

CHAPTER-4

IMPEDIMENTS AND CHALLENGES TO RIGHT TO INFORMATION LAWS IN INDIA: AN INTROSPECTION

4.1. An Overview

Development of a country largely depends on the availability of public facilities such as public distribution system, healthcare in government hospitals and dispensaries in subsidised prices and other basic facilities to its citizens. This goal can be achieved by carrying out policies and by effectively implementing them. The implementation part depends primarily on the government officials. Secrecy in governing these policies can breed in corruption and shunt the growth and development of the nation. Therefore, sound disclosure policy involving active participation of citizens can ensure good governance.

In India, the Right to Information Act, 2005 has given this opportunity to the citizens and empowered them to participate in the governance of the country facilitating people-centric governance. The sense of accountability and responsibility of the public authorities have increased considerably post the enactment of the Act. Undoubtedly, the Act has proved useful in restoring individual rights but it has achieved very little in changing the existing system of governance where the democratic institutions have significantly lost their credibility due to deep pervasive corruption in the prevailing circumstances.

Despite being one of the best pieces of legislation in the world, due to lack of awareness among the citizens and absence of voluntary disclosure, the citizens are deprived of their fundamental right.

Therefore, in order to bring in the true spirit of democracy, the three organs – the legislature, executive and the judiciary should work in cooperation with each other. The legislators should not only enact laws but also ensure that the laws are best suited to public interest. The bureaucrats should function honestly and should be unaffected to

any extraneous pressure. The judiciary being the guardian of the Constitution should interpret the law in its widest amplitude.

Nevertheless, over the last few decades, we have witnessed that the legislature makes the laws and rarely takes into consideration its impact on the people at large. The executive works under the patronage of the ministers and can seldom take independent decisions. Although the judiciary has given wider interpretation to this right, some judgements have indeed defeated the legislative intent of the Act. A corollary to these factors, people have lost faith in the democratic process and feel betrayed by the government whom they elect and bring into power. Moreover, growing income inequality, unemployment and burden of taxes and have left the common man in a state of hopelessness.

Information is a resource which empowers people to act more meaningfully as electors as well as elected representatives of the people to act more meaningfully as electors as well as elected representatives of the people.¹ Despite the enactment of legislation like RTI Act, transparency in governance still remains a distant dream where the people are still not well informed and are not able to exercise their right to franchise properly. In addition to this, deliberate attempts are made by the government to deny information to the public which amounts to violation of our fundamental right to know.

Taking into consideration these factors, the present Chapter delves deep into the impediments that have hindered the effective implementation of the Act and examines the possible solutions to this problem.

4.2. Impediments to Efficacious Implementation of Right to Information Act, 2005 in India

The history of the RTI Act as discussed in Chapter 1, reflects that it was people's movement against corruption that led to the enactment of the Act. The administration was forced to participate in a public hearing and made accountable to the public at large.

¹ S.P.Sathe, *Right to Know*, 1 (N.M.Tripathi Private Ltd.(1991)

With the proliferation of applications requesting information by the citizens, the resistance towards sound implementation of the Act increased manifold from various corners. From the lower level of offices to the Prime Minister's office (PMO) there is a continuous and motivated attempt to deny information and discourage disclosure of information to the citizens. It has been more than a decade since the passage of the Act but the institutions and agencies under the government and non-government sector under the control of the government have showed lackadaisical attitude towards their responsibilities. The fact that the Central Information Commission and State Information Commissions are flooded with cases reflects non-compliance of the provisions of the Right to Information Act, 2005.

The study so far reflects that the Act which is a potent weapon in the hands of the citizens but its use is circumscribed due to various challenges associated with its implementation which is discussed in detail in this Chapter.

