi-facetedness and configuration of corruption in the real world. Secondly, narrowing down the idea of corruption, so that it applies only to the public sector and to bribe-taking politicians and other public officials, seriously underplays the supply side of corruption, that is, the active and often determinative role national and international business corporations, the private sector, and the black economy play in the increase in corruption among the politicians, bureaucrats and intermediaries.[8]

[4] ibid.
[5] ibid.
[6] ibid.
[7] Upendra Baxi, 'Many Meanings of Corruption' *The Indian Express* (6 March 2016) <http://indianexpress.com/article/opinion/columns/judiciary-corruption-law-of-contempt-4556016/> accessed on 12 June 2017
[8] N. Ram, *Why Scams are here to Stay* (1st edn, Aleph Book Company 2017).

This is probably why the United Nations Convention against Corruption, a legal instrument that was adopted by the United Nations General Assembly in October 2003, keeps the term 'corruption' undefined. It merely enumerates certain activities including bribery, embezzlement, misappropriation, influence trading, money laundering, laundering the proceeds of crime, concealment and obstruction of justice, as certain forms of corruption.[9] The Prevention of Corruption Act, 1988, enacted by the Parliament, too, does not contain any definition for the word 'corruption.'

3. **Kinds of Corruption:**[10]

Anti-corruption campaigners generally fit the multiplicity of types and forms of corruption into a couple of descriptive boxes – grand corruption, petty or everyday corruption, political corruption and bureaucratic corruption.

- Grand Corruption – This is described by Transparency International as 'acts of corruption committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of public good.'
- Petty Corruption – Transparency International describes it as the 'everyday abuse of entrusted power by low and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places such as hospitals, schools, police departments and other agencies.'
- Political Corruption – This is described as 'a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers who abuse their position to sustain their power, status and wealth.'[11]
- Bureaucratic Corruption – It is often treated as a distinct category in political studies. But while the differentiation can be significant in some cases, political and bureaucratic corruption are frequently interlocked.

All the above forms of corruption relate to the misuse of public office for private gain. These forms do not refer to an important dimension of corruption, 'the abuse of private office

[9] United Nations, *United Nations Convention Against Corruption* (2004)<https://www.unodc.org /documents/brussels/UN_Convention_Against_Corruption.pdf> accessed 4 July 2017
[10] ibid.
[11] ibid.

for private gain' and here too the public sector is implicated in the sense that it has been 'lax in the regulations that were supposed to restrain the activities of private actors."[12]

4. RTI Act and Anti-Corruption

The Preamble to the RTI Act clearly states that the aim and objective of the Act is to contain corruption and to hold the government and its instrumentalities accountable to the governed. Some of the notable cases where RTI has been successful in exposing dubious deals are as follows:[13]

- The Adarsh Society Scam:

  In 2008, RTI applications were filed by activists like Yogacharya Anandji to highlight the fact that a 31-storey building, which had permission for six floors only and originally meant to house war widows and veterans, were allotted to several politicians, bureaucrats and their relatives.

- Public Distribution Scam :

  In 2007, members of Krishak Mukti Sangram Samiti, an NGO dedicated to the cause of anti-corruption, filed an RTI application that highlighted irregularities in the distribution of food meant for people below the poverty line. Several government officers were arrested after a probe.

- Misappropriation of Relief Funds:

  A 2008 RTI Application filed by a Punjab based NGO helped in exposing the illegal allocation of money, meant for victims of the Kargil War and other natural disasters by bureaucrats heading certain branches of Red Cross Society, to buy cars , air conditioners, etc.

[12] Pranab Bardhan, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) World Development 341 < https://projects.iq.harvard.edu/files/gov2126/files/bardhan_economistapproach.pdf > accessed 5 February 2018.

[13] Vibhuti Agarwal, 'A look at some RTI Success Stories' (2011) Wall Street Journal <https://blogs.wsj.com/indiarealtime/2011/10/14/a-look-at-some-rti-success-stories/> accessed 5 June 2017.

5. Cancerous Growth of Corruption versus RTI

Though the RTI Act has played a pivotal role in exposing corruption in various arenas, yet, the statistics presented above are indicative that the cancerous growth of corruption has not been brought to a standstill; scams cripple the economy and development of the country continue to plague the three branches of the state. The following are, seemingly, some of the shortcomings of the RTI Act:

- Overlooking the concept of Grand Corruption:

The understanding of the concept of corruption that most of the common people have is limited in the sense that they tend to narrow it down to misappropriation of finances and public funds. They tend to overlook the concept of 'grand corruption' that sets in when the political class frames legislation or policies with the sole objective of benefitting a certain class of people alone. For example, a questionable policy which cripples the economic condition of the country might be formulated by the government with the sole aim of helping certain private businessmen, with *quid pro quo*. This is contrary to the concept of 'Good Governance.' In *Abdul Farook v Municipal Council, Perambalur and Ors*,[14] the Apex Court observed that the Doctrine of Good Governance requires the government to rise above its political interests and act only in public interest and for the welfare of its people. In the *State of Maharashtra and others v Jalgaon Municipal Corporation and others*,[15] it was held that one of the principles of good governance in a democratic society is that private and smaller interests must always give way to larger public interests in case of a conflict. In *Manoj Narula v UOI*,[16] the Supreme Court held:

> *"In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as primary one and any other interest secondary. The maxim Salus Populi est Suprema Lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for Fundamental Rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by*

[14] 2009 (15) SCC 351.
[15] 2003 (9) SCC 731.
[16] 2014 (9) SCC 1.

the decision making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not a Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation."

