

TRANSPARENCY OF JUDICIARY UNDER **RIGHT TO INFORMATION**

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1. ABSTRACT

The participants of this democratic system of India i.e. citizens have a right to know what, how and why of any decision, changes or continuity regarding or of its functioning. Right to Information is a Fundamental Right and is guaranteed as per Article 19 and 21 of the Constitution of India and was enacted by Parliament of India in 2005. This research paper will discuss in detail the attitude of judiciary particularly in Supreme Court and several High Courts and that of Central Information Commission and State Information Commissions towards Right to Information. This part of research also looks into the implementation and impact of RTI on Judiciary; whether it was a regressive or progressive legislative change. With the changing time and laws people are becoming more aware of their rights; and with more awareness of Right to Information people have started questioning judiciary on more number of aspects; so this research paper discusses about all such issues which is raised in courts due to RTI and whether officials like bureaucrats, politicians and especially the judges follow RTI rules or not; also tells about the tussle going on between judiciary and various commissions made for RTI. Also there is a comparison as regards to situation in other countries and what are the rules framed by other countries so as to maintain the transparency and accountability in the country. There is also the solution provided to these issues arising in this democratic country as to how to make judiciary follow RTI rules and how to make them accountable and whether Supreme Court should come under RTI or not.

The Indian Supreme Court may be standing at a historic juncture where it has open doors for the public to question its accountability by disclosing information pertaining to the assets and interests of the judges of the higher judiciary. It can be seen that Supreme Court is reluctant to bring the higher Judiciary under the purview of the Right to Information Act. There is already a tussle emerged between the Delhi High Court and the Supreme Court, with the former seeking to bring the higher judiciary under the Right to Information and justifying the need for disclosure of assets of judges of the Supreme Court and the High Courts. The reasons which the Supreme Court has been giving so as to avoid disclosure of such information are that such information is on the grounds of independence, confidentiality, and possible breach of fiduciary duty. RTI is a part of Freedom of Speech and Expression and is a key component in the attainment of economic, social and political rights of an individual as well as the community at large; so for attaining all these goals and

to protect these rights Judiciary needs to work hand in hand with the Commissions so as to provide convenient information to the citizens which they require or asks for.

2. RTI AND JUDICIARY

RTI- a key to good governance is one of major legislative change made. This applies to all States and Union Territories of India except the State of Jammu and Kashmir.

JUDICIARY is among the three and one of the vital organs of the State as envisaged in the scheme of our Constitution and has a unique role to play in comparison to the other two organs.

The Indian Judicial system is one of the oldest legal systems of the world. It is part of the inheritance, India received from the British after more than 200 years of their colonial rule, and the same is obvious from the many similarities the Indian legal system shares with the English legal system.¹ The Indian Constitution and the judicial system have laid down the framework of the current legal system and also derive powers from it. The foundation source of law i.e. the Constitution of India is the supreme law of the country. Judiciary has not only laid down the framework of Indian Judicial system but also has defined respectively the directive principles which are the duties of state and fundamental rights and duties of people.

The institution of judiciary is one of the most important organs in a democratic setup as it is entrusted with the great responsibility of administering justice, one of the core needs of the citizenry. Being the custodian of rights of the citizens of a country, judiciary is bestowed with the task of realizing the Constitutional values to the fullest extent. The Preamble to the Constitution enshrines the ideals of securing social, economic and political justice to all its citizens. Justice failed to be meted out in a fair manner. It jeopardizes the interests of the civil society and also vitiates the principle of rule of law. An independent judiciary is considered to be the cornerstone of a democracy. Judiciary and judicial decisions have given a shape to the Indian Polity to a great extent. In ensuring the process of fairness in governance and administration the role played by the judiciary has been pivotal.

The citizens' right to know the true facts about the administration of a country is one of the essential ingredients of a country and also for a democratic State. If there is an open

¹NathubhaiBhat, Accountability of Judiciary to Bar and Society at Large, 28 Indian Bar Review 163 (2001).

government where there is full access to information regarding functioning of government then only the participants of democracy i.e. people can play an important role in the democracy.²

A citizen cannot achieve knowledge unless he has certain basic freedoms such as freedom of thought, information, conscience, speech, expression, locomotion and so on and so forth.³

The freedom of information as one of the members of the Constituent Assembly said, is one of the terms around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutional prevail.⁴

The said freedom is attained at considerable sacrifices and suffering and ultimately it has come to be incorporated in the various written Constitutions'; therefore it is basic right "Everyone has the right to freedom of opinion and expression; it covers a wider area, this right includes freedom to hold opinions without interference and to seek and receive and imparts information and ideas through any media and regardless of frontiers" proclaims as the Universal Declaration of Human Rights(1948).⁵

The people of India declared in the Preamble of the Constitution which they gave unto themselves their resolve to secure to all citizens liberty of thought and expression.⁶

These freedoms represent the basic values of life in a civilized society and have been given a place of pride in our Constitution. The expression 'freedom of information' is not used in Article 19 in the Constitution but it is declared by the judiciary that it is included in Article 19(1) (a) which guarantees freedom of speech and expression.

3. INDEPENDENCE OF JUDICIARY

²V.R., Krishna Iyer, Freedom of Information 86 (1990).

³A.B. Srivastava, Right to Information Laws in India 11 (2006).

⁴Justice A.H. Saikia, "The Right to Information Act, 2005- An Instrument to Strengthen Democracy" AIR 2007 (Journal) p. 119.

⁵ The Universal Declaration of Human Rights, 1948 is a declaration adopted by the United Nations General Assembly on 10th december1948 at Palais de Chaillot, Paris. The Declaration arose directly from the experience of the second world war and represents the first global expression of rights to which all human beings are inherently entitled.

⁶ Preamble of the Constitution of India- WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a {Sovereign Socialist Secular Democratic Republic} and to secure all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the {unity and integrity of the nation}; IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

“The public have the right to have independence of the Judiciary preserved; the absolute freedom and independence of judges is imperative and necessary for the better administration of Justice.”

3.1. WHAT IS THE MEANING OF INDEPENDENCE OF JUDICIARY OR JUDICIAL INDEPENDENCE?

Judiciary is the guardian of the constitution and defender of fundamental rights of the people.

Before discussing about how independence of judiciary is maintained in India, it is essential to explain what does the term “independence of judiciary” mean.

In the words of **Dr. V.K. Rao**, “Independence of judiciary has three meanings:

- The judiciary must be free from encroachment from other organs in its sphere. In this respect, it is called separation of powers. Our Constitution makes the judiciary absolutely independent except in certain matters where the Executive heads are given some powers of remission etc.
- It means the freedom of the judgments and free from legislative interference. In this respect, our constitutional position is not very happy because the legislature can in some respects override the decisions of the judiciary by legislation. The Income-tax Amendment Ordinance of 1954 is an example,
- The decisions of the judiciary should not be influenced by either the Executive or the Legislature—it means freedom from both, fear and favour of the other two organs.”⁷

So Judicial Independence of Judiciary refers to an environment where judges are free to make decisions or pass judgement without any pressure from the government or other powerful entities.

Independence of Judiciary means that the judiciary as an organ of the government should be free from influence and control of the other two organs i.e., the executive and the legislature of government.

⁷ <http://www.yourarticlelibrary.com/india-2/independence-of-judiciary-in-india/49299/>.

3.2. WHY IS JUDICIAL INDEPENDENCE IMPORTANT?

The founders of this system understood that judges who are able to apply law freely and fairly are essential to the rule of law. The Constitution guarantees our rights on paper, but this would mean nothing without independent courts to protect them. For the performance of judiciary as the guardian of the Constitution it is essential that the judiciary must be independent. It is only when judiciary is independent of the control of executive and legislature that justice can be assured to the citizens.

Laski says, “The independence of the judiciary from the executive is essential to freedom.”⁸

It may become oppressive if judiciary is subjected to the executive control and the majority might become tyrannical and violate the constitution and freedom of the people if subjected to legislature.

It is also essential that, the judges should possess a high degree of impartiality, dignity, integrity and above all independence of judgement.

Judicial independence is thus important in a modern state for the following purposes:

- To secure an impartial trial of the accused and to protect the innocent from injury and usurpation.
- To keep the Government officials within the bounds of their legitimate authority and to check the arbitrary use of their powers.
- To act as the guardian of the constitution especially in a federal form of government.

Judicial independence plays an important role in maintaining the democratic set-up of any country. Rights of the citizens against the arbitrary powers of the executive or legislature. Freedom from the influence and control of the executive is of crucial importance. It is important for individual freedom that the judges give their verdict without fear or favour. It refers to an environment where the judge can pass impartial judgement.