4.2.1. Shortcomings in the Legislation

The Right to Information Act, 2005 was a carefully drafted legislation that went through long deliberations and debates before its enactment. The deficiencies that existed in the Freedom of Information Act, 2002 were removed through the enactment of this Act. Nevertheless, several ambiguities have surfaced over the years while interpreting the Act that has caused immense hardships to the information seekers. It is interesting to note that the ambiguities in the legislation is conveniently misinterpreted by the public authorities to refuse disclosure of information and defeat the purpose of the Act which are mentioned below:

(i) Definition of 'Public Authority'

Under the Act, the most controversial definition till date remains "public authority". The legislation makes it clear that a citizen can only seek information from an authority provided it is established and constituted either under the Constitution or by the Parliament or the State Legislature. It also includes local bodies and authorities that are established, constituted and under the control of the government and involve public money directly or indirectly. The Non-Governmental Organisations substantially financed, directly or indirectly by the government also comes under the ambit of the Act.

Therefore, an applicant before filing an application, have to ascertain that the authority is a public authority under the Act. In the absence of precise definitions of the words “substantially financed” or “indirectly financed”, there lies enough ambiguities as to the applicability and extent of the Act.

Moreover, different State Information Commissions have given different interpretation to define these public authorities due to which the citizens hesitate from approaching the offices for filing applications. Several subsidies, like allotment of land on concessional rates and tax exemptions are extended to various organisations and agencies that still refuse disclosure of information to public. Although the interpretation of the Apex Court in *Thalappalam case*² has removed these ambiguities to a considerable extent but it still remains one of the major lacunae in the Act.

(ii) Interpretation of ‘Public Interest’

The term ‘Public interest’ is not defined in the RTI Act. The Black Law’s Dictionary defines ‘Public interest’ as the general welfare of the public that warrants recognition and protection. It also means something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation.³

Under the Prevention of Corruption Act, 1988, public interest is involved where the “State, the public or the community at large has an interest.”⁴ According to Sec-8(2) of the RTI Act, to disclose exempted information, the information should pass through the public interest test before it is disclosed to the public.⁵ This provision is also often misinterpreted and used as a shield by the PIOs to conveniently deny information from the citizens.

(ii) Information relating to ‘Life and liberty’

The Act lays down that if information concerns life and liberty of a person, such information should be made available within 48 hours.⁶ In the absence of clear interpretation, the citizens are often unaware of the correct use of this provision.

² *Supra* note 2

³ Black’s Law Dictionary Seventh Edition, Bryan A, Garner, West Group 2001, USA

⁴ The Prevention of Corruption Act, 1988 s.2(b)

⁵ The Right to Information Act, 2005 s. 8(2)

⁶ *Supra* note 5 s.7(1)

(iii) Ambiguities Relating to Exemption Clause

The resistance of government towards disclosing information is further strengthened by the exemption clause that gives certain immunity to the public officials. In most of the cases, for refusing information, the public authorities take refuge under Sec 8 (1)(a) to 8(1)(j) which exempts disclosure of information to the public. Further, section 24 gives immunity to twenty six intelligence and security organisations mentioned under the Second Schedule of the Act. The Act empowers the state government to alter the schedule which is often been used arbitrarily.

(iv) Vague Provisions on Appeals and Complaints

Under the Act, an information seeker being rejected information or on the refusal of the PIO to act on his application within the prescribed time frame under the Act has two remedies available. He can either approach the First Appellate Authority or file a complaint before the Information Commission under Sections 19(1) and 18(1) respectively. The citizens often get confused with these provisions as they are overlapping and difficult to interpret from plain reading.

(v) Lack of Uniformity in Rules framed by the States

The Act empowers the competent authorities of the Central and the State Governments as well as the High Courts and the Supreme Courts to frame rules and procedures for the effective implementation of the Act, which vary from state to state. However, lack of uniformity in these rules causes immense inconvenience to the citizens. The amount of fees, the mode of payment and the procedure involved in filing applications and appeals are different for different states which makes it cumbersome for citizens to seek information in the public offices.

Ergo, it is seen that over the years, the interpretation of the above provisions have deprived the people from demanding information. The Public officials have misused the provision and denied information every time taking advantage of the vacuum in the legislative provisions. Therefore, amendments to crease out such ambiguities would deter the public officials from resorting to such misuse.