Policy decisions are subject to judicial review if they violate fundamental rights;[17] however, the trend has always been to not interfere. Thus, it becomes all the more imperative for the citizens to remain vigilant and expose anomalies in the decisions. The only way to discover and analyse the truth behind policies is to ask for file notings of the policies and decisions, which are permissible by virtue of the proviso to Section 8(i) of the RTI Act. However, on account of the narrow-minded concept of corruption that people have, decisions that impact the country as a whole, taken with mala fide motives and against the public interest are not brought to light.

- Lack of trained Public Information Officers

Section 5 of the RTI Act provides for the designation of Public Information Officers (PIOs). A PIO is also a staff of the concerned government department. A lot of times, the clerks are appointed as PIOs. When a particular piece of information is asked, they need to have the ability to properly apply their mind as to whether the particular piece of information can be given or not and to what extent. Instead, in the practical scenario, the PIOs simply ask permission from their senior officials as to whether the information can be given. Now if the information sought, seeks to expose corruption in the concerned department and if the senior official himself is at fault, then the PIO will naturally be asked to withhold the information. Ultimately, the sufferer is either the applicant or the PIO himself as under Section 20, the penalty for denying request for information or knowingly giving incorrect information is imposed solely on the PIO and not his superiors.

[17] *Bharat Aluminium Company Ltd. v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 649.

- One-sided usage of the enactment by the common man

The common man tends to use RTI for private purposes than to expose corruption. It is primarily the journalists, NGO members and some well-known anti-corruption crusaders who constantly file RTI applications when they feel that there is some sort of foul play in the system. However, government departments are wary of the above-mentioned people, especially journalists, and so they tend to refuse information or sometimes give incomplete information.

- Lack of cooperation from the public authorities and the political class

Many of the public authorities and the political class have been and are doing their best to keep the veil of secrecy on their affairs. There is a tendency to give too much of information, in addition to what is asked, which often confuses and misguides the RTI applicant. Specific information pertaining to what is asked is not given. Sometimes, applications are returned with flimsy reasons like citing that there is no proper signature. Each state government makes its own set of amendments to exempt its bodies from RTI purview. For example, in Tamil Nadu, the cyber crime cell and the Home (Police VII) Department is exempted. The Government in Kerala is wary of making all cabinet decisions within the purview of RTI.[18] A wilful delay is seen sometimes while responding to RTI applications that question any dubious practice in a department. Then even if the applicant gets a favourable order from the Chief Information Officer, the public authorities prefer an appeal to the High Court. The backlog of cases and the years it takes for the adjudication process to be completed is a boon for them as it helps to cover up their sham.

- Lack of enforcement of the Right to Inspect

Section 2(j)(i) of the RTI Act, 2005 brings the right to inspect work, documents and records within the ambit of Right to Information. Many are not aware of this powerful right which brings the common man in direct contact with the system.

[18] 'Kerala: Pinarayi Vijayan says all Cabinet Decisions won't fall under RTI' *The Indian Express* (Thiruvananthapuram, 20 January 2017) <http://indianexpress.com/article/cities/thiruvananthapuram/kerala-pinarayi-vijayan-says-all-cabinet-decision-wont-fall-under-rti-4483753/> accessed at 10 July 2017.

- Difficulty in identifying corrupt practices

There is a considerable amount of difficulty in detecting underhand, corrupt deals even if the necessary information is furnished. It is also a general tendency of each department to furnish information with technical jargons which are difficult to understand.

- Lack of Personnel

The government departments recruit fewer employees as compared to their sanctioned strength. So the PIOs and other staff are already overburdened and on top of it, when they are asked to do an arduous task with no sort of incentive, they do not work as effectively to provide information.

- Political Parties not yet within the purview of RTI

Six national parties in India including the Bharatiya Janata Party and the Indian National Congress have refused to comply with the Central Information Commission Order of 2013 declaring them as public authorities.[19] The Commission held that that even though political parties are non-governmental organisations yet they wield and influence the exercise of governmental power and, thus, it is imperative for political parties to be transparent. The relevant part of the order reads:

"*Political parties are a unique institution of the modern Constitutional State. These are essentially civil society institutions and are, therefore, non-governmental. Their uniqueness lies in the fact that in spite of being nongovernmental, political parties come to wield or directly or indirectly influence, exercise of governmental power. It is this link between State power and political parties that has assumed critical significance in the context of the Right of Information."*

A writ petition was filed later by the Association of Democratic Reforms to bring all recognised national parties within the ambit of RTI. That has not yet been disposed off till now by the Apex Court.

