

The doctrine that the Judges cannot make law or create law is an outmoded doctrine and a myth. The creative role of the Judges is a *sine qua non* of judicial process. To borrow the words of Douglas J. of the United States Supreme Court, the problems before the Supreme Court require at times the economist's understanding, the poet's insight, the executive's experience, the politician's scientific understanding, the historian's perspective (See, Cornell Law Review, Vol. 45 1960, as cited by T.K. Tope in his Supreme Court of India and Social Jurisprudence (1988) Vol.1 SCC p.8).

In *State Financial Corporation v. M/s. Jagadamba Mills* (AIR 2002 SC at 843) Justice *Arijit Pasayat* has observed that, "Judges interpret Statutes, they do not interpret judgments. They interpret words of Statutes; their words are not to be interpreted as Statutes."

After 1970, the horizon of judicial activism expanded. Judges realized that in order to fulfil the socio-economic, political –religion aspirations of the people they have a role to play. Judges like Justice *Krishna Ayer*, Justice *Bhagwati*, Justice *Subba Rao*, Justice *M.H. Kania* to mention a few, adopted an activist stance and laid down remarkable and landmark judgments fulfilling the pious obligations embodied under the constitution (See *Kesavananda Bharati v. State of Kerala* (AIR 1973 SC 1461), *Hussain Ara Khatoon v. Home Secy. State of Bihar* (AIR 1979 SC), *Sumil Batra v. U.O.I.* (AIR 1978 SC 597), *Indra Sawhney v. U.O.I.* (AIR 1993 SC 477) etc.

This all told, we may say that the pendulum of Finding Law and Creating Law has been oscillating between judicial valor and judicial constraint.

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## Commentary on THE RIGHT TO INFORMATION ACT 2005 Users' Guide and Manual

*Containing*

Rules made by Central Government, State Governments and other Competent Authorities  
under Act as also Relevant Reference Material

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*"Knowledge will for ever govern ignorance  
and a people who mean to be their own governors  
must arm themselves with the power knowledge gives.  
A popular government without popular information  
of the means of obtaining it, is but a prologue  
to a farce or tragedy, or perhaps both"*

—JAMES MADISON

Introduction of the Freedom of Information Bill 2000 in the Lok Sabha on July 25, 2000, was said to be the most significant milestone in the history of legislation of our country. However, the Bill was referred to a Select Committee of the Parliament and though ultimately passed on 6-1-2003 leading to enactment of the Freedom of Information Act 2002 (Act 5 of 2003), its enforcement was made subject to clause that the Act would come into force on such date as the Central Government may by notification in the Official Gazette, appoint (Section 1(3) of the Act). The date of enforcement was not notified for various reasons and the Act remained on statute book as such till its repeal and substitution by Right to Information Act 2005, a revised and improved version of the Act 5 of 2003. The 2005 Act, enacted with the avowed objective of conferring a statutory right on the citizens of India to have access to government-controlled information or to seek information from Central Government/State Governments, local bodies and other competent authorities as a matter of right, has been heralded as the dawn of a new era in governance. By bridging the knowledge gap between the rulers and the ruled, the managers and the beneficiaries, the Act, it is hoped would prove to be instrumental in bringing in transparency and accountability in government and public institutions, which would help in bringing the malignant growth of corruption, which they are suffering from, in check. The scope of the Act is wide enough to cover all the constitutional institutions and, subject to exemption clauses, universally applies to all the public authorities. Even the judiciary and judicial members barring judicial proceedings will come under purview of the Act.