Every democratic country adopts various means to ensure freedom of the judiciary and thereby to ensure individual freedom. The **U.S.A.** has adopted system of separation of

⁸ <http://www.preservearticles.com/201106258647/what-is-meant-by-the-term-independence-of-judiciary.html>.

powers to ensure independence of the judiciary. In the case of England where constitutional system is based on the concept of Parliamentary sovereignty, the adoption of separation of powers is ruled out. Partly the same situation exists in case of India, for in India, the doctrines of Parliamentary and constitutional sovereignty are blended together.

3.3. INDEPENDENCE OF JUDICIARY IN INDIA

The framers of the Indian Constitution at the time of framing of our constitution were concerned about the kind of judiciary our country should have. This concern of the members of the constituent assembly was responded by **Dr. B.R. Ambedkar** in the following words:

“There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured“.

The question that arises at first instance in our minds is that what made the framers of our constitution to be so much concerned about providing the separate entity to the judiciary and making it competent.

The answer to this question lies in the very basic understanding that so as to secure the stability and prosperity of the society, the framers at that time understood that such a society could be created only by guaranteeing the fundamental rights and the independence of the judiciary to guard and enforce those fundamental rights. Also in a country like India, the independence of the judiciary is of utmost importance in upholding the pillars of the democratic system hence ensuring a free society.⁹

The constitution of India adopts diverse devices to ensure the independence of the judiciary in keeping with both the doctrines of constitutional and Parliamentary sovereignty. Elaborated provision is in place for ensuring the independent position of the Judges of the Supreme Court and the High Courts.

Firstly, the judges of the Supreme Court and the High Courts have to take an oath before entering office that they will faithfully perform their duties without fear, favour,

⁹Atin Kumar Das, Independence of Judiciary in India: Critical Analysis, <http://mulnivasiorganiser.bamcef.org/?p=482>.

affection, ill-will, and defend the constitution of India and the laws. Recognition of the doctrine of constitutional sovereignty is implicit in this oath.

Secondly, the process of appointment of judges also ensures the independence of judiciary in India. The judges of the Supreme Court and the High Courts are appointed by the President. The constitution of India has made it obligatory on the President to make the appointments in consultation with the highest judicial authorities. He of course takes advice of the Cabinet. The constitution also prescribes necessary qualifications for such appointments. The constitution tries to make the appointments unbiased by political considerations.

Thirdly, the Constitution provides for the security of tenure of Judges. The judges of the Supreme Court and the High Court's serve "**during good behaviour**" and not during the pleasure of the President, as is the case with other high Government officials. They cannot be arbitrarily removed by the President. They may be removed from office only through impeachment. A Judge can be removed on the ground of proved misbehaviour or incapacity on a report by both Houses of Parliament supported by a special majority.

Fourthly, their salaries and allowances are charged upon the Consolidated Fund of India. Further, the salaries and allowances of Judges of Supreme court and High courts cannot be reduced during their tenure, except during a financial emergency under Article 360 of the constitution.

Fifthly, the activities of the Judges cannot be discussed by the executive or the legislature, except in case of removal of them.

Sixth, the retirement age is 65 years for Supreme Court judges and 62 years for High court judges. Such long tenure enables the judges to function impartially and independently.

Seventh, a retired Supreme Court judge cannot practice engage in legal practice in any court in India. However, a retired High court judge can practice law in a state other than the state in which he served as a High Court judge. These restrictions ensure that a retired judge is not able to influence the decision of the courts.

The **hierarchy of judicial system** in India plays an important role in maintaining the independence of judiciary. Supreme Court is the highest court for justice. Then, there

are High Court and District Courts in every state. Then, there are People's courts known as LokAdalats. If no decision is reached at these LokAdalats, then the cases move to courts.¹⁰

In a leading case, **S.P. Gupta v. Union of India** 1981 Supp.SCC 87¹¹

A seven Judge Bench of the Supreme Court followed **Raj Narain**¹² case and observed thus:

"Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their Government is doing, The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the Government.¹³ It is only if people know how Government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory Democracy.¹⁴ This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.¹⁵

4. SHOULD THE SUPREME COURT COME UNDER RTI?

¹⁰Vijay Jiswal Independence of Judiciary in Indian Constitution (august 29 2013)
<http://www.importantindia.com/2146/independence-of-judiciary-in-indian-constitution/>.

¹¹S.P. Gupta v. Union of India 1981 Supp.SCC 87.

¹²State of U. P. v. Raj Narain AIR 1975 SC 885.

¹³ While some scholars have recognized fairness and impartiality to be the ends sought to be achieved by the means of judicial independence (See Shirley Abrahamson, Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence, 64 Ohio State Law Journal 3 (2003)), some others have argued that ends are often politicized, i.e., politics does not remain outside the confines of judiciary but well within it, often shaping the ends it seeks to achieve.(See Stephen Burbank, What Do We Mean by "Judicial Independence"?, 64 Ohio State Law Journal 323 (2003)).

¹⁴R.S. Pathak, Administration of Justice and Public Accountability, 15 Indian Bar Review 213 (1988).

¹⁵ Ibid.

Also Right to information is the landmark legislative act in the Indian history of governance also in the Indian parliamentary system. RTI was aimed to increase the level of transparency & accountability in governance and also aimed at dual role of empowering common man to know about various administrative processes & at the same time instilled a pressure upon the executive to act legitimately. RTI gave more power to roots of this country i.e., people from where Constitution derive its power. Certain departments were left away from the reach of RTI as it would compromise security & Secrecy which is must constitutionally & legally.

Including higher judiciary in the ambit of RTI will have its own pros & cons

PROS

- It will increase the amount of transparency in judiciary in case of appointment of judges.
- Chances are that would decrease nepotism and despotism as criticized to be present in judiciary.
- It will increase accountability of judiciary. Judges can be held accountable for their decisions.
- It will decrease the no. of case pendency as judiciary will have given solid reasons & explanations for it.
- Timely conclusion of cases.
- It will increase the faith of people if they could also know about judicial working.
- Decrease need of people to intervene in judicial appointments.
- Vacant seats in various judicial constituencies will become transferable & recruitment for those posts will take pace.
- It will give more power to people to get their answers easily without any delay & informal paperwork.
- Corruption will be checked with increasing lucidity.

- Courts have always been questioned for pending cases. RTI can place yardstick among judicial for timely disposal of justice.
- Judiciary as watchdog of constitution as drawn boundary for public officials but it itself is not willing to be under purview of RTI.

CONS

- It will compromise independence of judiciary as specified by constitution.
- It will challenge the decision making power of Supreme Court.
- It will create extra burden on judiciary as every filed will be answerable by judiciary
- .It will compromise secrecy & security involved in certain cases. This may prove detrimental for our country.
- Judiciary will become puppet in the hands of people rather than being the sole justice provider of the country.
- It will increase the political involvement in judiciary.
- Challenging decisions of Supreme Court means pointing finger every time at constitution.
- Delay in judicial appointments & transfers as a over conscious approach can be adopted to avoid conflicts.

Though secrecy is essential to avoid unnecessary delays and unwanted interruptions but transparency is paramount. It boosts the confidence of a citizen and illustrates the belief our founding fathers had in judiciary when they declared it guardian of our supreme constitution.

Tussle between Higher judiciary and executive is not new. Successive governments and critics (prominent lawyers) have blamed the judiciary as roadblock in bringing the transparency in present collegiumssystem. Invalidating NJAC and successive attempts as unconstitutional has only diminished the image of Honourable judiciary.

Hence it is high team that higher judiciary be brought under RTI Act with following limitations:

- Subjudice case where disclosed info can influence judge's verdict.
- Confidential info to maintain unity and integrity of nation.
- If info does not deal with issue of a public importance and doesn't affect the person in any way.

So, to conclude I would like to say that judiciary being the sole guardian of constitution and human rights may be included in the ambit of RTI but it should be done to certain extent like

- In case of bribe taken by judges.
- In case of manipulation of judgement.
- In certain cases which need transparency like cases involving human and social welfare.

In a leading case of the **Cpio, Supreme Court of India v. Subhash Chandra Agarwal & anr. W.P. (C) 288/ 2009**¹⁶

The Court found that the Chief Justice's office is a "public authority" within the meaning of the Right to Information Act (the Act) as it performs numerous administrative functions in addition to its adjudicatory role. Access to information it held was therefore regulated by the Act. The Court emphasized that information pertaining to submitted declarations and their contents constitutes "information" within the meaning of Section 2 (f) of the Act.

The CPIO argued that assuming that asset declarations constituted "information" under the Act, disclosure would breach a fiduciary duty owed to the judges. The rule of confidentiality of asset declarations was also found in the 1997 Resolution. The Court dismissed this argument pointing out that the CJI could not be a fiduciary vis-à-vis Judges of the Supreme Court as judges held independent office and their affairs or conduct was not controlled by the CJI. As to the confidentiality of information, the Court highlighted that

¹⁶Cpio, Supreme Court of India v. Subhash Chandra Agarwal & anr. W.P.(C) 288/ 2009.