[19] CIC/AT/A/2007/01029&01263-01270, dated 29 April 2008.

- Opaqueness of the judiciary

Like other institutions, judiciary has also been involved in corruption. But since corruption is generally associated with the political class, the general public have not focussed too much on the working of the justice delivery organ. There have been a few notable attempts to breach the wall; the reluctance shown by the members of the judiciary to be more transparent is apparent.

Certain instances that illustrate the reluctance of the judiciary to furnish information:

(i) In 2007, Mr. Subhash Chandra Agrawal filed an RTI application to the Supreme Court seeking information pertaining to declaration of assets by Supreme Court Judges, among other things. The request was denied citing lack of information. When the Central Information Commission, in 2009 asked the PIO to furnish the information, the Supreme Court challenged this order twice before the Delhi High Court even as it made some amount of information about judges' assets public, on its website.

(ii) In 2007, Mr. N. Anbarasan filed an RTI request before the Karnataka High Court for information regarding the scrutiny and classification of writ petitions, The information was denied. After this, Mr. AKM Nayak, the State Chief Information Commissioner, and a former Additional Chief Secretary, appealed against the High Court ruling. The Supreme Court not only dismissed the appeal but imposed affine of Rs 1lakh on Mr. Nayak for 'wasting public money for satisfying his ego'.[20]

In a landmark decision, the Delhi High Court, in 2009 had asked the public authority under the Act, pertaining to the Apex Court to make the assets of its judges public. The verdict was challenged by the Supreme Court through its public authorities and in the ironical way that our system is set, is pending before the judges of the Supreme Court.

In 2010, a three-judge bench of the Delhi High Court consisting of Justice A.P. Shah, Justice Vikramjit Sen, and Justice S. Muralidhar, in a path breaking judgement held that the

[20] Aniket Aga, 'The Supreme Court still adamantly refuses to yield to RTI' (*The Wire*, 3 September 2015) <https://thewire.in/law/the-supreme-court-still-adamantly-refuses-to-yield-to-rti > accessed 11 July 2017.

RTI Act would extend to the office of the Chief Justice of India as well. The verdict demonstrated a unique feature of judicial federalism in the country where a High Court can render a judgment "against the Supreme Court." The Delhi High Court enunciated that "judicial independence is not the personal privilege or prerogative of the individual judge; it is the responsibility.... a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof."[21]

Justice A.P Shah enunciated that the declarations are not furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest. Therefore, the asset information that is communicated by the Supreme Court Judges with the CJI are not held in the capacity of a fiduciary and therefore, can be revealed , if directed to do so. This judgment too was taken to the Supreme Court on appeal and is pending.

The Apex Court, in 2015, declared that medical expenses of judges are not qualified to come within the ambit of RTI. They reasoned that it is personal information despite the petitioners arguing that the money comes out of public funds and that the same immunity was not extended to the medical expenses of legislators.[22]

- Fear

There is a sense of fear while dealing with the powerful political class who run the system; both from the lowest to the highest rung. There have been many cases wherein whistleblowers have been attacked. Worse, their own reputation have been tarnished by the vengeful authorities who file false cases against them.

[21] Kaleeshwaram Raj,'Courting Transparency in the Modern State' (*The Week*, 10 July 2017) <http://www.theweek.in/news/india/courting-transparency-in-the-modern-state.html> accessed 12 July 2017.
[22] Gaurav Pathak, 'Medical Expenses of Judges cannot be revealed under RTI Act' (*Livelaw,* 2 July 2015) <http://www.livelaw.in/medical-expenses-of-judges-cannot-be-revealed-under-rti-supreme-court/>accessed 30 June 2017.

- Lack of proper maintenance of records/flimsy excuses

There have been many instances wherein information could not be given by the public authorities because the relevant documents were missing. Genuine cases apart, many such reasons including ones such as "files being eaten up by mice' are just concocted tales to deny information."[23]

6. Using RTI Effectively to Combat Corruption – Suggestions

- Enforcing S.4(2) of the RTI Act

Section 4(2) of the Right to Information Act states that "it shall be a constant endeavour for public authorities to provide as much information *suo motu* so that there should only be a minimum resort to the RTI Act." However, neither the State Information Commissioners nor the Chief Information Commissioners have authority under this Act to pass blanket directions for the enforcement of this provision. This authority needs to be given so that the very essence of this legislation is achieved.

- Exercising the Right to Inspect under S.2(j)(i) of the RTI Act

The right to inspect the work, documents and records is an invaluable right in the hands of the public which serves a dual purpose – detection of dubious practices and keeping the public authorities on their toes, that ultimately leads them to avoid corrupt practices.

- Demanding file notings

File notings should be demanded, under RTI on all major decisions and policies that impact the country.

- Imparting proper on-the-job training to PIOs

PIOs should be given proper training both before and during their tenure so that they can apply their minds independently and decide whether the information can be given and to what extent. They must be made to understand the purpose of the legislation and their own significance in exposing corruption and accelerating the country's development.