4.2.2. Bureaucratic Failure in Governance

From the plain reading of the Right to Information Act, 2005, it is amply clear that the whole mechanism of disclosing information and ensuring its delivery to the Information Seeker belongs to the executive. Failure in fulfilling these obligations defeats the very purpose of the RTI Act. The Secrecy system has become much less a means by which government protects national security than a means by which government safeguards its reputation, dissembles its purpose, buries its mistakes, manipulates its citizens, maximises its power and corrupts itself⁷ These officials directly work under political patronage of the ministers and senior officials making a strong hold in their services. Honest officials have little to do in this regard as those who blow the whistle are either censured; reduced in rank or transferred to remote places.

Corruption ridden bureaucracy is a pandemic in India and bureaucratic failure has crippled the effective implementation of the RTI Act. The public servants in India get the protection of Article 311 of the Constitution fixing their tenure and making it difficult to terminate their services. Various Committees and Commissions were set up to eradicate corruption in India. Among others, the Sanathan Committee Report of 1963 proposed setting up of Vigilance Commissions both at the Centre and in the States to combat the menace of corruption. It also highlighted the gravity of political corruption.⁸

4.2.2.1. Institutional Framework for fighting Bureaucratic Corruption in India

To tackle cases of corruption against government servants, the mechanism adopted include Prevention of Corruption Act, 1988 and the Indian Penal Code 1860 enforced through Central Vigilance Commission (CVC) and the Central Board of Investigation (CBI) with the other state agencies; the Comptroller and Auditor General of India,(C& AG) the establishment of Lokpal and Lokayuktas under the Lokpal and Lokayuktas Act, 2013 and the Central Information Commission(CIC) under the Right to Information Act, 2005. These institutions have been working under the government but have done very little to end the menace of corruption.

⁷ *Infra* note 11 ,147 Quoted by Justice K.K.Mathew

⁸ Dr.Madabhushi Sridhar , *Right to Information Law & Practice* 284 (Wadhwa Nagpur 1st Edition 2007)

(i) Central Vigilance Commission

The Central Vigilance Commission (CVC) created in 1964 got statutory recognition in 2003. Its role is with the objective of monitoring all vigilance activity under the Central Government and advising various authorities in Central Government organisations in planning, executing and reviewing and reforming their vigilance work.⁹ It got statutory recognition in 2003. By virtue of the GOI Resolution dated April 2004 on “Public Interest Disclosure and Protection of Informer”, the CVC has been authorised as the Designated Agency to receive written complaints relating to allegations of corruption or misuse of office under the Whistleblower Protection Act, 2011 which has not been functionalised yet.

One of the major setbacks of the CVC is that it is inadequately empowered to work independently to deal with corruption cases. Lack of autonomy reflects from the fact it can only advise the government in vigilance and disciplinary matters and have no powers to handle criminal cases.

(ii) The Central Board of Investigation

The superintendence of the Central Board of Investigation (CBI) relating to investigation of offences under the Prevention of Corruption Act, 1988 lies with the CVC and other matters with the Department of Personnel and Training.

A good number of states in India have given their general consent to the Central Government for investigation of complaints of corruption against the public servants under the control of the Central Government; Public Sector undertakings; Corporations Banks under the control of Government of India functioning in the states. However, consent of the state government would be required for investigation of complaints against the officials of the state government to take actions against their own officials in matters pertaining to corruption.

In the recent past, we have seen the extent of dominance by the government in controlling these organisations.¹⁰ The CBI too has always been in controversy because of its failure to act independently.

⁹ Available at: www.cvc.nic.in (last visited on Jan 6, 2019)

¹⁰ See “What is going on at the Central Bureau of Investigation?” The Hindu, 19 January 2019

(iii) Lokpal and Lokayuktas

The Administrative Reforms Commission Report 1967 opined creation of an independent body like Ombudsman in India – the Lokpal at the centre and Lokayuktas at the state levels. In several states of India, Lokayuktas have been established to hold the officials accountable for corruption. However, it is also true that these institutions are often weak and do very less to deter bureaucratic misdeeds. Recommendations for establishment of Lokpal and Lokayukta at the centre and the states was made by the Administrative Reforms Commission which submitted its Report in October, 1966. It also suggested that these institutions should be given constitutional status to avoid conflicts with other agencies of government. A number of states have established Lokayuktas since then with varying provisions. Due to lack of uniformity and absence of proper mechanism to curb corruption, these institutions have not been able to function effectively.