“mere marking of a document, as ‘confidential’, in this case, did not undermine the overbearing nature of the Act”.

The CPIO also submitted that access to asset information would result in unwarranted intrusion of judges’ privacy. The Court found that Section 8(1)(j) of the Act indeed stipulated the exemption from disclosure of personal information of a third party on the ground of privacy. The exemption applied irrespective of whether a third party was a private individual or a public official. The Court noted that if the information concerns a third party, public interest in disclosure is required.” . In case of public servants, the degree of their privacy protection was lower and thus a larger public interest in disclosure was more likely to override the interest in privacy. Once the information requester demonstrated “the larger public interest”, the next step for a relevant authority was to consult a third party (the public servant) and eventually to balance the interest in disclosure against the privacy concerns

The Court ordered the CPIO to release information about asset declarations made by the judges of the Supreme Court, but not their content as the requester did not seek for it.

DECLARATION OF ASSETS.

These declarations of Assets in the form of real estate or investments have been made to the Chief Justice of the High Court in accordance with the Full Court (of the Supreme Court) resolution dated 7th May, 1997, adopted by the Full Court of the High Court of Delhi on 26th July, 1997 and reiterated on 8th July 2008.

The decisions of this court in Central Public Information Officer-vs-Subhash Chandra Agarwal (W.P. No. 288/2009, decided on 2.9.2009 by a single judge) as upheld in Secretary General, Supreme Court of India-vs-Subhash Chandra Agarwal (decided on 12-1-2010 by a Full Bench) held that “such personal information regarding asset disclosures need not be made public” unless public interest considerations dictate it, under Section 8 (1) (j), of the Right to information Act, 2005. The safeguard (of privacy), it was held, “is made in public interest in favour of all public officials and public servants.

The Full Court Resolution of the Supreme Court of India on 7th May , 1997 adopted by the Full Court of the High Court of Delhi on 26th July, 1997 and reiterated on 8th July, 2008:

“Resolved that every Hon’ble Judge should make a declaration of all his/her assets in the form of real estate or investments (held by him/her in his/her own name or in the name of his/her spouse or his/her dependant family member within a reasonable time of assuming office and in the case of sitting judges within a reasonable time of the adoption of this Resolution and thereafter when ever any acquisition of a substantial nature is made, it shall be disclosed within a reasonable time. The declaration so made shall be to Hon’ble the Chief Justice of this Court. Hon’ble the Chief Justice should make a similar declaration for the purpose of the record. The declaration made by the Hon’ble Judges or Hon’ble the Chief Justice, as the case may be, shall be confidential.”

The declarations, however, are placed in the public domain, in view of the Full Court resolution of the Delhi High Court, dated 28.08.2009 when it was agreed to make the declarations public.¹⁷

5. DIFFERENT ASPECTS OF VITAL PILLAR OF INDIAN DEMOCRACY AND FINAL INTERPRETER OF CONSTITUTION AND LAWS i.e. JUDICIARY UNDER RTI ACT



THE SUPREME COURT OF INDIA

5.1. ABSENCE OF RULES:

The Supreme Court of India has not notified any rules to operationalise the Right to Information the Right to Information Act, 2005 (RTI Act) within its offices. According to a combined reading of **Section 2(e) (ii)** and **Section 28** of the RTI Act, the Chief Justice of India is the competent authority empowered to notify rules prescribing, amongst other things, the amount of application fee and additional fee that may be collected from information requesters. The website of the Supreme Court does not display any notification issued by the Chief Justice of India under Section 28 of the RTI Act.¹⁸

In September 2007, CHRI sent a formal application along with application fee to Supreme Court requesting a copy of the RTI Rules notified by the Chief Justice. The CPIO’s reply is given below:

¹⁷ <http://delhihighcourt.nic.in/assets.asp>.

¹⁸ The Right to Information Act, 2005, Bare Act With Short Notes, Universal Law Publishing, 2016.

- Supreme Court of India has not framed any separate rules under Section 28(2) of the Right to Information Act, 2005.
- Sh. Ashok Kumar, Additional Registrar/CPIO, Supreme Court of India, New Delhi. (sic)
- Sh. Sunil Thomas, Registrar, Supreme Court of India is the first Appellate Authority, under the Right to Information Act, 2005.
- The fee is Rs. 10/- under the Right to Information Act, 2005 in the Supreme Court of India.

More recently, in February 2010, CHRI sent another formal application along with application fee to the CPIO of the Supreme Court, seeking a copy of the Rules notified by the Chief Justice of India, under Section 28 of the RTI Act. The CPIO's second reply is given below:

I write to say that this Registry for the present is following the provisions of Right to Information Act, 2005 (22 of 2005) which is available on the website of the Central Information Commission i.e. cic.gov.in. Shri. M K Gupta, Registrar, Supreme Court of India is the First Appellate Authority under the Right to Information Act, 2005 and the appeal, if so advised, can be filed within 30 days from the receipt of this reply.

The replies obtained under the RTI Act from the CPIO clearly indicate once again that the Chief Justice of India has not notified any Rules to operationalise the RTI Act within the Supreme Court. This is worrisome for the following reasons:

In the first reply we received in September 2007, the CPIO stated that Rs.10 was charged as application fee. It is only reasonable to expect that there might be some authoritative legal instrument that forms the basis of the CPIO's decision to collect Rs.10 as application fee from a requester. However, according to the CPIO no separate Rules have been notified by the Chief Justice of India. This admission may imply that the CPIO collects the application fee according to the rate prescribed by the Government of India for public authorities under its jurisdiction. However these Rules do not automatically cover the Supreme Court unless the Chief Justice of India issues a notification that the Rules framed by the Government of India will apply to the Supreme Court also. Even this step does not seem to have been taken by the Supreme Court.

In the second reply we received in February 2010, the CPIO states that the Registry of the Supreme Court follows the provisions of the principal Act as it exists on the website of the Central Information Commission. There is no mention of the Rules framed by the Supreme Court. It is also not clear whether any notification has been issued indicating the applicability of the Rules framed by the Government of India to the Supreme Court.

Similarly in the absence of Rules the Appellate Authority designated by the Supreme Court has no guidance for dealing with first appeals filed under Section 19(1) of the RTI Act.

A five-judge bench of the Supreme Court has held as far back as 1959 that subordinate legislation or the detailing of the provisions of an enactment must be notified in the Gazette for it to become effective¹⁹. Later, a two-judge bench of the Supreme Court held as follows:

Publication of an order or rule in the Gazette is the official confirmation of making of such an order or rule.... The publication of an order or rule is the official irrefutable affirmation that a particular order or rule is made, is made on a particular day (where the order or rule takes effect from the date of its publication) and is made by a particular authority; it is also the official version of the order or rule.²⁰

Given the fact that neither separate Rules have been framed nor has the public been formally notified that the fees will be charged by Supreme Court according to the Rules made by the Government of India, for charging fees the CPIO has no formal guidance in law . This means that CPIO is duty- bound to give all information free of cost till fee rates are prescribed in the Rules.

Recommendation

The Chief Justice of India, as the competent authority, may invoke his powers under Section 28 of the Right to Information Act and immediately frame Rules relating to the collection of fees and the disposal of first appeals in the Supreme Court.

6. ANALYSIS OF THE RTI RULES OF DELHI HIGH COURT

¹⁹Narendra Kumar and Others. v The Union of India (UOI) and Others, AIR 1960 SC430

²⁰ITC Bhadrachalam Paperboards and Anr.vMandal Revenue Office, Andhra Pradesh and Others. JT 1996 (8) 67.

The Delhi High Court (DHC) notified the Delhi High Court (Right to Information) Rules, on 11 August 2006 - 10 months past the 120-day deadline stipulated in the Right to Information Act, 2005 (RTI Act/principal Act). DHC stands 9th in the chronological order of High Courts that put in place mechanisms to operationalize the RTI Act. These Rules were subsequently amended twice in 2007 (May and October) and for the third time in 2009 (January). Changes were incorporated again as recently as in May 2010. These amendments are aimed at curing some of the difficulties created by Rules that were in excess of the intent and provisions of the principal Act. The notifications relating to the RTI Rules are accessible on the DHC website.²¹

The Rules lay down procedures that citizens must observe to seek information from DHC. The Rules explain how authorised officers, namely, the public information officer (PIO), the Assistant PIO (APIO) and the Appellate Authority (AA) shall give effect to the provisions of the principal Act. The Assistant Registrar (Establishment) is designated the APIO, the Joint Registrar (Establishment) the PIO and the Registrar (Establishment) the AA.

6.1. POSITIVE ASPECTS OF RTI RULES

6.1.1. Information to be provided or request rejected within 15 days:

The PIO is required to provide information requested to the requester as soon as practicable, and preferably within 15 days if the information requested is found fit for disclosure under Rule 4(v). Similarly PIO is expected to issue a rejection order, where necessary, within 15 days. These are welcome improvements over the principal Act requiring the PIO to make a decision on the request within a shorter deadline.