[23] Rumu Bannerjee 'Files Go Missing, CIC smells a Rat' *Times of India* (1 July 2017) <http://timesofindia.indiatimes.com/india/files-go-missing-cic-smells-a-rat/articleshow/59393365.cms> accessed 5 July 2017.

- Changing the composition of the committee for the appointment of PIOs

Under Sections 12 and 15 of the RTI Act, the Chief Information Commissioners and Information Commissioners at both Central and State Government are appointed by a Committee headed by the Prime Minister and the Chief Minister, respectively, and comprising the opposition leader and a Cabinet Minister to be nominated by the Prime Minister/Chief Minister. This structure is slightly misbalanced because out of the three people appointing, two are a part of the ruling government. Therefore, this may give rise to circumstances wherein the government appoints its own loyalist to the post to ensure that the whistleblower is kept at bay. In the present scenario, where PIOs are already reluctant to give information, this could be dangerous. Thus, it is suggested that the Chief Justice of the Supreme Court or his/her nominee should also be a part of the Committee that appoints Information Commissioners. There should not be any veto power and the decision by the majority should be final. This will ensure a proper check-and-balance system.

- Prohibiting disclosure of applicants' details

There have been instances of government leaking information about the details of the RTI applicants, which has subjected the latter to blackmailing, threats and even death. Not only should the Whistleblowers Protection Act be strictly enforced, but also a specific provision should be imposed in the RTI Act that prohibits disclosure of details of the RTI applicant and imposing a punishment to those, who act on the contrary.

- Constituting separate Benches

To reduce the backlog of appeals pertaining to the RTI Act in the High Courts and the Supreme Court, separate benches may be constituted both in the High Courts and the Supreme Court to dispose of the matters quickly.

- Doing background research

It is important to do some background research on the concerned Department before filing an RTI, which seeks to expose corruption. This is necessary because to get the rights answers, the right questions need to be asked and it also helps the applicant in understanding the information furnished by the concerned Department which is likely to contain technical jargons. Activists can also take the help of resource persons skilled in the particular field to understand the information.

- Digitising all records

Compulsory digitisation of records must be done. The government can make use of the skilled but unemployed youth in the country to do the same.

- Adequate staffing

The recruitment in government departments must match the vacancies. Overburdening of work on the shoulders of a few is also one of the reasons for an incessant denial of information.

- Exempting organisations – An unnecessary practice

The habit of both the state and the central government to exempt more and more organisations from the RTI Act should be prevented. It is clear from Section 8 that certain categories of information should not be disclosed. Information that impedes the process of investigation, that would prejudice the sovereignty, economic interests of the country, etc., should not be given; but that does not mean all organisations that deal with such matters should absolutely be exempt from the purview of RTI. The public have a right to get information on the general working of the organisation, its questionable impact on the financial exchequer, etc. Exempting an agency in totality, removes the feeling of accountability they feel towards the people, which is dangerous in a democracy.

- Broadening the scope of Public Authorities

The definition of 'public authorities' under Section 2(h) of the RTI Act is a bit narrow and should be broadened to include all bodies and institutions that discharge public functions, though they may not come within the ambit of State as per Article 12 of the Indian Constitution.

- Including political parties under the ambit of RTI

All national and regional political parties must be subject to RTI.

- Ensuring a transparent judiciary

The judiciary must be willing to open its doors to the RTI Act, in terms of both the assets and other expenses of the judges that are paid from public funds. This is for the simple and fundamental reason that these constitutional authorities are signing their own bills, when

they make a claim. The concept of independence of judiciary has no correlation to this, and so, cannot be a reason for not divulging the details. The Doctrine of Constitutional Trust, which the judiciary has reiterated time and again, should be applied to itself as well; this automatically creates a duty to be transparent and accountable to the public.

7. Conclusion

The significance of the RTI Act (2005) in the journey to curb the cancerous growth of corruption cannot be undermined. Without it, legislation such as the Prevention of Corruption Act, 1988 and even the Lokpal and Lokayukta Acts, 2013 are nothing but toothless tigers. However, there is a need for changes in both the legislation and the mindsets of the governing class, who need to realise that transparency and accountability are inseparable parts of a democracy; the fact that they are not doing a favour to the citizenry by providing information. All the three wings of the state, including the judiciary has to embrace this ideal. At the same time, the people ought to realise that this particular piece of legislation is meant for each one of us to be active participants in ridding the system of this taint and contributing to the country's development; it is not a task to be just left to NGOs or certain whistleblowers or journalists. Effective and full use of the Act by vigilant citizens alone can root out the menace of corruption from the system. For as Justice Louis Brandeis of the United States Supreme Court said in 1913, "Sunlight is the best disinfectant."

