



INDIAN JUDICIARY & RIGHT TO INFORMATION

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Received: June 15, 2015; Revised: July 21, 2015; Accepted: July 23, 2015

Abstract- Indian bureaucracy use to work in secrecy as followed in British period, which resulted in to corruption and misuse of power. India has also changed its nature of state from being a laissez faire state to social welfare state, wherein state has covered every aspect of public life. In this state activism state assumed more and more powers to regulate society, which led to corruption, misuse and abuse of statutory and administrative powers. Even though India is one of the world's largest democracy, it suffers from hurdles like poverty, corruption, population, criminalization of politics and weaker administration and legal system. In order to become a democratic country in real sense it needs to overcome these hurdles. One of the key adjuncts for this is; right to information. In order to become democratic country in real sense, there should be a participation of the people in decision making process of the government & for effective participation; people should have information or knowledge about the functioning of the Government. The basic postulate of democracy is good governance which is based on transparency & accountability. In order to become real and participatory democracy Indian Parliament passed a Right to information Act, 2005 which came in to force on 12th October 2005. However the credit for initiatives for the open and good governance goes to Judiciary and the movements led by civil societies & MKSS. Supreme Court of India through its several decisions given from time to time has recognized the right to information. However in real practice judiciary often fail to follow its own canon, which is called as the Law of the Land. The Right to Information Act provides for the definition of Public authorities under Sec.2 (h), which can be clearly interpreted to include judiciary. It should follow the principles of transparency, accountability as declared by it for more progressive, participatory democracy. Judiciary should be more accountable and transparent than any other organ of the State, but in recent times even the Indian judiciary has been involved in controversy pertaining to disclosure of information and corruption. It is said that this Right is the child of Indian Judiciary but judiciary failed to follow its own preaching. This is a small study gauging the accountability and transparency of judiciary and applicability of the Right to Information Act, 2005 to Indian Judiciary.

Keywords- democracy, right to information, good governance, transparency, accountability and Indian Judiciary

Citation: Aghav A. (2015) Indian Judiciary & Right to Information. International Journal of Humanity and Social Sciences, ISSN : 2231-3532 & E-ISSN : 2231-3540, Volume 4, Issue 1, pp.-074-078.

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Introduction

Lord Denning says "Let me say at once that we will ever use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is a right of every man, in parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest".

After independence we have adopted democratic form of Government. However the question is do we have democracy in real sense? To answer this question we need to study historical background of our country. India has a colonial past and our most of legal framework is based on the common law legal system [1], wherein secrecy was the rule and transparency an exception. There was no obligation under the common law to provide access to governmental information. Official Secrets Act of 1923 enacted during

colonial era provides for secrecy and confidentiality in governance. The Act (OSA 1923) mostly deals with matters security and provides a frame work for dealing with espionage. However this Act has been misused. There are many victims of this Act; some of the cases are Narmada Sarovar Dam, Bhopal Gas Disaster, Iftikhar Gilani case etc. [2]. The Second Administrative Reform Commission (ARC) recommended for the scrapping of this colonial legislation. It also suggested that OSA 1923 should be repealed and suitable safeguards to protect the security of the nation should be incorporated in the National Security Act [3]. Indian bureaucracy use to work on same lines of secrecy of British period in governmental functioning which resulted in to corruption and misuse of power. Bureaucracy misused the Act to cover up their anti-social activities and corruption.