(iv) Comptroller and Auditor General of India

The audit scrutiny by the C&AG in politically sensitive cases involving misuse of large funds or of political office has often brought the office of C&AG in conflict with the ruling political elite at the centre as well as in the states.¹¹

The C & AG's (Duties Powers and Conditions of Service) Act, 1971 was lays down the duties and powers of the C& AG. Sec 13 of the Act casts an obligation on the C&AG to audit all expenditure of the Union and the states on the utilisation of funds allotted to them. It is a known truth that since C&AG works under political patronage, social audits are better alternative.

4.2.2.2. Impact of the Right to Information Act on the Indian Bureaucracy

Transparency and openness allowing free flow of information to the public can prevent corruption to a great extent. The RTI Act mandates disclosure of information which is subject to certain exemptions. The information defined in the Act also includes personal information of public officials if it outweighs public interest.

¹¹ Madhav Godbole, Public Accountability and Transparency The Imperatives of Good Governance, 250 (Orient Longman, New Delhi, 2004)

In *Girish Ramchandra Deshpande v. Central Information Commission & Ors.*,¹² the Apex defended the public officials by discouraging disclosure of personal information unless it that personal information affects public interest. This judgement has a bad precedent and opened a Pandora's box for the public servants to seek exemption and shirk accountability.

Moreover, the Central Information Commission is manned by retired bureaucrats and often avoid penalising the erring officials. Therefore, inability to combat corruption because of the dominant role played by the bureaucrats remains one of the major challenges in the implementation of the Act.

4.2.3. Exclusion of Private Sector

Most of the legislations of countries across the world have excluded the private sector from the purview of the information laws. The RTI Act of India also exempts disclosure of information by private organisations.

The New Industrial Policy brought in major reforms in the economic policies of India replacing the Licence Raj. It was believed by the policy makers that large scale corruption existing at that point of time would be controlled with the emergence of privatisation but sadly it has given way to deep capitalism.

Furthermore, with the advent of Liberalization, Privatisation and Globalization (LPG), many public service delivery functions have been outsourced to private bodies bestowing on them dominant role in carrying out public functions affecting the interest of people at large. In the prevailing circumstances, there is no reason for the people to be deprived of right to be informed on the matters that concern their day to day lives undertaken by the private sector. Various sectors including telecommunication, education, financial institutions media and others have been privatised or in partnership with the government. The Corporate sector generates the second largest resource of employment and dominate the lives of common people. Countries like South Africa has extended this right to private entities carrying out public functions.

¹² (2013) 1SCC 212

The question to be considered here is whether it would be correct to equate the private sector in India with that in advanced western countries in terms of its efficiency and productivity, and whether there is a framework of strong institutions and safeguards to protect society at large from the unscrupulous and exploitative traits of the private sector which seem to extend to even subverting national interests.¹³

It is a known fact that in the vicious cycle of corruption, the private players have a larger role to play. The influence of Ambanis, Adanis, Birlas, Tatas, Godrej etc. is not unknown to anyone. From the pre independence era, the big business houses had close association with the top bureaucrats of the government. Such associations had played a key role in negotiating and bargaining with the government before and after elections that has long term impact on the economy of India.

The latest example of such understanding is the launch of *Jio* company that has surpassed all other companies in terms of its success in such a short span. The Prime Ministers involvement in the launch of the company had created suspicion in the minds of the citizens.¹⁴ Several RTI applications in this regard were filed in the PMOs office seeking explanation of such involvement but they were denied access to such information. The same thing had happened in the case when the PM's picture was seen for endorsing Pay TM during the demonetisation drive. The private sector influences the destinies of millions in India and lack of accountability from these entities have bred large scale corruption.