SCOPE OF THE SUBORDINATE JUDICIARY UNDER SECTION 482 OF CRPC

Durga Khaitan*

ABSTRACT**

Section 482 of the Code of Criminal Procedure (CrPC) extends plenary powers to the High Courts to deal with any form of criminal matters. But whether these powers percolate down to the magistrates courts is a question because time and again these courts are unsure as to whether they can assume these powers to themselves to adjudicate criminal cases within their prescribed jurisdiction. The objective of this paper is to find out whether the subordinate judiciary can also enjoy those inherent powers granted under Section 482 of CrPC. The paper is based mainly on the analyses of judgments both in favour and against extending the inherent powers to the subordinate judiciary dealing with criminal matters. The paper argues that when subordinate civil courts can pass orders under Section 151 of the Code of Civil Procedure (CPC), why can't the magistrates courts pass orders invoking Section 482 of CrPC. The paper concludes by saying that the Indian criminal justice system will be greatly served if the inherent powers granted to the High Courts under Section 482 of CrPC are extended to the subordinate judiciary. The methodology adopted in this paper is doctrinal and the method employed (to reach at conclusive findings) is analytical.

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1. Introduction

On 29th October 1993, the Supreme Court of India while deciding the case of *K. P. Tiwari v State Of M.P* held, "Our legal system acknowledges the fallibility of the judges and, hence, provides for appeals and revisions. A judge tries to discharge his duties to the best of his capacity. While doing so, sometimes, he is likely to err. It is well said that a judge who has not committed an error is yet to be born."[1]

So, what happens when a Magistrate or a Sessions judge commits errors while passing interlocutory orders? The Code of Criminal Procedure (CrPC) is completely silent as to the remedy in such circumstances. The Code under Section 362,[2] however, provides for correction of clerical and arithmetic mistakes by Magistrates after the final judgment is passed. Under identical circumstances in a Civil Court, the Civil Judge or Munsif takes recourse to inherent powers as under Section 151[3] of Civil Procedure Code (CPC). Just like CPC, CrPC too has its provision saving inherent powers under Section 482 but whether a Magistrate or for that matter any other Criminal Court in subordinate judiciary, including Sessions Court, can make use of this provision or not is a question over which the higher judiciary seems to have different and at times even contradictory views.

2. Defining Inherent Powers

In a general sense, inherent powers are those that permanently exist in a particular authority by virtue of its very existence without being derived from any other authority. Different law dictionaries and Judges have defined the term inherent powers as follows:

[1] 1994 CrLJ 1377 (SC).
[2] Code of Criminal Procedure, s 362 - Court not to alter judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.
[3] Code of Civil Procedure, s 151 - Saving of inherent powers of court.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

(a) Black's Law Dictionary defines 'inherent powers' as "Existing in something as a permanent, essential, or characteristic attribute."[4]

(b) Webster's New World Law Dictionary defines it as "A power that must be deemed to exist in order for a particular responsibility to be carried out."

(c) John Bouveier defined inherent powers as "An authority possessed without its being derived from another. It is a right, ability or faculty of doing a thing, without receiving that right, ability or faculty from another."

(d) Justice Anderson defined[5] inherent powers as "The power of each court over its own process is unlimited; it is a power incident of all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and (to) see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter of the most careful discretion."

By a simple understanding of the various definitions it appears that any authority vested with any power or responsibility needs certain ancillary/allied powers to discharge the said responsibility properly and effectively and the same principle applies to judicial authorities/courts as well.

3. The Logic Behind the Development of Inherent Powers

The idea of inherent powers is not new to the Indian legal system, for the first time it figured as Section 151 of CPC. So far as criminal procedural law is concerned, prior to 1923, there was no provision dealing with inherent powers or any such power in CrPC and in 1923 this provision was added under Section 561A of CrPC, 1898, which later became Section 482 under CrPC, 1973.

[4] Oxford Dictionary, 'inherent' <http://www.oxforddictionaries.com/definition/english/inherent> accessed 12 March 2018.
[5] *Cocker v Tempess* 1841.

The Hon'ble Privy Council in *Jai Berham's case* held, "every Court exists to do real and substantial justice or to prevent abuse of its own process and hence, possesses inherent power to achieve these ends, where the code is silent on any matter."[6] Thus, prior to insertion of Section 482 CrPC, that is before amendment when earlier identical provision was in force as under Section 561A CrPC, the Privy Council interpreted in favour of inherent powers for every Court including that of the Magistrates.

Administering justice is the main objective of courts and while so doing they have to have powers enabling them to pass necessary orders for the ends of justice even when the statute fails to provide for the same. Speedy trials aid the administration of justice and for avoiding delay it is necessary that the grassroots courts are empowered to deal with exigencies by way of exercising inherent powers; if their authority is limited to the literal words of a statute, their ability to cater to justice stands retarded. The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfil their statutory and constitutional functions even when such actions are not specifically authorised by either constitutional text or by express provisions in a statute.

4. Section 482 CrPC Revisited

Section 482 CrPC lays down, "*Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

The language of provision shows it is an enabling provision, declaring for the sake of clarity that High Court's power is not affected and that as superior Court it has power of interference for meeting the ends of Justice. Nowhere is there any suggestion for exclusion of the Magistrate's power to invoke the provisions of Section 482.

[6] AIR 1922 PC 269.

5. The Two Contradictory Approaches Regarding Section 482

One school of thought holds that just like any other Court of Law the Magistrates too have inherent powers and it exists by virtue of the basic principle that no legislation can provide for in anticipation to address all situations that possibly can arise in future and therefore, the Courts have inherent power to pass necessary orders for ends of justice in such circumstances.