India has also changed its nature of state from being a laissez faire state to social welfare state, wherein state has covered every aspect of public life, wherein the role of a state is very important. It works

as medium or a vehicle of socio-economic regeneration and welfare of the people. In this state activism state assumed more and more powers to regulate society, which led to corruption, misuse and abuse of statutory and administrative power [4]. Today's administrative organ has acquired number of uncontrolled powers. This change in nature of state from laissez faire to welfare state makes the state single institutional repository of information about the social and economic and environmental problems [5]. It is said that, power corrupts and absolute power corrupts absolutely. It is important that these powers are exercised for public good. Even though India is one of the world's largest democratic country, it suffers from hurdles like poverty, corruption, population, criminalization of politics and weaker administration and legal system. In order to become a democratic country in real sense it needs to overcome these hurdles. One of the key adjuncts for this is; right to information. In order to become democratic country in real sense, there should be a participation of the people in decision making process of the government & for effective participation; people should have information or knowledge about the functioning of the Government. Without information they won't be able to participate and fulfill the role which democracy assigns to them. The basic postulate of democracy is good governance which is based on transparency & accountability. In order to become real and participatory democracy Indian Parliament passed a Right to information Act, 2005 which came in to force on 12th October 2005.

Right to Information as a Fundamental Right

The credit for initiatives for the open and good governance goes to judicial activism of the Supreme Court of India [6] and the movements led by civil societies and MKSS. Supreme Court of India through its several decisions given from time to time has recognized the right to information [7]. The formal recognition of a legal RTI in India occurred more than two decades before legislation was finally enacted, when Supreme Court of India ruled that right to information is implicit in the right to freedom of speech and expression under Art.19(1) of the constitution [8]. Part III of the Indian Constitution provides for the fundamental rights of the people against the state. One of the right under this part is Art.19 (1) which provides for the freedom of speech and expression. In *U.p v.Raj Narain* Supreme Court of India held "In government of responsibility like ours, where all the agent of the public must be responsible for their conduct, there can but few secrets. The people of this country have a right to know every public act, everything that is done in public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one way, when secrecy is claimed for transactions which can at any rate have no repercussions on public security" [9].

Subsequently in 1982 Supreme Court in *S. P Gupta's case* Supreme Court held that, the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right to free speech and expression guaranteed under Art 19 (1) (a) of the Constitution. Therefore the disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception, justified only where the strictest requirement of public interest so demands [10]. Thereafter also in many cases Supreme Court ruled that the right to information is a fundamental right [11].

Thus the notion of a right to information though not expressed directly in the Constitution it was interpreted & evolved by the judiciary. It's the activism of judiciary which gave this right as a fundamental right to the people before the statutory right under the Right to Information Act. In the light of the above discussion we can say that Indian Judiciary is the backbone of the right to information in India. It has supported very strongly the principles of Open Government based on transparency and accountability in all spheres of governance. Above mentioned rulings of the judiciary regarding right to information shows its liberal approach towards this right.

Right to Information Act & Indian Judiciary

In the light of the above mentioned decisions of the Supreme Court, we assume that our judiciary must be following the principles of transparency and accountability in their institution. Nevertheless in real practice judiciary often failed to follow its own canons, which is called as the Law of the Land [12]. The Right to Information Act provides for the definition of Public authorities under Sec.2 (h), which can be clearly interpreted to include judiciary [13]. It should follow the principles of transparency, accountability as declared by it for more progressive, participatory democracy. Judiciary should be more accountable and transparent than any other organ of the State, as they are the guardian of the democratic principles of transparency and accountability but in recent times even the Indian judiciary has been involved in controversy pertaining to disclosure of information and corruption. Prashant Bhushan a learned lawyer says, 'Having enjoyed enormous powers, including power of contempt without any accountability, the higher judiciary has over the years; tread on the toes of many persons and institutions, particularly the media [14]. There are number of shocking scandals in judiciary questioning the integrity of judges starting from J. Ramaswami, J. Ahok Kumar, J. Jagdish Bhalla, J. Sabharwal, J. Shamit Mukherjee etc. Now the question is who will preach the preacher.