Recommendation #1

The designated AA may be instructed to monitor compliance with Rule 4(v) to ascertain whether the requirement of expeditious disposal is diligently observed or not.

6.1.2. Issue of acknowledgement to the applicant:

Rule 3(b) requires the PIO to issue an acknowledgement to the applicant in Form B when the application is submitted along with the application fee. This is a welcome

²¹ <http://delhihighcourt.nic.in/rti.doc>: accessed on 25th March 2010

provision and ensures that the requester has documentary proof of submitting his/her request.

6.1.3. Time-bound compliance with the order of the Appellate Authority:

Rule 7(ii) requires DHC to supply the requested information within 30 days if the appellate AA orders disclosure. This is also a positive improvement as no such time limit is stipulated in the principal Act. The RTI Rules originally notified in 2006 empowered the AA to penalise any officer of DHC who refused to supply the information to the requester despite being bound to do so. This provision was rightly deleted in 2009 as the principal Act does not empower the AA to penalise anyone. In the absence of powers of sanction, a mechanism must be provided for the AA to monitor compliance with his/her orders. Rule 7(ii) may be amended to require the PIO to report time-bound compliance of orders to the AA.

Recommendation #2

In Rule 7(ii) the following words may be inserted after the words “as ordered by the Appellate Authority”: “with intimation of compliance to the Appellate Authority”.

6.1.4. Maintenance of records:

Rule 11 requires the AA to maintain a record of the number of appeals received and disposed along with details of fees collected. This is a welcome provision that goes a step ahead of the principal Act. Maintenance of such a record will help in the preparation of the annual report required to be submitted to the Central Information Commission.

6.2. ASPECTS REQUIRING RECTIFICATION THROUGH AMENDMENT

6.2.1. Application Process:

According to the rules mentioned in the Act an application is to be filed by the applicant in Form A and have to pay the prescribed application fee. If the information which is requested by the applicant does not fall within the jurisdiction of the PIO then he/she is required to forward it to the concerned PIO within five days of receiving the application. If the requested information falls under the jurisdiction of the PIO but attracts any exemption specified under Section 8 or 9 of the principal Act, then a rejection order will be issued, preferably within 15 days, in Form D. If the information is fit for disclosure then the

information will be provided in Form E within a maximum period of 30 days of receiving the application.

6.3. PROBLEMS WITH THE APPLICATION PROCESS

6.3.1. Compulsory use of Form A:

The Rules require that all applicants use Form A to submit information requests. This insistence on using a pre printed form can create problems under certain circumstances citizen may not be allowed to submit an information request by the PIO if pre printed application forms are not easily available. Making the use of application forms compulsory is a restriction imposed on potential information seekers and is clearly avoidable. Plain paper applications must also be allowed s long as they contain the minimum contents prescribed under Section 6 of the principal Act.

Recommendation #3

The existing "Explanation" clause before Rule 3(a) may be substituted with the following: “An application made on plain paper shall also be accepted provided it contains information relevant to all the fields mentioned in Form A.”

6.3.2. Restriction on requesters on submitting applications:

The DHC only accepts RTI applications for a period of four hours on working days. For applicants this is an unreasonable restriction.

According to Rule 3(a), citizens who wish to submit applications in person are allowed to visit the office of the PIO/APIO only between 11am-1pm and 2pm-4pm. A large majority of High Courts in other states do not place such a time-related restriction on potential requesters. Rule 3(a) may be amended to delete this restriction. A separate counter operated by an APIO may be set up within the premises of DHC to receive RTI applications during all working hours.

Recommendation #4

In Rule 3(a) the words “from 11 A.M. to 1 P.M and 2 P.M. to 4 P.M.” may be substituted by the words:

“During all working hours”.

6.3.3. Applicants are required to make a declaration:

Form A attached to the RTI Rules imposes an obligation on every requester to make the following declaration: “I state that the information sought does not fall within the restrictions contained in Section 8 of the Act and to the best of my knowledge it pertains to your office”.

Insisting on the applicant to make such a declaration serves little purpose. Whether the information requested attracts any of the exemptions or not, is a judgement that must be made by the PIO or the AA or any other competent authority within DHC. Citizens are not competent to make such a judgement as he/ she is not the creator or the holder of the information. There is no good reason why an applicant must be forced to make such a declaration. Also exemptions themselves are not absolute.

Section 8(2) of the principal Act provides for the disclosure of exempt information in the public interest if it outweighs the harm to any of the interests protected in Section 8(1). This declaration is in excess of the provisions of the principal Act and may be deleted.

Recommendation #5

Item no. 4 in Form A may be deleted.

6.3.4. Only one topic per application:

In January 2008, DHC amended the Rules to introduce an Explanation to **Section 3(a)** placing another restriction on potential requesters. For each topic of information citizens are required to make separate applications. Multiple points may be included in an application only if they relate to or are consequential; to each other. With the exception of the High Courts of Guwahti, Allahabad and Orissa no other High Court has imposed such a restriction. This amendment puts an enormous amount of discretion in the hands of the PIO to decide on the admissibility of an application. The issue is not about how many points of information may be allowed to be sought in one application; instead consideration about accessing how much information can be reasonably provided within the stipulated time limit keeping in mind the points mentioned in Section 7(9) of the Act.

6.3.5. Fee- related provisions:

The specifics of fee payable under the Rules are summarised below:

Application Fee: Rs. 50

Additional Fee: Photocopying: Rs. 5 per page

Appeal Fee: Rs. 50 per appeal

Mode of payment: Cash, Indian Postal Order, Demand Draft or Pay Order

6.4 PROBLEMS WITH THE FEE- RELATED PROVISIONS

6.4.1. Application fee is higher than the lowest benchmark set by other High Courts:

Originally the Rules stipulated Rs. 500 as the application fee. This fee was reduced to the current level of Rs. 50 through an amendment in May 2007. This figure is 5 times more than the Rs. 10 application fee stipulated by the High Courts of Karnataka and Kerala. Rs. 10 is prescribed by GOI and a large majority of state governments have also prescribed Rs. 10 only. There is no reason why DHC should collect more fees than the lowest benchmark set by other competent authorities and governments. The Rules may be amended to reduce the application fee to Rs. 10. Rule 4(iv) originally notified in 2006 was deleted in January 2009. Consequently, there is no need to specify in Rule 10, the application fee rate related to this deleted Rule.

Recommendation #6

- In Rule 10(A) (i), the figure “50” may be substituted with the figure “10”.
- Rule 10(A) (ii) may be deleted.

6.4.2. Additional fee rates are higher than the lowest bench mark set by other High Courts:

Rule 10 specifies that an additional fee of Rs 5 per page. The High Courts of Madras and Kerala have set the lowest bench mark for additional fee by charging Rs 2 per page. Similarly GOI and a large majority of State Governments also charge additional fee at the rate of Rs 2 only. No reasonable reason is there that why DHC should collect more fees than the lowest benchmark set by other competent authorities and governments. The Rules may be amended to reduce the additional fee rate.

Recommendation #7

In Rule 10(B) (i), in the column named 'Price/Fee in Rupees', the figure: "5" may be substituted with the figure: "2".

6.4.3. Absence of adequate guidance regards mode of fee payment:

The Rules notified by DHC originally mentioned cash as the mode of fee payment only in the context of applications received electronically. No mode of fee payment was mentioned when applications are submitted in person or by post/ courier. In May 2010 the Rules were amended to include payment via Indian Postal Order, demand draft or pay order. It made the rule applicable to applications received by post as well. This amendment does not state in whose name these instruments must be drawn. Further the High Courts of Andhra Pradesh, Chhattisgarh and Jharkhand and allow payment of fees through court fee stamps. Payments made through non- judicial stamps are recognised by the High Court of Orissa. The Rules notified by the DHC may be amended in order to allow for more modes of fee payment to create greater convenience for potential applicants. The Rules may also be amended to clearly indicate the identity of the officer in whose name the negotiable instruments may be drawn for making fee payment.

Recommendation #8

- In Rule 3(b) the words: "Court Fee Stamps and Non-judicial Stamps" may be inserted after the words "Indian Postal Order, Demand Drafts, Pay Order".
- In Rule 3(b) the words: "drawn in favour of the Registrar General" may be inserted after the words: "Indian Postal Order, Demand Drafts, Pay Order, Court Fee Stamps and Non-judicial Stamps" (after amending as recommended above).

6.4.4. Fee is charged for admitting first appeal:

Rule 10(B) (ii) requires every requester who is aggrieved by a decision of the PIO to pay Rs. 50 while submitting an appeal under Section 19(1) of the principal Act. There is no enabling provision in the principal Act for DHC to collect fees while admitting appeals. Unlike Section 6(1) which clearly provides for collection of application fee, and Section 7 which provides for collection of additional fee for providing the information, there is no mention of any fee payment in Section 19 which relates to appeals mechanisms.