And there exists a contrary view that the Magistrates do not enjoy any inherent powers for the simple reason that Section 482 CrPC does not confer or reserve any such power directly or expressly on the Magistrates.[7]

The following are a few judgments that indicate that Magistrates do not enjoy inherent powers under Section 482 of CrPC.

(1) In 1977, the Hon'ble Supreme Court in *Bindeswari Prasad's Case* held, "Even if Magistrate had any jurisdiction to recall the order, it could have been done by another judicial order after giving reasons that he was satisfied that a case was made out for recalling the order. We, however, need not dilate on this point because there is absolutely no provision in The Criminal procedure Code of 1898 (which applies to this case) empowering a Magistrate to review or recall an order passed by him. Criminal Procedure Code does contain a provision for inherent powers, namely, Section 561A which, however, confers these powers on the High Court and the High Court alone. Unlike Section 151 of Civil Procedure Code, the Subordinate Criminal Courts have no inherent powers. In these circumstances, therefore, the learned Magistrate had absolutely no jurisdiction to recall the order dismissing complaint*"*.[8]

(2) In 2004, a similar view was expressed by the Supreme Court in *Adalat Prasad v Rooplal Jindal* where Court held that, "the observation of this Court in the case of

[7] *A. S. Ganraya v S. N. Thakur* AIR1986 SC 1440.
[8] *Bindeshwari Prasad Singh v Kali Singh* AIR 1977 SC 2432.

Mathew[9] that for recalling an order of issuance of process erroneously, no specific provision of law is required would run counter to the Scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew's case (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."[10]

(3) In 2009, in *Mithabhai Pashabhai Patel v. State of Gujarat*,[11], the Supreme Court held, "The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The pre- cognisance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four-corners of the Code."

The following are a few judgments that indicate that Magistrates do enjoy inherent powers under Section 482 of CrPC.

(1) In 1969 in *Pritam Singh v State*, the Allahabad High Court resorted to a judicious, as distinct from hyper technical, approach and interpreted this provision to mean that subordinate Criminal Courts have inherent powers and held that, "in case of an order which is a nullity there is no reason why the court, having discovered the mistake be not allowed to correct it and be compelled to adapt the lengthy process of referring the case to the High Court. In this case Court made a distinction between an erroneous order and an order which is a nullity and arrived at the finding that in case of erroneous order the subordinate court has no inherent power to rectify the mistake."[12]

(2) In 1992 Supreme Court in the case of K M Mathews recognised the inherent powers of Magistrate and held, "Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could

[9] 1992 AIR 2206; 1991 SCR Supl. (2) 364.
[10] *Adalat Prasad v Rooplal Jindal* (decided by the Supreme Court 25 August 2004).
[11] (2009) 6 SCC 332.
[12] *Pritam Singh v State* AIR1969 ALL 513.

be tried. It is his judicial discretion. No specific provision required for the Magistrate to drop the proceedings or rescind the process" and that, "to ask the accused to undergo the trial of the case merely on the ground of the issue of process would be oppressive. No person should be tried without a prima facie case."[13] Thus Supreme Court interpreted the provision and held that subordinate criminal court has inherent powers to drop the proceedings against an accused when no prima facie case could be made out against him.

(3) In 2008, a similar view was expressed by the Supreme Court in *Sakiri Vasu v. State of Uttar Pradesh and Others.*[14] The Court held, "It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary to its execution." The above discussion shows that the Supreme Court and Various High Courts have held different ,at times even contradictory, opinions and views as regards the question whether sub-ordinate Criminal Courts have inherent powers or not.

6. Section 482 CrPC per contra Sec. 151 CPC

Both Sec. 482 CrPC and Sec 151 CPC may be compared as both proceed on a similar fundamental assumption. None of these two provisions provides for any new powers; they only lay down that the inherent powers which the criminal courts or civil courts possess shall be protected and this is clearly spelled out to ensure that it is not understood that the only powers possessed by the courts are those expressly conferred by the Codes and no inherent power has survived the passing of the Codes.

[13] 1991 SCR Supl. (2) 364.
[14] (2008) 2 SCC 409.

In the case of *Harsh Kapoor v Smt. Komal Kapoor,* the Uttarakhand High Court held, "The intention of the Legislature enacting the code of Criminal Procedure and the Code of Civil Procedure vis-à-vis the law laid down by this Court it can safely be concluded that when there is a specific remedy provided by way of appeal or revision the inherent power under Section 482 Cr. P.C. or Section 151 C.P.C. cannot and should not be resorted to."[15]

In *Padam Sen & Anr v State of U.P*,[16] the Supreme Court observed: "Inherent powers of Court are in addition to powers specifically conferred on the Court by the Code. They are complementary to those powers and, therefore, it must be held that the Court is free to exercise them for the purposes mentioned in Section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against intentions of the Legislation. It is also well recognised that inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code."