The European Union (EU) Social Charter provides for participation of employees in decision making, profit and equity. In India, labour participation has been put under Part IV of the Constitution of India. In addition to this, there are various legislations that involve the worker in the management of the companies. Despite these measures, there is absence of accountability from these private entities,

Moreover, there are many non-governmental institutions and agencies carrying out public functions that often escape accountability because of the ignorance of the

¹³ Madhav Godbole, "The Changing Times-A Commentary on Current Affairs", 278 (Orient Longman 2000)

¹⁴ "Reliance Jio's front page ad featuring Modi raises eyebrows" The Hindu September 22,2016

citizens. The exclusion of private sector aggravates the misery of the common people who rarely get the opportunity to question the private entities.

4.2.3.1. Legislations and Regulations Promoting Accountability in Corporate Sector

The Corporate sector has a tremendous influence on the lives of a common man. With the advent of industrialisation, the corporate sector has made a stronger footing in India carrying out various functions which were earlier under the powers of the government. Although the corporate sector does not directly come under the purview of the Right to Information Act, 2005, greater transparency has been ensured post the high profile scams in recent times.

Earlier, the shareholders of company holding shares for a limited period of time seldom took interest in the affairs of the company. The annual board meetings were not carried out efficiently and the management easily got away in the absence of a surveillance mechanism. However, after the unearthing of the high profile corporate scams, the shareholders have become more vigilant about their investment. It has certainly triggered a sense of accountability among the private sector to be more accountable and transparent. Taking into consideration the increasing role played by the corporate sector in our day to day lives, including their obligation to furnish information on the demand by the citizens has become necessary.

Accountability is expected from government at different levels because the responsibility to govern the state as representatives of people lies with the government. They are accountable to the courts and the Parliament if there is any failure to comply with the duties by the government. Unfortunately, the private sector is immune from disclosing information that concerns the public. The legislations that govern the corporate sector and demands accountability are discussed below:

(i) Competition Act, 2002

One of the primary objective of the Competition Act is to protect the interest of the consumers and promote fair competition in the market. It mandates disclosure of information that helps in preventing anti-competitive practices. The Competition Commission of India displays all kinds of Information complying with the provisions of

the Act. The Act also provides for restrictions on disclosure of information without the previous permission in writing of the enterprise.¹⁵

(ii) Companies Act, 2013

Transparency is also ensured under the provisions of the Companies Act, 2013. The new Act enhances the procedure relating to memorandum and articles of association that reflect accountability. Every member has right to obtain and inspect copies¹⁶. It provides opportunity to the creditor or contributor to inspect any work¹⁷ and ensures inspection production and evidence of documents kept by Registrar¹⁸. The Central govt is empowered to direct companies to furnish information on statistics¹⁹.

(iii) SEBI (Securities and Exchange Board of India) Act, 1992

The Act provides for the establishment of a Board (SEBI) to protect the interests of investors in securities and promotes the development of and regulates the securities market. It also issues a format known as Standard Listing Agreement of Stock, a document executed between companies and the stock exchange to ensure good corporate governance.

(iv) Accounting Standards issued by the ICAI (Institute of Chartered Accountants of India)²⁰

Accounting standards including disclosure of financial statements are issued by this autonomous body under the Companies Act, 2013 for improving the quality of corporate financial reports by issuing accounting standards.²¹

(v) Secretarial Standards Issued by the ICSI (Institute of Company Secretaries of India)²²

ICSI is an autonomous body that is empowered by the Companies Act, 2013 to issue standards on General Meetings and Meetings of the board of Directors to be

¹⁵ The Competition Act, 2002 s.57

¹⁶ The Companies Act, 2013 ss.71 & 85

¹⁷ *Id* s-293

¹⁸ The Companies Act, 2013. s.399

¹⁹ *Id.* s.405

²⁰ Available at: <https://www.icaai.org> (last visited on Dec 29, 2018)

²¹ *Supra* note 17 s.129

²² Available at: <https://www.icsi.edu> (last visited on Dec 29, 2018)

complied with by the company. In addition to this, the Serious Fraud Investigation Office is established in 2003 under the Ministry of Corporate Affairs, Government of India that carries out investigations relating to corporate frauds. It coordinates with the Income Tax Department and the CBI.