Justice V. Ramaswami was first judge of the Supreme Court, against whom the impeachment motion was signed by 108 M. Ps in 1991. A year later in an inquiry he found guilty of willful and gross-misuses of office, while serving as the chief justice of the Punjab and Haryana High Court. However he could not be removed as parliament got divided on regional lines and impeachment process failed to remove him [15]. In *K.Veerawamy's case* court observed "A judicial scandal has always been regarded as far more deplorable than scandal involving either the executive or a member of a legislature. The slightest hint of irregularity or impropriety in the court is a cause for great anxiety and alarm. A legislature or an administrator may be found guilty of corruption without apparently endangering the foundation of the State. But the judge must keep himself absolutely above suspicion to preserve the impartiality and independence of judiciary and to have public confidence thereof". Court also observed that A single dishonest judge not only dishonors' himself and disgraces his office but jeopardizes the integrity of the entire judicial system [16].

In another case J. Ashok Kumar was appointed as chief justice of Madras High Court. The collegium of three senior judges of the Supreme Court unanimously decided not to confirm his appointment as a permanent judge as many corruption complaints were made against him. An inquiry report by Intelligence Bureau also leveled corruption charges against him. However he was given extension as additional judge which was confirmed on Chief Justice's recommendations. The recommendation by chief justice of India

was made without consulting other judges of the collegium. Justice Ashok Kumar's appointment violated the law laid down by the constitution. In a writ petition before Supreme Court by an eminent lawyer Shanti Bhushan challenging the appointment of J. Ashok Kumar as a Chief Justice of Madras High Court, S.C held that "It is significant to note that some of the Hon'ble judges were parties to the judgment relied on by the petitioners while functioning as Chief Justice of India have not thought it necessary to consult the collegium as is evident from the fact that from 1.1.1999 to 31.7.2007 in more than 350 cases the collegium was not consulted. It means they were also of the view that the practice procedure was being followed rightly. Therefore the plea that without the consultation with the collegium, the opinion of the chief justice of India is not legal and cannot be sustained. Court further said we have no hesitation in saying that a person who is not suitable to be appointed as a permanent judge on the ground of unsuitability due to adverse factors on account of mental and physical capacity, adverse material relating to character and integrity and other relevant matters, which are so paramount and sacrosanct for functioning as a judge, should not be continued as an additional judge. Even when additional judge is appointed as a permanent judge, he does not become immune from action, if circumstances so warrant [17].

A step further wherein Delhi High Court held the Mid Day Journalist guilty of contempt in Court on its own motion [18], for reporting that retired justice Y.K Sabhrawal, in the capacity of Chief Justice of India passed a judgment on sealing of the commercial property in residential area which benefited his sons who were partners in a commercial enterprise involved in the construction business which was considered by the court as lowering the image of the judiciary [19]. Court held that publication has crossed the 'Laxman Rekha' the principle which was laid down in Haridas [20]. In a protest to contempt of court proceeding against a journalist learned lawyer Shanti Bhushan said "If making these allegations publicly, even though true and supported by official documents, constitutes contempt of court I am clearly guilty of the same and would like to invite appropriate action against myself." [21] In this case subsequently Justice J.S Verma and Justice V.R Krishna Iyer called an independent inquiry. There are many cases where integrity of judiciary comes in to question. It also shows that judiciary lacks accountability; above mentioned cases are the some of the instances of corruption in judiciary.

There are also some issues pertaining to disclosure of information by the judiciary. In land mark case in 2007 *Subhash Chandra Agrawal* a RTI activist made an application to the CPIO, Supreme Court of India, to arrange to send him a copy of complete files as available in Supreme Court inclusive of copies of complete correspondence exchanged between concerned constitutional authorities with file noting related to said appointment of judges, a copy of the 1997 resolution of the Full court of Supreme Court passed by all the judges to make a declaration of assets and information on any such declaration of assets etc. filed by the judges of the supreme Court. He also requested for further information if High Court. Judges are submitting declaration about their assets etc. to respective Chief Justices in States. The CPIO, Supreme Court of India promptly replied to the application so filled under the said Act, informed the applicant that the Registry does not deal with the matters pertaining to the appointment of Hon'ble Judges of the Supreme Court of India. Appointment of the judges of the Supreme Court and High Courts are made by the President of India as per the procedure

prescribed by law and the matters relating are not dealt with and handled by the Registry of the Supreme Court of India. The CPIO accordingly informed the applicant that the information sought by him neither maintained and nor available in the Registry. The applicant Subhash Chandra Agrawal made an appeal before the appellate authority of Supreme Court of India challenging the said order. The appellate authority dismissed the order of the CPIO.