In *Manohar Lal Chopra v Rai Bahadur Rao Raja Seth Hiralal*,[17] the Apex Court held: "the inherent jurisdiction of court to make orders *ex debito justitiae* is undoubtedly affirmed by Section 151 of the Code but inherent jurisdiction cannot be exercised so as to nullify the provision of the Code of Civil Procedure. Where the Code of Civil Procedure deals expressly with a particular matter, the provision should normally be regarded as exhaustive."

In 2004 in *Subramanium Sethuraman v State of Maharashtra and another*,[18] the Supreme Court held: "interlocutory orders may be challenged as under Section 482 CrPC". The provision

[15] *Harsh Kapoor and Others v Smt. Komal Kapoor* 2013 (2) U.D. 349 (decided on 21 August 2013 by Uttarakhand High Court).
[16] AIR 1961 SC 218.
[17] AIR 1962 SC 527.
[18] 2004(13) SCC 324.

for Criminal Revision as under Section 397[19] CrPC provides for revision of orders passed by Magistrates but sub section (2)[20] of Section 397 CrPC bars criminal revision of interlocutory orders and as such people aggrieved by interlocutory orders apparently had no relief under the Code of Criminal Procedure. And Supreme Court held that in such circumstances provisions of Section 482 CrPC can be invoked.

Interestingly, Section 397 CrPC gives revisional power to both High Court and Sessions Court. Whereas Section 482 CrPC, the exercise of which is lawful for the purpose of revision of interlocutory orders as per Supreme Court, confers such powers exclusively to High Courts. Thus a Sessions Court has power to revise final orders of Magistrates as under section 397 CrPC but has no power to revise interlocutory orders of Magistrate as under Section 482 CrPC.

A Civil Judge has power to revive or restore a plaint dismissed for default under Order 9 of CPC, but no such provision is provided in CrPC enabling the Magistrate to restore a complaint by invoking inherent powers under Section 482 CrPC. Enabling the Magistrate in this sphere will only help in expediting the process of adjudication.

In *Ram Chand & Sons Sugar Mills Pvt. Ltd. v Kanhayalal Bhargav*,[21] the Supreme Court observed, "inherent power of the Court is in addition to and complimentary to the powers expressly conferred under the Civil Procedure Code; but that power will not be exercised if it's exercise is inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. If there are express provisions exhaustively covering a particular topic, they give rise to a necessary implication that no power shall be exercised in respect of the said topic otherwise than in the manner prescribed

[19] CrPC, s 397- Calling for records to exercise powers of revision. (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order- recorded or passed, and as to the regularity of any proceedings of such inferior Court.."

[20] Section 397(2) CrPC - The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

[21] AIR 1966 SC 1899.

by the said provisions. Whatever limitations are imposed by construction on the provisions of S 151 of the Code, they do not control the undoubted power of the Court to make suitable order to prevent the abuse of the process of the Court." Under Section 151 CPC,1908 Supreme Court reiterated the well established legal principle that "the Courts have unlimited and unrestricted powers under Section 151 CPC to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court". So the broader philosophy behind enactment of Section 151 CPC and Section 482 CrPC are somewhat similar.

Inherent powers under section 482 vests solely in High Court and subordinate Criminal courts are not allowed to use inherent powers. The above discussion shows that many a times Section 482 were invoked to deal with matters like recalling of process mistakenly issued in offences triable by Magistrate, deleting any adverse remark made against any person and such matters of limited seriousness which can be dealt with Magistrates and by Sessions Courts in their revisional capacity.

Law's vast outreach and conceivable potentiality of remedy is sought everyday by all and sundry, it is no more a domain of the rich and powerful. With both crime graph[22] and population graph steeply rising,[23] there is urgent need to bring justice to one's doorsteps. Recognising the inherent powers of Magistrates and Sessions Courts will further the cause of accessible and affordable justice.

On the other hand, as we witness an era of docket explosion before High Courts it is high time that the burden of High Courts is reduced by recognising the inherent powers of Magistrates, Sessions Court and subordinate Criminal Courts to deal with interlocutory matters and matters such as re-examining the order issuing process or correction of mistakes or review power of review and recall of orders other than those restricted by Section 362 CrPC.

[22] National Crime Records Bureau, Ministry of Home Affairs, Crime in India- Statistics <ncrb.nic.in/StatPublications/CII/CII2015/FILES/Statistics-2015_rev1_1.pdf> accessed 5 March 2018.
[23] Trading Economics <https://tradingeconomics.com/india/population.> accessed 5 March 2018.

7. Various Reports Suggesting Expansion of Scope Under Section 482

Various recommendations made in law commission reports and others such as the Malimath Committee Report indicate that the scope of Section 482 of CrPC may be extended. The following are some of the observations of some of the Reports regarding expansion of the scope of Section 482 of CrPC.