Stakeholder society theory, a mandatory corporate social responsibility under the Companies Act, 2013 under which the management is responsible for providing a decent return on investment to shareholders and also towards the community and environment. This provision has been often neglected by the firms and the funds are misdirected owing to lack of proper policies and enforcement mechanisms. It came to light that a battery operated silver chariot for a temple in Maharashtra was made by the DRDO under the head - corporate social responsibility.²³ In the absence of audit mechanism and lack of accountability and transparency have led to corruption.

All these legislations and Regulations have promoted accountability from the private entities but the long list of the loan defaulters and their migration to other countries crippling the economy reflects that in practice very little is achieved.

4.2.3.2. Challenges to the Right to Information Act from the Private Sector

Exclusion of the private sector from the purview of the Act has been one of the greatest deficiencies in bringing transparency. Although the private entities do not fall under the strict definition of appropriate government, the information relating to private sector fall under the definition of 'information' and the respective authorities are obligated to disclose information to the citizens. In *Cellular Operators Assn. v. TRAI*²⁴, the Hon'ble Supreme Court stated that for the healthy functioning of the democracy, all subordinate legislation needs to be transparent subject to well defined exception.

Almost in all sectors the private companies have to register themselves and seek permission for their functioning from the respective government department. Therefore, to seek information from the private entities the concerned department under which they are registered are to be approached such as consumers can seek records of actions taken by the private telecom service providers on their complaints from the Telecom

²³ "DRDO Chariot Runs Into Controversy," *The Sunday Standard*, 23rd Nov, 2014

²⁴ (2016) 7 SCC 703

Regulatory Authority of India (TRAI). The CIC held that, “a consumer, through TRAI can access the information on the action taken by the service provider on his complaint”.²⁵

Also in the landmark decision given by the CIC in *Sarabjit Roy v. Delhi Electricity Regulatory commission*²⁶ the private public utility authorities were brought under the purview of the Right to Information Act, 2005.

Due to lack of awareness and dissemination of such decisions, the citizens remain aware of these provisions of the Act. Since the obligation under Sec-4 is seldom complied with, the private sector escapes accountability most of the times.

Therefore, pro active disclosure by these private parties can resolve problems relating to filing of applications. Also creating awareness about the Act by displaying in the respective offices, details with regard to the government departments where the information would be made available can reduce harassment of the public to a great extent and promote transparency.

4.2.4. Fundamental Right to Privacy in Conflict with Right to Information

The Right to Information Act, 2005 has empowered the citizens to seek all kinds of information from the public authorities that concern them and has given them an opportunity to participate in the governance of the country. The Act overrides all other legislations that create barrier to such disclosure including the Official Secrets Act, 1923, used as a shield by the public officials to deny information.

However, the right to information is not absolute as the Act empowers the government to withhold certain category of information if it falls under the exemptions expressly laid down under the Act.²⁷

According to the Act, personal information refers to information regarding ‘third party’ and it does not apply if the information seeker wants information about himself or

²⁵ *Mr.Akshay Kumar Malhotra v.TRAI* CIC/BS/A/2014/001091/7529 01

²⁶ CIC/WB/A/2006/00011

²⁷ The Right to Information Act, 2005.s.8

his case ,as the question of privacy does not arise in such cases.²⁸ In the absence of any concrete definition of personal information or public interest, there lies enough ambiguity as to what information is considered as private and what can be disclosed to the public giving rise to conflict between right to privacy and right to information Varying orders of Information Commissions with regard to this overlap creates further ambiguities.

In *Union Public Service Commission v. R.K.Jain*²⁹, the courts held that an RTI applicant who was seeking personal information of a third party is obliged to prove that the disclosure would serve the public interest better than keeping the information confidential. Therefore, the burden of proof lies on the third party to prove that disclosure of the information is not in public interest. The protection of privacy principle states that the individual should, have some control over the use of information made by others, especially in matters relating to government agencies and of information concerning them.³⁰

The Act expressly provides for a procedure for seeking information from the third party before disclosing his personal information to the applicant. Due to existing ambiguities in the provision, the public servants often resort to this provision to safeguard their privacy rights and misuse it. Therefore, getting access to the personal information of another individual has always been challenging for a citizen.