Contrary to initial apprehension that the Act would remain preserve of select social activists and whistle blowers, the number of complaints and appeals that are being filed before the Central Information Commission and the State Information Commissions, if

taken as an indicator of its use, would show that more and more people are invoking the Act, and for a variety of reasons. An interim assessment of the Act, conducted jointly by the National Campaign for People's Right to Information (NCPRI) and the Right to Information Assessment and Analysis Group (RaaG), shows that the Act is now being used by the citizens not only to secure answers to their questions, but as a tool to fight against corruption and for their right to have roads, bridges, electricity and such other public amenities. The survey showed that an overwhelming majority of rural residents saw information as the key to solving village problems. In fact, the Act has proved to be a handy weapon in the hands of common citizens to get relevant data to expose wrongdoings of public servants, which would not have otherwise been possible. It was only through the information furnished under the Act that it was revealed that many junior police officers were arresting persons under Section 498-A of Indian Penal Code for dowry harassment in violation of the order of their seniors. As per a directive issued by the Hyderabad Police Commissioner in the year 2002 arrests under Section 498-A of IPC could be made only on the orders of officers of the rank of DCP and above. But the details furnished by the Public Information Officer in applications filed by persons accused of the offence seeking information on details of the arrests made, revealed that in many instances, the investigating officers used their own discretion to arrest the accused without consulting their seniors.

There may be nothing wrong in going by the number of complaints and appeals being filed before the Central Information Commission and the State Information Commission to show use of the Act by cross section of citizens across the country, the very same figures would also narrate the sorry state of affairs, when it comes to implementation part of it and the reading

may not enthruse the information seekers. In the scheme of Act, one approaches the Commission only when he is aggrieved by the non-performance of Public Information Officer and the appellate authority. A study of numerous orders that have been passed by the Central Commission/State Commissions, would reveal that most of the applicants were not able to get satisfactory answers either from the PIOs or the appellate authorities designated by the concerned public authorities. In many cases there were no answers to questions of applicant and where provided they were either not relevant or partial and incomplete or vague. It further shows that Government bodies are devising ingenious ways to discourage lay people from using the powerful right to Information Act. In many cases applicants have been asked to pay a whopping amount for seeking information. There are also instances of threatening applicants and applying pressure tactics to make them withdraw their applications. The Act though provides for penalizing PIOs for not providing the relevant details or correct and required information and they can be asked to pay a significant amount as fine, it seems it does not work as a deterrent or the penal provision is not invoked by the Commission, the way it should have been.

Coming to the performance of public authorities in complying with *Suo Motu* Disclosure Provisions of the Act, according to the report of 'the National Assessment of the Degree of Compliance to *Suo Motu* Disclosure Provisions of RTI Act' by Bengaluru based Public Affairs Centre (PAC), the response of ministries and departments under the central government to information sought was far better at 53 per cent, than state governments at 28 per cent and union territories at 19 per cent. Some of the States like Jharkhand, Arunachal Pradesh and Assam showed zero compliance, while Uttarakhand and Kerala were at the bottom of the list as "least-compliant". Even

performance of the State like Karnataka, which is one of the leading States in IT industry, in terms of compliance with requirements of Act is reported to be below average. It ranked 15th among India's 28 States, while State like Bihar scored 55 per cent and ranked among the top five compliant states. So also, Nagaland and Delhi ranked high with a performance level of 62 per cent and 56 per cent respectively. Among various ministries/departments, while department of commerce and ministry of panchayati raj top scored with 87 per cent degree of compliance followed by ministry of agricultural and cooperation and ministry of urban development at 80 per cent, ministry of environment and forests scored the lowest at 11 per cent and urban poverty alleviation showed zero per cent compliance. Its website contained no information pertaining to *suo motu* provisions during the period under survey [Study Report, March 10, 2009].

Evidently, there is lack of strong will power. Enactment of legislation with the avowed objective of promoting transparency and making the public authorities accountable to the public at large so as to create a climate for democratic way of life and democratize the democracy by itself cannot be adequate; to achieve the end results it is necessary that the provisions of the Act are implemented with total conviction. So also, while the legislation says that it has universal application and covers all the constitutional institutions, the Parliament, the Executive and the Judiciary, going by the decision of the PMO to keep the assets of ministers and their relatives under wraps saying that information in this regard is exempted from the provisions of the Act, and the Judges' reluctance in making their assets public, it cannot be said that transparency call given by the Government and acknowledged by the legislature has universal application, but is selective and subjective. Such selective application of the Act would only render the legislation discriminatory and prejudiced.