Similarly, Section 28(2) which empowers the Chief Justice of DHC to notify Rules for implementing the principal Act also makes no reference to collection of fees at the first

appeal stage. Clearly, Parliament's intention was to make provisions for fee payment only at the application and information disclosure stage and not at the appeals stage. Given this scheme of fee payment in the principal Act, the general power of rule making given in Section 28(1) of the principal Act cannot be invoked to impose a new kind of fee on the applicant. The Supreme Court ruled in 1992, saying:

“The rules are meant only to carry out the provisions of the Act and cannot take away what is conferred by the Act or whittle down its effect.”²²

Requiring appellants to pay a fee while submitting first appeals has the effect of whittling down citizen's right to have the information access dispute adjudicated free of cost. This Rule is in excess of the provisions of the principal Act.

In a parliamentary democracy not one paisa may be collected from the citizens by way of tax, or fees without Parliament's approval. The Madras High Court and the High Courts of Karnataka, Andhra Pradesh, Jharkhand, Orissa and Rajasthan do not impose appeals fee on potential appellants. DHC may amend the Rules to delete the requirement of collecting fees for admitting appeals.

6.4.5. No guidance regarding fee payment for inspecting records:

The Rules do not contain any fee- related provision for inspection. The definition of right to information in Section 2 (j) of the principal Act includes the right to inspect its records unless exemptions in Section 8 and Section 9 are applicable. Unless the rate of fee is specified by Rules inspection must be allowed free of cost for every requester. If it is the policy of DHC to allow free inspection of its records for an unlimited period of time, the Rules may be amended to specify the fee rates for inspection. The Madras High Court and the High Court of Karnataka have notified the lowest fee rates for inspection. The requester may inspect the records free of cost for the first hour and pay Rs. 5 for every subsequent 15-minute period. GOI charges even lower rates at Rs. 5 for every subsequent hour after the first hour.

Recommendation #9

²²Commissioner of Income Tax Bombay v Gwalior Rayon Silk Manufacturing Company Ltd., AIR 1992, SC1782.

DHC may amend the Rules indicating whether inspection of records will be allowed free of cost or if fees will be charged. If fees are likely to be charged the rates may be specified at the lowest benchmark set by GOI and other High Courts.

6.4.6. Determination of the date of submission of the application:

Rule 4(v) states that the date of the application shall be deemed to be the date on which the entire fee or the balance fee or deficit amount of the fee is deposited with the authorised person. This Rule is clearly in contradiction with the scheme of fee payment given in Section 7 of the Act. The period of 30 days start from the day the requester submits the application along with application fee.

According to Section 7(3) the time taken between the despatch of the additional fee intimation letter to the requester and the actual deposit of the additional fee with the PIO is to be excluded from the reckoning for calculating the 30-day period.

In other words the 30- day clock stops ticking as soon as soon as the PIO despatches the additional fee intimation letter. The time gets resumed only when the additional fee is deposited by the requester. The intervening days are not taken into consideration for calculating the 30- day period.

Rule 4(v) creates the impression that the 30-day period commences only when all fees due have been paid to the PIO. This Rule is clearly in violation of the scheme of the principal Act and must be amended as recommended below.

Recommendation #10

In Rule 4(v) the following words may be deleted: “However, the date of the application shall be deemed to be the date of deposit of the entire fee or the balance fee or deficit amount of the fee to the authorized person.”

6.5. NEW RESTRICTIONS ON DISCLOSURE

6.5.1. Rejection on the basis of non-availability of the requested information:

According to Rule 4(iii), a PIO may reject a part of the information request if it falls outside his/her jurisdiction. This is clearly contradictory to Section 7(1) and Section 6(3) of the principal Act. According to Section 7(1), a PIO may reject an information request only for reasons provided in Section 8 and Section 9 of the principal Act. No other reason is

valid. This supreme position is further protected in Section 22 where the principal Act is given an overriding effect in the event of any inconsistency with any provision of other laws or legal instruments. Section 8 and Section 9 do not contain any provision that enables a PIO to reject a request on the grounds that it falls outside his/ her jurisdiction. Instead Section 6(3) requires the PIO to transfer that part of the request which does not fall within the jurisdiction of his/her public authority to such other public authority whose working is closely related to that subject matter. This transfer must be affected within five days and the applicant must be informed in writing. Rule 4(iii) is clearly in violation of the letter and spirit of the principal Act. This Rule may be deleted.

Rule 4(i) as originally notified in 2006 empowers PIO to return an application if the requested information in its entirety did not fall within his/ her jurisdiction. This provision was rectified through amendments in May 2007 and January 2009 as it was against the letter and spirit of Section 6(3) of the Act. So, if an application in its entirety may be transferred to another PIO, there is no reason why parts of an information request may not be similarly transferred.

Recommendation #11

- In Rule 4(iii) the words: “is partly outside the jurisdiction of the authorized person or” may be deleted.
- A new Rule 4(iv) may be inserted after Rule 4(iii) stating as follows: “If any part of the information sought does not fall within the jurisdiction of the authorised person it shall forward such part to the concerned PIO as soon as practicable, and in any case not later than 5 days, from the date of receipt of the application and inform the applicant of such transfer in writing.”

6.5.2. Amending the proformas for transferring RTI applications:

The Rules with regard to transfer of information is not reflected in Form C. Form C continues to advise the requester to approach the relevant public authority if any part of the information request does not relate to the working of DHC.

Recommendation #12

- Para 2 in Form C may be substituted with the following: “As the information requested by you is not available with our office and is more closely linked with the

working of (mention name of the public authority) your application has been transferred under Section 6(3) of the RTI Act to: (mention designation of the PIO and address of the relevant public authority to which the application has been transferred) on (mention date of transfer).

- Para 3 in Form C may be substituted with the following: “You are requested to contact the PIO of the aforementioned public authority for further action on your application.”
- Para 3 in Form E may be deleted.

6.5.3. Dismissal of application for non-payment of application fee:

Rule 3(b) empowers the PIO to dismiss an application received in electronic form if the application fee is not deposited within seven days. This is an unreasonable provision and is contrary to the letter and the spirit of the Act. None of the provisions in the Act empowers the PIO to dismiss an application merely on the grounds of not paying the application fee. Dismissal means rejection of an information request. A PIO may reject a request only on basis of grounds mentioned in Section 8 or Section 9. Rights provided in the Act cannot be taken away in the Rules. The PIO always has to inform the applicant regarding non-payment of application fee while informing him/her about the additional fee payable. If the request is fit for rejection on the grounds that one or more of the exemptions are attracted it does not make much sense to insist on the payment of application fees.

Recommendation #13

In Rule 3(b) the words: “failing which his application will be treated as dismissed” may be deleted.

6.5.4. Compulsory denial of information falling under Section 8 of the RTI Act:

Rule 5 states that information specified under Section 8 of the Act will not be disclosed at all. This Rule displays ignorance of the public interest override clause mentioned in the principal Act. According to Section 8(2) of the principal Act, information exempt under Section 8(1) may be disclosed if public interest in disclosure outweighs the harm to the protected interests. Even if an information request on the face of it appears for rejection, the public interest test must be applied. Compulsion of rejecting information without taking into consideration public interest clause is against the letter and spirit of the principal Act.

6.5.5. Non-disclosure of information relating to judicial functions and duties of the court:

Rule 5(a) requires the PIO to reject a request if it relates to the judicial functions and duties of the court or any matter incidental or ancillary to it. This provision goes against the spirit of the Act. Judicial independence is necessary and must be respected and not interfered with and there is no dispute about this fact. Under the Delhi High Court Rules strangers do not have an automatic right to access documents and records related to judicial proceedings till the case is completed and the decision of the Court announced. The one who is stranger and is not a party to suit must provide justification as to why he/ she need to seek the copies of documents that form a part of live judicial proceedings. He/ she may be able to obtain copies only if the judge is satisfied with the reasoning. The Act permits non-disclosure of judicial records only if it has been expressly forbidden by the court or where disclosure may constitute contempt of court or where the disclosure may impede an investigation or prosecution process. This rule is equally applicable for both strangers and parties to a suit. The Delhi High Court Rules treat all official letters of the DHC as privileged documents and copies that may not be available or given to strangers.

6.5.6. New exemption relating to judicial service examinations:

Rule 5(c) states that any information affecting the confidentiality of any examination conducted by DHC including Delhi Judicial Service and Delhi Higher Judicial Service will not be disclosed. The competent authority has to decide on the question of confidentiality. Section 8(1) (d) of the Act provides a broad exemption where any information where any such information by which the competitive position of a third party would harm may be withheld from a requester. This provision appears to be adequate as it takes care of the confidentiality of examinations.