(a) Report of the 14th Law Commission:- Though laws attempt to deal with all cases that may arise, the infinite variety of circumstances which shape events and the imperfections of language make it impossible to lay down provisions capable of governing every case which in fact arises. Courts which exist for the furtherance of justice should, therefore, have authority to deal with cases which, though not expressly provided for by the law, need to be dealt with to prevent injustice or an abuse of the process of law. This has led to the acceptance of the principle that even in cases where the law is silent and has made no express provision to deal with a situation which has arisen, the courts have inherent powers to do substantive justice and prevent an abuse of the process. In this light, the Commission recommended that the statutory recognition of such inherent power under Section 561A of CrPC should be vested in all subordinate criminal courts.[24]

(b) Malimath Committee Report:- The observations in Para 2.17.1 (pg:30) of the Report indicates that the inherent powers of the High Courts under Section 482 of CrPC connote the residuary powers of such Courts to do justice. The Report said: **There is no good reason to deny inherent powers to the other subordinate criminal courts** *(emphasis added)*. The Report recommended: "Every Court shall have inherent power to make such orders as may be necessary to discover truth or to give effect to any order under this Code or to prevent abuse of

[24] Law Commission, Reform of Judicial Administration (Law Com 14) part II, pp 828-830 <lawcommissionofindia.nic.in/1-50/report14vol2.pdf> accessed 21 March 2018.

the process of court or otherwise to secure the ends of justice."[25]

(c) Report of 141st Law Commission:- As per the Report, "The inherent powers ,thus, recognised (under Section 561-A), empowers the court, *inter alia,* to prevent the abuse of the process not only of High Court but of any Court."[26] The Report recommended amendment of Section 482 to the extent of statutory recognition of this power to all Courts including courts of Magistrates. The Report speaks of conferring (emphasis added) inherent powers by way of amendment but the truth is, neither can the inherent powers be conferred nor does Section 482 (earlier section 561A) CrPC or for that matter Section 151 of CPC purport to confer any such rights. Rather these provisions merely recognise the existing inherent powers of the Court. In relation to Section 151 of CPC, these powers are not conferred upon the court, they are rather inherently possessed by the court; why, then, all the subordinate criminal courts would not have the inherent powers even without their statutory recognition.

8. Conclusion

The first level of court system in India, i.e., the primary structure of the subordinate judiciary, consists of two streams- Civil & Criminal. These two faculties/streams/branches are manned by Civil Judges and Judicial Magistrates, respectively.

Law recognises, grants and saves the inherent powers of the Civil Judge, which is the lowermost Judge in the structure of civil adjudication in terms of jurisdiction as well as seniority/experience. It is the first filing Court for the minimum pecuniary jurisdiction and anyone who qualifies to be a Judge at this level is placed as Civil Judge or as a Judicial Magistrate in his/her first posting. So the junior-most Civil Judge has inherent powers as under Section 151 of Civil Procedure Code. But another officer of the same qualification and seniority

[25] Committee on Reforms of Criminal Justice System, (report , vol I) 266 <https://mha.gov.in/sites/upload_files /mha/files/pdf/criminal_justice_system.pdf> accessed 21 March 2018.
[26] Ministry of Home Affairs, Need For Amending The Law As Regards Power of Courts To Restore Criminal Revisional Applications and Criminal cases Dismissed For Default in Appearance (Law com 141, 1991) 15<lawcommissionofindia.nic.in/101-169/report141.pdf> accessed 12 February 2018.

who is placed as a Judicial Magistrate does not have any inherent powers as per Section 482 CrPC. Even the Sessions Judge or Assistant Sessions Judge or Additional Sessions Judge or Chief Sessions Judge of a District, who are entrusted with trial and adjudication of offences punishable by death sentence are also not having any inherent powers as under Section 482 CrPC. Thus, the argument that inherent powers are not granted to subordinate Criminal Courts as it entails lot of maturity to handle also stands no ground.

Moreover, just as in case of bail matters and death sentences every single order of a subordinate Criminal Court is open to scrutiny of the higher and the highest Court of the land and orders passed by virtue of inherent powers will be no different. And if gravity of the matter concerned is the issue, the law maker can very well demarcate the areas and matters of lesser gravity where such powers can be exercised by the Magistrates and the areas where they can be exercised by the Sessions Judge.

It is real hardship for the common litigant to travel all the way to a High Court for remedy in the case of a minor mistake such as issuing process. In a study, it has been found that geographical proximity of the litigant with the court is a significant factor in deciding whether he can actually avail of the remedy or not.[27] This study, interestingly, reveals that there is proportionately increased likelihood of a litigant availing a remedy if it is available at a geographically nearer place. And to make the population of more than 1.3 billion to approach 24 High Courts raises obvious accessibility issues and the process involves lot of man hours and expenses also which in turn makes it an economically expensive exercise as well.

[27] Nick Robinson, The Indian Supreme Court in numbers (Azim Premji University LGDI Working Paper 2012-2013), <http://azimpremjiuniversity.edu.in/Pages/PageNotFoundError.aspx?requestUrl=http://azimpremjiuniversity.edu.in/sitepages/pdf/LGDI%20Workingpapers%2014December2012%20The%20Indian-Supreme-Court-by-the-Numbers%20NickRobinson.pdf.> accessed 12 March 2018; See also Nick Robinson, Quantitative Analysis of Indian Supreme Court's Workload, (2013) 10(3) Journal of Empirical Legal Studies 573-601.

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