Even the political parties, which supported the people's movement for right to information and hailed the enactment of legislation using high sounding words, refuse to be accountable to the public at large in respect of their sources of funding and the amount they spend in elections. An order by the Central Information Commission asking political parties to make public their Income-tax Returns under the Act, only received rejection from all major political parties terming the order as politically motivated, *mala fide* in intent and an assault on privacy. Exemption under clauses 8(1)(e) and 8(1)(j), which relate to immunity granted to 'documents received in fiduciary relationship' and 'personal information' is exploited as an escape route.

The Act, which is outcome of a long-drawn people's movement, though still evolving and its scope as also its limitations yet to be tested, needs continued backing and constant involvement of people to sustain and bloom into an effective weapon in the hands of common men to fight against corruption and declining value system in our public institutions. It is a known fact that the bureaucrats, who have been allowed by the system to become a power-centre in their own right, at both the national and State level, see themselves as a distinct class and operate and behave as a superior race, with a halo of unwarranted mystique and awe around them. These operators of power have always been resistant to any reforms that are likely to affect them or the way they go about their duties and the day to day functioning, which, as observed by the Second Administrative Reforms Commission, headed by Union Minister for Law and Justice M. Veerappa Moily, is generally perceived to be "unresponsive, insensitive and corrupt". It is, therefore, natural for them to be annoyed and to have felt offended by the very idea of enacting a statute like the RTI Act, which does not fit into their scheme. In fact, but for public outcry, the Act could have been sabotaged

within six months of its enactment by amending one of its most important provisions, that is, one relating to disclosure of information from the file notings. Instead of having a 'pro-active approach', the government, it seems was more concerned about the likely demoralization that such provision in the Act may cause on the bureaucracy. The government which promised to give a more "progressive, participatory and meaningful" Act than the previous one, should not have worried about dishonest bureaucrats and politicians who have all the reasons to be worried about such disclosure. As a matter of fact, no honest civil servant need be worried of such disclosure. Section 8(1) of the Act has enough safeguards to protect confidentiality of sensitive matters by exempting all such matters from disclosure. In a country, which has been ranked as the 74th most corrupt country among the 180 countries of the world [Corruption Perception Index (CPI) 2008, prepared by Transparency International] and its bureaucracy, as the least efficient among 12 Asian economies which include other than India, Singapore, Hong Kong, Thailand, South Korea, Japan, Malaysia, Taiwan, Vietnam, China, Philippines and Indonesia [Survey conducted by a Hong Kong-based Political and Economic Risk Consultancy (Perc)], a strong Right to Information Law can play a significant role in changing the scenario. Rational and judicious use of Act by alert citizens shall certainly work as a deterrent and check spread of corruption, even if not able to weed it out completely, or at least make India's bureaucracy effective in its delivery system.

The only matter of concern is abuse or misuse of the Act. The Act, which is meant to be an effective tool against corruption, red-tapeism and nepotism in the administration, cannot be allowed to become a tool in the hands of a busy body only for the purpose of settling personal scores or for other oblique motives. In a recent decision

the High Court of Andhra Pradesh has observed that those who want to get data using the Right to Information Act have to be more practical and realistic. Indiscriminate use of Act seeking information just for the sake of it and without there being any useful purpose to serve would only put enormous pressure on the limited human resources that are available with the public authority. Diversion of such resources, for this task would obviously be at the cost of ordinary functioning of the public authority. Beyond a point, it may even become harassment, for the concerned agencies. [*Divakar S. Natarajan v. SIC, A.P. State Information Commission*, 2009 (2) ALD 644]. The Act, to achieve desired results must be used rationally and judiciously. The Act cannot be allowed to be used by a person for promotion of his personal interest, or to know about the private affairs of those in public life without any justifiable reasons but just to harass or embarrass them, or solely with the object of harassing the public authority, in the garb of exercising his right to information. So also, the Act cannot be turned into a tool for vendetta of an employee against his organization. In such cases, the provisions of the Act have to be strictly interpreted to make sure that larger public interest is not allowed to suffer. The Commission normally rejects such applications with deprecatory observations yet much needs to be done in this direction to impart a sense of responsibility on those, who want to derive benefit under the Act.