Recommendation #14

The existing Rule 5 in its entirety may be substituted with the following:

Exemption from disclosure of information:

- There shall be no obligation on the PIO to provide a requester any information that attracts one or more exemptions mentioned in Sub-Section 1 of Section 8 or in Section 9 of the Act: Provided that the PIO or the competent authority, may disclose

exempt information as per Sub-Section 2 of Section 8 of the Act, if such disclosure outweighs the harm to the protected interests;

- Where a request for access to information is likely to be rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

6.5.7. No guidance regarding severability of information:

There is a major shortcoming in the rules i.e. that these rules do not make any reference to the severability clause contained in Section 10 of the Act.

6.5.8. Disclosure subject to the Rules and Regulations of DHC:

Rule 6 states that disclosure of information is subject to the rules and regulations of DHC notified and implemented periodically. This Rule may seem to be reasonable in context of destruction of records. The motive of this Rule is to guide the PIO.

7. DISCLOSURE OF MEDICAL BILLS OF JUDGES

The RTI activist Subhash Chandra Aggrawal filed an appeal against the judgement of a division bench of the High Court which had upheld the decision of its single judge bench that information about reimbursement of medical bills of judges and their families cannot be disclosed under the transparency law.

The Supreme Court on July 2, 2015, Thursday ruled that medical expenses of judges and their families cannot be made public under Right to Information Act, maintaining that there should be “some respect for privacy”.²³

“There should be some respect for privacy and if such information such as medical bills of judges will be being disclosed, there will be no stopping.”

At present the question of disclosure of medical bills is being raised, in future somebody may ask what medicines are purchased by the judges.

²³ https://www.telegraphindia.com/1150702/jsp/frontpage/story_29132.jsp.

Today he is asking information for medical expenses. Tomorrow he will ask what the medicines are purchased by the judges. When there will be a list of medicines he can make out what type of ailment the judge is suffering from. It starts like this. Where does this stop," a bench headed by Chief Justice H L Dattu said.²⁴

The bench also comprised of Justices Arun Mishra and Amitava Roy, refused to interfere with the Delhi High Court verdict and the plea for seeking details of medical reimbursements of Supreme Court judges go dismissed stating that i had personal information and proving it would amount to invasion of their privacy.

The single judge had set aside the Central information Commission (CIC) direction holding that judges have to disclose such information.

The advocate activist did not agree with advocate- activist Prashant Bhushan that since citizens are given the right to information, they are entitled to know how public money given by them in form of taxes to the government is spent by other public servants, they also have a right to know how these funds are being utilised for medical treatment of judges.

The bench was not in agreement with Mr Bhushan who said when it comes to demand for providing information about politicians, bureaucrats and other public servants, the Supreme Court passes "good judgements" but there is an impression that same yardstick and principle is not applied when information relating to judges is sought under RTI.

The activist- lawyer argued that can it then be said that reimbursement of medical bill from consolidated fund has no relation to public activity or public interest.

Mr Bhushan's case was important and sensitive because whatever would be applied to the judges would automatically set a precedent and be applied to other public servants on the issue of medical bills.

He also added that one can't say that one law will apply to judges and other law will be applicable on other public servants. That will defeat the purpose of giving citizens right to information.

Senior Advocate **Siddharth Luthra** argued that the information was not within the purview of the RTI Act.

²⁴<http://www.hindustantimes.com/india/sc-says-judges-medical-bills-cannot-be-disclosed-under-rti/story-41ob1DrbxXueOBaTAPhrRJ.html>.

“The information sought by appellant includes details of the medical facilities availed by individual judges. The same being personal information, we are of the view that providing such information would undoubtedly amount to invasion of their privacy,” it said.

“...we are unable to understand how the public interest requires disclosure of the details of the medical facilities availed by the individual judges. In the absence of any such larger public interest, no direction whatsoever can be issued under the RTI Act by the appellate authorities,” it said.

Bhushan submitted that **Section 8(1) (j)** of the RTI Act only permits non-disclosure of “personal information which has no relationship to any public activity or interest, or which would cause unwarranted invasion of privacy of the individual”.

Thus information concerning expenditure of public money cannot be exempted from disclosure since it cannot be said to be information which has no relationship with public activity or public interest.²⁵

So, the Supreme Court held that the medical expenses incurred o judges and the family members cannot be disclosed or made public under the Right to Information Act.

8. IS RTI FACING RESISTANCE FROM THE JUDICIARY?

Citizens seeking information from the courts, scores of RTI applications have been filed by such citizens in the last 10 years and many of these have required judicial adjudication. Five such matters reached the Supreme Court; three of these were referred to a constitution bench that is yet to be set up. At the stage of admission the other two cases were dismissed by the apex court, the RaaG- SNS report notes:

“Unfortunately, these cases raised matters of great public interest but were dismissed by the SC without providing any details or reasons in their orders. One of them sought information using the RTI Act, about cases pending with the Supreme Court in which the arguments had already been heard but orders had been reserved. In the other matter, the applicant sought the total amount of medical expenses of individual judges reimbursed by the Supreme Court, citing a Delhi high court ruling of 2010 which stated that, ‘The

²⁵<http://www.dailymail.co.uk/indiahome/indianews/article-3147719/Supreme-Court-rejects-bid-make-judges-medical-bills-public.html>.

information on the expenditure of the government money in an official capacity cannot be termed as personal information’.”²⁶

9. INFORMATION DENIED ON APPOINTMENT OF JUDGES

In one of the three cases referred to the constitution bench, in 2009 the file noting, exchanged between the chief justice of India and other concerned constitutional authorities relating to the appointment of Justice H.L.Dattu, Justice A.K Ganguly and Justice R.M.Lodha as judges of Supreme Court, superseding the seniority of Justice A.P.Shah, Justice A.K Patnaik and Justice V.K.Gupta, a request was filed by an RTI applicant for seeking a complete correspondence of this. The information which RTI applicant wanted to seek was denied. The information officer of the apex court appealed directly to the Supreme Court against order when direction was given by Central Information Commission (CIC) that the information is to be furnished.

10. CIC ORDER ON ASSETS OF JUDGES CHALLENGED BEFORE APEX COURT

There was a second case in which the RTI applicant asked if any declaration of assets was ever filed by the judges of the Supreme Court or high courts to the respective CJIs. The Supreme Court’s 1997 resolution requires judges to disclose their assets to the CJI; assets held by them in their own name, in the name of their spouse or any person dependent on them. The information was denied but the CIC directed that the asked information to be provided to the applicant. The CIC order was challenged by the Supreme Court in the Delhi high court, which held that according to Section 8(1) (j) of the RTI Act, the contents of asset declaration were entitled to be treated as personal information; but since the information asked by the RTI applicant only sought to know whether the 1997 resolution was complied with, the sought information should be provided. A three- judge bench of the high court stated:

“...A judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof...Accountability of the judiciary cannot be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Well defined and publicly known standards and

²⁶ <https://thewire.in/124766/judiciary-accountability-transparency-rti/>.

procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant.’’²⁷

This judgement was then challenged by the chief public information officer before the Supreme Court.

In this third case, quoting a media report, an RTI was filed with the Supreme Court seeking copies of correspondence between the then CJI and a judge of the Madras high court regarding the attempt of a union minister to influence judicial decisions of the said high court. There was also an application for seeking information regarding the name of the concerned union minister. The CIC, in its order, overturned the decision of the public information officer; this denied the information which applicant wanted to seek. By passing the Delhi High court, the public information officer of the Supreme Court directly moved a petition before the SC challenging the CIC order to disclose information.

11. THREE CASES CLUBBED TOGETGER

In its order, the Supreme Court, while hanging the case related to correspondence between the CJI and other constitutional authorities regarding appointment of judges, clubbed together with the other two cases with this matter. The apex court order stated that as the grave constitutional issues was at stake so consideration of higher bench was required, including the need to balance the independence of the judiciary and the fundamental constitutional right of citizens of speech and expression.

The court listed three sets of questions which, according to them, raised substantial questions of law as to the interpretation of the constitution:

- Whether the concept of independence of judiciary requires and demands the prohibition of furnishing of the information sought? Whether the information sought for amounts to interference in the functioning of the judiciary?
- Whether the information sought for cannot be furnished to avoid any erosion in the credibility of the decisions and to ensure a free and frank expression of honest opinion by all the constitutional functionaries, which is essential for effective consultation and for taking the right decision?

²⁷ <https://thewire.in/124766/judiciary-accountability-transparency-rti/>.

- Whether the information sought for is personal information and therefore exempt under Section 8(1)(j) of the Right to Information Act?²⁸

The report by RaaG and SNS notes that constitutional issues like the adverse impact people's right to information might have on judicial independence, or amount to interference in the functioning of the judiciary, or compromise its credibility; the first two sets of questions relates to such constitutional issues, it is not clear how the third question related to exemption on grounds that it is personal information under section 8 (1) (j) of the RTI Act raises any of the constitutional concerns.