Thereafter the applicant made an appeal before the CIC under Sed. 19 of the Act. The CIC set aside the orders passed by the authorities, directed CPIO, Supreme Court to furnish the information asked by the applicant and also held that the information in question is maintained like any other official information available for perusal and inspection to every succeeding CJI in the appeal before the CIC, the CPIO took several defenses including the submission that the Registrar of the Supreme Court did not hold the information; the information sought related to a subject- matter which was "an in-house exercise" and pertained to the material held by the CJI in his personal capacity. It was also submitted that the declaration made by the judges of the Supreme Court had been made over by them to the CJI on voluntary basis in terms of the 1997 Resolution in a "fiduciary relationship". On the basis of the last said submission, it was also contended before the CIC that the disclosure of such information would be in breach of the fiduciary character attached to the material and was, therefore, contrary to the provisions of section 8 (1) of the Act. The CIC vide its order dated 6th January, 2009 rejected the contentions of the CPIO. He reasoned that Supreme Court is a "public authority" within the meaning of section 2 (h) of the Act since it had been established by and could not, therefore, be categorized as "personal information" held by the CJI in his "personal capacity". It was argued before the CIC that the CJI and the Supreme Court of India were two distinct public authorities. This contention was repealed with further observation that the Registrar and the CPIO of the Supreme Court are (were) part of the said institution and thus not independent or distinct authorities. On this finding, it was held by CIC that the CPIO was obliged to provide the information to a citizen making an application under the Act unless the disclosure was exempt. The CIC noted that the CPIO was obliged to provide the information to a citizen making an application under the Act unless the disclosure was exempt. The CIC noted that neither the CPIC nor the First appellate authority had claimed that the information asked for was exempt on account of "fiduciary relationship" or it being "personal information" He concluded that the exemptions under sections 8 (1) (e) or 8(1)(j) were not attracted to the case. The CIC, vide order dated 6th January, 2009, thus directed the CPIO "to provide the information asked for by the appellant in this RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice.

A writ petition was preferred by the CPIO challenging the said directions of CIC before the Delhi High Court held that the office of the chief Justice of India was "public authority" under the Act and was covered by its provisions. He further held that the asset declarations by Supreme Court judges pursuant to the 1997 Resolution, was "information", under the RTI Act. It was also held that the CJI did not hold such declarations in a fiduciary capacity or relationship. The CPIO and the Registrar of the Supreme Court appealed to a larger bench of three judges. The said Bench confirmed that the expression "public authority" as used in the Act was of wide ampli-

tude and it included an authority created by or under the Constitution of India, which description holds good for the Hon'ble Chief Justice of India.

The Hon'ble Court held that in the absence of any specific exclusion, asset declaration by the judges held by the CJI or the CJs of the High Court's as the case may be, are "information" under section 2(f) and this position was not disputed by the Attorney- General. However, according to him, the term "held" under the Act necessarily requires a Public Authority to have the right to call for information, or impose on a person an obligation to provide such information to the public authority. In this regard the High Court held that the words "held by" or "under the control of" under section 2(j) will include not only information under the legal control of the public authority but also all such information which is otherwise received or used or consciously retained by the public authority in the course of its function and its official capacity. There are any numbers of examples where there is no legal obligation to provide information to public authorities, but where such information is provided; the same would be accessible under the 2005 Act. For example, registration of births, deaths, marriages, applications for election photo identity cards, ration cards, pan cards etc.

The Bench confirmed the order of the learned single Judge and dismissed the appeal, thereby upholding its single Bench order that the Hon'ble CJI came within the purview of the RTI Act and that the details of the judges' assets could be disclosed under it. It also upheld that the CJI was a "public authority" and hence could not claim immunity under the RTI Act [22].