The book endeavours to discuss all these aspects and related issues vis-à-vis the scope and parameters of the right to information conferred on the citizens of the country by virtue of the Right to Information Act 2005, in the light of provisions of the Constitution of India, provisions of the new Act and the existing statutory provisions which have bearing on the subject matter. The FIRST PART of the book gives a brief introduction of 'Right to Know and the Freedom of Information

Law' covering various aspects having bearing on the subject matter and deals with —

- (a) Democracy, Democratic Values and Right to Know,
- (b) Right to information law: World scenario at a glance,
- (c) 'Right to know' under Constitution of India,
- (d) Refusal of disclosure on ground of 'public interest immunity'
- (e) Movement for right to Information, and
- (f) Enactment of the Right to Information Act 2005

Even prior to enactment of 2005 Act, right of citizens to information has found expression in various legislations operating in different fields, such as voter's right to information under the Representation of the People Act 1951, Consumer's right to information under the Consumer Protection Act 1986, Right of accused to be informed of grounds of arrest, right to bail and legal aid under the Criminal Procedure Code 1973, Right to Information of workmen under Labour Welfare Laws etc. All these and more have been discussed independently and annexed to Part I of the book along with an Annexure dealing with Constitutional and statutory provisions/legislations restricting the free flow of information.

PART II of the book deals with the Right to Information Act 2005, its scheme and interpretation of various provisions therein. The scope, extent and parameters of the right to information conferred by the Act on the citizens of the country, duty of State to provide for RTI regime and obligations of public authorities to establish necessary machinery to facilitate dissemination of information by designation of such Public Information Officers and duties and liabilities



of Public Information Officer have been discussed at great length. Procedure for obtaining information has been explained taking notice of intricacies involved with the aid of not only decisions rendered by various High Courts dealing with provisions of the Act but also important and selected decisions of the Central Information Commission. Remedy of appeal before Central/State Information Commission and scope of judicial review of decisions given by Commission has been discussed with necessary elaboration. The discussion is based on the judicial interpretations, which the subject matter has received even prior to enactment of Act 2005 from the Supreme Court as also the High Courts and decisions rendered by various High Courts dealing with provisions of the 2005 Act since enacted. Imported and selected decisions of the Central Information Commission have been separately discussed to explain procedural intricacies and to illustrate the point in issue wherever found necessary. Guide for Public Authorities and Public Information Officers, *etc.*, as issued by the Central Information Commission, have been annexed to this part of the book for ready reference.

PART III of the book contains Rules and Regulations made by the Central Government and State Governments as also other Competent Authorities. Important statutes, which have close relevance to the subject matter of the book find place in PART IV of the book. This part also includes complete text of United Kingdom Freedom of Information Act 2000.

In addition to providing detailed index to contents of the book and parallel mapping of discussion under Part I of the book and under various sections of the Act in Part II, a 'Fact Finder', in the form of an intensive and extensive, but precise index-cum-ready referencer, designed to facilitate easy and quick location of desired information contained in the book and various provisions of the Act, has also been given.

The book, written in a simple layman language, it is hoped, shall not only serve as guide for the information seekers but also meet the requirements of the Bench and the Bar and cater to the needs of the Public Authorities and Public Information Officers entrusted with the job of giving effect to the benign provisions of the Act in their true spirit.

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## CENTRE STATE LEGISLATIVE RELATIONS IN REGARD TO THE DOCTRINE OF REPUGNANCE

By

—SRINIVAS BORRA\*

### *Introduction*

According to *B.N. Shukla* "The distribution of Legislative powers between the centre and the units is an essential feature of a Constitution based on the federal Model. Every Federal Constitution, thus established a dual polity that is the central polity and the subsidiary

sovereign polities. The present Constitution of India in making the distribution of legislative powers between the Union and the States. The Constitution has gone into great details regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities.

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