This report highlights the issues in relation to the judiciary and other public functionaries and ruled in favour of transparency and also highlights the contradictions in herent in the stand taken by courts in these matters by quoting judgements of the Supreme Court in which the court itself discussed one or more of these issues.

For instance, the Supreme Court in **Manohar s/o Manikrao Anchulevs State of Maharashtra & Anr** in 2012 stated that "It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny."²⁹

In **Union of India vs Association for Democratic Reforms, 2002**, the court directed the Election Commission to call for information from all candidates seeking election to parliament or a state legislature, and from their spouses and dependants, about their assets as, "...there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruptions by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not miscomputed himself in collecting wealth after being elected."

In **PUCL vs Union of India in 2003**, while examining the plea that contesting candidates should not be required to disclose the assets and liabilities of their spouses as it would violate the right to privacy of the spouses, the Supreme Court held that the fundamental right to information of a voter and citizen is promoted when contesting

²⁸ <https://thewire.in/124766/judiciary-accountability-transparency-rti/>

²⁹ Ibid.

candidates are required to disclose the assets and liabilities of their spouses. The SC ruled that when there is a competition between the right to privacy of an individual and the right to information of the citizens, the former right has to be subordinated to the latter right, as the latter serves a larger public interest.

Similarly, to ensure transparency and improve the process of selection of judges in Supreme Court in **Advocates-on-Record Association and Ors.vs Union of India** in 2015, a five-judge bench laid down broad guidelines for the government of India which was tasked with the responsibility of preparing the Memorandum of Procedure for the appointment of judges. Among other things, the guidelines stated that the eligibility criteria and procedure for selection of judges must be transparent and put up on the website of the court concerned and the department of justice. In addition, they required the provision of an appropriate procedure for minuting the discussions including recording the dissenting opinion of the judges in the collegium.³⁰

12. SUPREME COURT'S CHANGING POSITION

Former information commissioner **Shailesh Gandhi** believes that Supreme Court's position has been changing from the past few years.

If one sees the situation before the RTI Act came into force and the situation after the Act, it looks like these two are two different countries, two different courts.

Before the RTI Act came freedom of speech was existing but nobody questioned the court and nobody tried to find out anything about the courts and at that time people had faith on judicial system. The Right to Information changed this paradigm. But after RTI came into force people started asking all kinds of questions whether it be convenient one or not.

Now the judiciary refuses to look at RTI applications that have anything to do with them. Often judiciary has been very direct in showing its anger against RTI; like in its first judgement that was related to CBSE, they said that RTI should not be allowed to damage the peace, integrity and harmony of India.

It simply means that the current phase of RTI in the courts is one that is defensive. It is not anti-RTI; it is more defensive in terms of the openness of the RTI.”

³⁰ Ibid.

13. JUDICIARY TOO RESISTS ACCOUNTABILITY

Senior advocate **Prashant Bhushan** concurred that the judiciary too does not like transparency when it concerns its own accountability. One can see from the previous cases that when it comes to them, the courts do not want any accountability or any transparency and this we have seen in all kinds of issues.

For example, in case of judicial appointments, the court shies away from transparency, by and large, some judges are exceptions who ask for it, but otherwise they don't want transparency. Same is the situation in case of accountability. They don't want any accountability and, in fact, they have progressively whittled down their accountability.”

14. PUBLIC PRESSURE CAN CHANGE THE TUNE

Bhushan said the judiciary has also very often taken contempt action against people who have written anything against the judiciary or the judges. “Therefore, it is very clear that by and large judges do not want any accountability, or any transparency. And that is why now that the RTI Act has also been applied to them they are passing judicial orders basically obstructing the orders of the CIC. This is what has happened. Ultimately these matters are for the courts to decide. But once there is sufficient public opinion then probably they will change their tune.”

According to Bhardwaj of SNS, given the extremely progressive orders related to transparency by the Supreme Court before the RTI Act was passed, people expect the judiciary to champion the cause of transparency and expand the scope of the law. “The reluctance of the judiciary to submit itself to the RTI Act is very concerning and we really hope that the constitution bench will give a progressive ruling on the questions referred to it. One of the main objectives of the RaaG-SNS report is to provoke a public debate on the manner in which the RTI Act is being interpreted by the adjudicators and to mobilise public opinion to demand greater openness in the functioning of all public authorities including the courts.”³¹

³¹ <https://thewire.in/124766/judiciary-accountability-transparency-rti/>

15. COMPARISON WITH OTHER OFFICIALS, WHETHER THEY SHOULD FOLLOW RTI OR NOT?

15.1 IN CASE OF POLITICIANS AND BUREAUCRATS:

The Supreme Court was moved on **May 19, 2015, Tuesday** for a for a declaration making political parties “public authorities” to come under the Right to Information Act, liable to disclose their financial assets for public scrutiny.

This petition was filed by noted RTI activist Subhash Agarwal and Association for Democratic Reforms; this is a NGO whose legal battle led to the Supreme Court judgement 2002 making it mandatory for electoral candidates to declare their criminal antecedents.

The apex court’s move to make the political parties accountable comes the very same week in which it gave refusal for bringing the medical expenses of sitting and retired Supreme Court- judges under RTI ambit.

“Political parties cannot disclose their internal functioning and financial information under the Right to Information Act as it will hamper their smooth functioning and become a weak spot for rivals with malicious intentions to take advantage of.”

This was the answer given by the Union government to the Supreme Court against making political parties publicly accountable under the RTI Act.³²

The CIC, in both 2013 and March 16, 2015 declared all national and regional political parties to be public authorities under the Right to Information Act, 2005. The petition argues that both orders were “final and binding”.

The petition argued that political parties should come under RTI i.e. they should follow RTI as they play a core role in governance, and in fact, enjoy a “stronghold” over their elected MPs and MLAs under Schedule 10 of the Constitution. This Schedule makes it compulsory for MPs and MLAs to abide by the directions of their parent parties, failing which the member stands to be disqualified.

“Under **Section 29A of the Representation of the People Act, 1951** all political parties must affirm their allegiance to the Constitution of India and such allegiance is made

³²<http://www.thehindu.com/news/national/political-parties-cant-be-under-rti-act-centre-tells-sc/article7575584.ece>

compulsory for the purpose of registration under sub-section (7) of Section 29A. Therefore, political parties so registered must furnish information to the public under the right of information under Article 19(1)(a) of the Constitution of India, since right of information has been held to be a part of freedom of speech and expression under Article 19(1)(a),” the petition, represented by advocate **Prashant Bhushan**, said.³³

It also said that the Law Commission of India in its 170th Report on ‘Reform of the Electoral Laws’ in May 1999 had also recommended for transparency in the functioning of political parties specially focusing on financial transparency and accountability in their functioning.

It further said the Law Commission of India in its 255th Report on Electoral Reforms in March 2015 has also proposed its recommendations on the issue of obligations on political parties for disclosure of their information.

The CIC has made a very liberal interpretation of **Section 2(h)** of the RTI Act, leading to an erroneous conclusion that under the RTI Act political parties are public authorities. The Centre’s affidavit said that political parties are not established or constituted by or under the Constitution or by any other law made by Parliament.

It said there were already provisions in the **Income Tax Act, 1961**, and **Representation of the People Act, 1951**, which demand “necessary transparency regarding financial aspects of political parties”.

So, six parties were declared as public authorities by CIC under the RTI Act as they fulfilled the four conditions given in the definition of a public authority under section 2(h) of the RTI Act.

16. CONDITION IN OTHER COUNTRIES IN CASE OF DISCLOSURE OF ASSETS OF JUDGES

Over the last few years, the disclosure of assets and incomes of public officers has emerged as a global anti- corruption issue. These disclosure obligations were initially directed at elected officials, such as legislators and executive branch officials. Recently this issue has emerged as a definitional coverage and compliance issue for judicial officials-

³³<http://www.thehindu.com/news/national/rti-activist-moves-sc-to-disclose-parties-financial-assets-for-public-scrutiny/article7223829.ece>.

particularly judges. Few of the countries have specific legislation that expressly dereferences judges.

Barely a decade ago, suggesting to judicial officers that introducing rules and obligations to declare their assets and other relevant interests and activities as part of upholding judicial integrity and preventing opportunities for corruption was met with great scepticism. Even among those few who were serving in jurisdictions where income and asset declaration systems applied to judges too, many of them did not miss any opportunity to criticize these systems as equally intrusive and useless in identifying illicit enrichment or preventing conflicts of interests.³⁴

16.1. INTERNATIONAL PRINCIPLES

The United Nations Convention against Corruption contains various provisions which require public officials to make declarations highlights the importance of measures and systems for declaration like of their outside activities, employment, investments, assets and substantial gifts and benefits from which a conflict may result- provisions which due to the wide definition of “public official” adopted by the Convention also apply to judicial officers. The Implementation Guide and Evaluation Framework for Art 11 which provides guidance on how best to put such financial disclosure systems into practice was published by UNODC in 2015.