In the judgment the Delhi High Court reiterated that accountability of the judiciary could not 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 were transparent, accessible and effective. Behind this notion was a concept that the wielders of power- legislative, executive and judicial- were entrusted to perform their functions on a condition that they were account for their stewardship to the people who authorized them to exercise such power. Well defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society [23]. Second Administrative Reform Commission after careful study also recommended that implementation of the Act applies to both the Legislature and the Judiciary and respective authorities may adopt them with appropriate modifications to suit institutional requirements [24].

In last week the Centre had submitted a list of eight "bad appointments" by the collegium headed by CJI, in last 20 years, to a bench of justices J S Khehar, J Chelameswar, Madan B Lokur, Kurian Joseph and Adarsh k Goel. In 2001 CJI headed collegium appointed two judges as Chief Justices of High Court of Jammu and Kashmir despite the fact that they were not suitable for appointment as judges. The collegiums appointed S.K Gupta and Brij Lal Bhat as the Chief Justices of the High Court though they were of 'doubtful integrity' [25].

Step towards Transparency and Accountability by the Judiciary

As a step toward the transparency and accountability, on 13th April 2015 the government notified the National Judicial Appointments Commission law [26] and effectively brought to an end the two-decade old collegium system of judicial appointment. National Judi-

cial Appointments Commission (NJAC) is a body responsible for the appointment and transfer of judges to the higher judiciary in India. The Commission is established by amending the Constitution of India through the ninety-ninth constitution amendment vide the Constitution (Ninety-Ninth Amendment) Act, 2014 [28]. The NJAC replaced the collegium system for the appointment of judges as mandated in the existing pre-amended constitution by a new system. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Lok Sabha and the Rajya Sabha to regulate the functions of the National Judicial Appointments Commission. We have also hopes from the Judicial Standards and Accountability Bill no. 136-Cof 2010 [28] which is passed by Lok Sabha on 29 March 2012 which replaces the Judges (Inquiry) Act, 1968. It seeks to create enforceable standards for the conduct of judges of High Courts and the Supreme Court, change the existing mechanism for investigation into allegations of misbehavior or incapacity of judges of High Courts and the Supreme Court, change the process of removal of judges, enable minor disciplinary measures to be taken against judges, and require the declaration of assets of judges [29].

Conclusion

Right to Information Act is also applicable to Judiciary as principle of Rule of Law is equally applicable to the Judiciary. Independence of Judiciary cannot be interpreted as Supremacy of the Judiciary; it is the Constitution which is Supreme. Judiciary is the guardian and custodian of the constitution. Judiciary showed its liberal approach in making pronouncement about the citizen's right to information, but showed unwillingness to follow what they pronounced. Lord MacKay says judicial independence doesn't mean that the judges are above the law. It is appreciable that the judiciary for its craftsmanship to harness the right to information to achieve an extremely laudable social objective, viz., that of preventing criminalization of Indian politics [30]. Right to Information Act if implemented in its true spirit and adopted by the legislature and the judiciary can establish democracy in real sense and ultimately also for good governance.

The National Judicial Appointments Commission & Judicial Standards and Accountability Bill are the legislations which shows endeavor by judiciary to follow the democratic principles of transparency and accountability. Indian Judiciary through basic structure doctrine and broad right to life explored and enlarged its role. It argues that the Court justified these two doctrines not only a wide reading of constitution, but also an appeal to broad, almost metaphysical, principles of 'civilization' or 'good governance' [31]. It's not only the People of India but other democratic countries of the world also have high expectation from Indian Judiciary as our Judiciary is one of the strongest and influential judiciary in the world.

Conflicts of Interest: None declared.

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- a. by or under the Constitution;
 - b. by any other law made by Parliament;
 - c. by any other law made by State Legislature;
 - d. by notification issued or order made by the appropriate Government, and includes any:
 - i- body owned, controlled or substantially financed;
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