The issue of judicial independence is addressed by several treaties, conventions and non-binding guidelines and principles while none of them addresses this issue of assets disclosure in the judiciary directly, some such as the UN Basic Principles on the Independence of Judiciary (UNBP).

16.2. FIGHT AGAINST CORRUPTION EFFORTS

To prevent and combat corruption several conventions such as the Council of Europe Criminal Law Convention on Corruption (COE Convention); it specifically includes judges as public officials, the Organization for Economic Cooperation and Development Anti-Corruption Convention (OECD Convention) and the Inter American Convention against Corruption (OAS Convention). The burden of proving that income and assets were delivered legitimately on public officials under the principle of unjust enrichment and

³⁴ <https://www.unodc.org/unodc/en/frontpage/2017/February/strengthening-judicial-integrity-through-financial-disclosure-systems-for-judges.html>.

requires public officials to file income and asset disclosure statements is only expressed by the OAS Convention.

Even though the OAS Convention created the legal basis for income and asset disclosure of public officials, the legal question which remains unclear is as to whether judges are deemed to be public officials and this issue is being debated in many countries.

A number of countries in Latin America , such as Brazil, Mexico, Colombia, El Salvador, Honduras, Costa Rica, Nicaragua and Argentina, have passed specific assets disclosure laws and rules that pertain to public officials are largely in response to OAS Convention.

Poland: The draft law **Freedom of Information Act**³⁵ prepared by a coalition of NGOs, grants the access to information held by public authorities. This law requires that these authorities (judges are specifically included) provide information related to annual salaries, other incomes, benefits and privileges. They also need to provide some property statements.

El Salvador: the **Illegal Enrichment Law**³⁶ requires public officials including judges to file an affidavit with a state entity. Public officials and any individual responsible for managing public assets; these subjects are included in the legislation. The law specifically mentions Supreme Court judges, electoral judges, and tax court of appeals judges.

Uganda: The Constitutional office of the Inspectorate of Government (ombudsman), which is charged with the overall responsibility of fighting corruption; responsibility for the enforcement of the Leadership Code of Conduct is on the Inspectorate of Government.

Argentina: The Supreme Court adopted conflict of interest guidelines by the Court Rule that are similar to those found in the 1995 **Public Ethics Law** (which is applicable to public officers in the Central Government). The Public Ethics Law establishes that every public officer in the Central Government has to make a disclosure of his assets in an affidavit deposited in the Anticorruption Office. In Argentina there is medium size

³⁵ Poland, Illegal Enrichment Law (1959, amended 1974, 1992).

³⁶ El Salvador, Freedom of Information Act (2001).

disclosure; judges are exempt from declaring some kinds of property if it might jeopardize their security.

The United States: In the United States, there is an obligation to make a broad disclosure i.e. broad accountability of financial holdings, including a list of gifts, lectures fees or other outside incomes. There has been a lot of criticism of some judges for not fully disclosing their assets.

16.3. ASSET/INCOME DISCLOSURE CHECKLIST

The following are some key issues that should be addressed by reformers when thinking about drafting and passing legislation on income and assets disclosure:

- Is there a clear rule that makes assets disclosure mandatory for judges?
- Is the disclosure obligation provided by the Constitution, the law or a judicial rule? Are serious issues of separation of powers raised in the country's constitution (with respect to whether the judiciary should pass and enforce its own disclosure rules)?
- Who is under the disclosure obligation? Only judges or other judicial officials also?
- Does the judge have to report the assets of his family members? What are the criteria used to define "family members"?
- Which kind of assets and incomes must be disclosed and what information, if any, should remain confidential?
- What is the procedure to access the information? Is it narrowly or broadly conceived?
- Who can receive and file the information?
- Where is the information available (physically, on-line, mail, fax, etc) and is there a cost for it?
- Who can access the information (the public, media, businesses, international organizations, etc)?
- Is there any sanction for those who do not comply with the disclosure requirements?
- Is there sufficient punishment for those who sell, disclose or use protected information for corrupt or illicit purposes?
- How often are the judges obligated to present the information (annually, pre-appointment, pre-retirement, etc)?

- Are there clearly defined processes and a trusted entity for determining whether illegal enrichment has occurred based on this information?
- Does the institution or official(s) responsible for receiving, maintaining and reviewing this information have the capacity, resources and political will to discharge its legal and ethical responsibilities?
- Is there a serious likelihood of abuse, especially in relation to the protection of the right to privacy, career or physical safety?
- Is the judiciary independent and capable of enforcing these laws and regulations fairly and effectively and of protecting people's human and privacy rights?
- Is there an access to information and whistleblower law? Are privacy rights in this area clearly defined in the legislation?
- If there is systemic corruption or institutional state capture, a comprehensive cost benefit analysis focused on potential human rights abuses should be undertaken and carefully weighed.
- Is there sufficient executive, parliamentary and civil society oversight as well as an independent media that can fairly report on this information to the public?
- Have the criminal and civil codes undergone reform and are the investigative and prosecutorial roles of judges and prosecutors clear?
- Is there an anti-corruption commission or campaign underway? If so, are the laws and judicial institutions being used as political weapons?

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17. SUGGESTIONS AND CONCLUSIONS

The right to information is a fundamental right that the state must enforce and guarantee. In the above written text the discussion has been made on how the Information Commissions and the judiciary are promoting and enforcing democratic accountability via the RTI Act. Also the **suggestions (recommendation)** have been given along with the points in the research paper.

According to the RTI Act, for generating information for the purpose of law no public authority is under any obligation. Authority is under an obligation only when information is already available with a public authority and authority is not exempted under law. However in order to promote democratically grounded independence of judiciary the higher judiciary in India needs to proactively generate and disclose information about assets and interests of the judges under the RTI Act; public should know about the money which they give to government in form of taxes that how and in what proportion money is being spent in various sectors of country.

The Supreme Court argued in the Delhi High Court that if the Supreme Court is required to disclose any information under the RTI Act, then the draft judgements, notes, and other communications between judges will have to be disclosed by the Court, this can

adversely affect the independence of judiciary. Yet such apprehension is unfounded because matters pertaining to the duties performed by the judiciary are not being discussed in legislature as it is prohibited by the Constitution, and also the RTI Act prohibits such disclosure. Moreover, if a disclosure is prohibited by a court or tribunal then such disclosure cannot be made under the RTI Act. There was also a contention made by the Supreme Court that the RTI Act only mandates disclosure whenever information is available to public authorities if it is not barred under the Act, does not support such contention. Adverse effect of RTI Act on the independence of the judiciary is difficult to conceive.

Right to information is a fundamental right, which the RTI Act realizes. At the High Court stage many technical arguments were raised by the Supreme Court to undermine its duty to disclose. In the process, the Supreme Court also undermined the 1997 Resolution, on which the judges of the Supreme Court and High Courts have relied in a bona fide manner. Some High Courts also resolved to make asset declarations public under the Resolution. There was an argument by the side of the Supreme Court that the Resolution declares the information confidential. It is been specified by the RTI Act that any law, rule, or regulation that is in conflict with the RTI Act shall be subservient to the RTI Act, means that the transparency law overrides any confidential clause in the 1997 Resolution.

Therefore, instead of looking for the loopholes in the law and ascertaining an escape clause to avoid disclosure, the law should be interpreted by the Supreme Court in its true spirit, and embrace disclosure of information as a matter of law. This should be taken as an opportunity by the Court for re-establishing itself as the doyen of Indian democracy, especially when the future of the right to information is going to be decided by the entire court.

It is time to abandon the imperial baggage of judicial elitism and conspicuous secrecy. The Supreme Court should begin practicing what it preaches. While allowing the judiciary to be controlled and regulated by the executive or the legislature might be fraught with danger, it is also dangerous to allow the judiciary to function without any semblance of accountability and public scrutiny.³⁷

³⁷SupriyaRouth, Independence Sans Accountability: A Case for Right to Information Against the Indian Judiciary, 13 Wash. U. Global Stud. Rev. 321 (2014), http://openscholarship.wustl.edu/law_globalstudies/vol13/iss2/7.

To ensure that accountability shall target mismanagement, abuse of discretion, corruption and other administrative malpractices all efforts are being directed. However it is well recognised that right to information is not sufficient to improve governance and a lot more needs to be done. Thus one can see that Right to Information has been as the key to strengthen participatory democracy and promoting people-centric governance. Downtrodden sections of the society can be empowered by giving them access to information so that they can demand their welfare and actually bring into operation the numerous beneficial schemes of the government, which due to lack of administrative intent to bring them in action mostly remain on paper.

In a fundamental sense, therefore the Right to Information Act, if used and implemented prudently, has the potential to unleash good governance system more responsive to community needs, and this is the basic premise of democracy.