Since the public officials fall under the ambit of the Act, openness is expected from them when disclosure of their personal information becomes necessary to serve larger public interest. The infamous *Girish Ramchandra's*³¹ case is a glaring example of the attempt to protect the interest of the public officials in the garb of privacy.

Furthermore, protection of right to privacy has attracted a lot of attention with the advent of technological advancement. Although digital acceleration has been a boon in our lives where information can be transmitted in a jiffy from one part of the world to the other, the hazards relating to such ease have been multiplying over the years. The

²⁸ *Shri Rakesh Kumar Singh v.Lok Sabha Secretariat*, Appeal No.CIC/WB/A/2006/00469;& 00394

²⁹ (DB)[196 (2013)DLT 170

³⁰ *Ibid*

³¹ *Girish Ramchandra Deshpande v. Central Information Commissioner & Ors* (2013) 1SCC 212

RTI Act that offers accessibility to information held by the government has been of little significance in the matters of accountability of the government and in the matters of mass surveillance.

While information relating to interception and communication surveillance may be obtained by filing an application under the Act, there lies enough ambiguity relating to the legality of such practice. An RTI application has revealed that up to 9000 phone calls and 500 e-mails were intercepted every month during Congress – led United Progressive Alliance’s rule in 2013,³² Another RTI application has revealed that 300-500 orders for interception of e-mails were issued per month by the government to obtain data by agencies like Intelligence Bureau, the Narcotics Control Bureau, Directorate of Enforcement, the Central Board of Direct Taxes, the Directorate of Revenue Intelligence, the Central Bureau of Investigation ,the National Investigation Agency, the Research & Analysis Wing and the Commissioner of Police, Delhi and the Directorate of Signal Intelligence(for service areas of Jammu and Kashmir) .³³

Although the Information Technology Act, 2000 and the Telegraph Act,1885 legalises monitoring and intercepting calls of the public by the government but mass surveillance done on the people at large results in insecurity and safety of persons. Very often unauthorised interception of large number of people are undertaken by the government to crack down terrorist attacks and other criminal activities. This has been strongly objected by many eminent personalities as to why the government needs to monitor calls of common people when it has sufficient information of the targeted databases. These decisions are often taken as executive decision and are kept confidential under the Official Secrets Act, 1923.The basis of these orders issued is neither accounted for nor disclosed.

The mandatory linking of Aadhaar to bank accounts and mobile numbers and also making it compulsory for school admissions and for appearing in competitive exams by executive decisions resulted in security breaches allowing strangers to access our biometric and demographic data.

³² “9000 calls, 500 E-mails Intercepted Every Month Under Congress Rule In 2013, Reveals RTI” Available at: <https://www.outlookindia.com>> (Last visited 20 Dec, 2019)

³³ *Ibid*

The incompetency of the government to secure the privacy of the Aadhaar database reflected in various instances of Aadhaar data leaking online through government websites, its misuse by private companies, fake Aadhaar card scam, sale of Aadhaar card details at a nominal amount etc. In response to various complaints and objections, the Hon'ble Supreme Court has struck down the mandatory linking of Aadhaar by private entities using Aadhaar information to authenticate identity of individuals and also removed the national security exception from the Act.³⁴ Other than filing of income tax returns and allotment of Permanent Account Number, Aadhaar is no more mandatory. However, for availing the benefits and services of the government schemes and subsidies, mandatory linking of Aadhaar remains compulsory.

Therefore, deletion of Aadhaar details stored with private companies will soon be made possible. However, in the absence of a legal framework, and inaccessibility of seeking information through RTI Act from the private entities, accountability relating to deletion of these records remains a challenge.

The Data Protection Bill, 2018 based on the recommendations of the Srikrishna Committee Report that has been in the line of GDPR adopted by the European Union has raised concern with regard to proposed amendments in the RTI Act. The Bill provides that it will have an overriding effect on other legislations including the RTI Act thereby diluting Sec-22 of the Act.³⁵ The Bill provides for significant substitution to Section 8 (1) (j) of the Act that provides the following:

“(j) information which relates to personal data which is likely to cause harm to a data principal, where such harm outweighs the public interest in accessing such information having the regard to the common good of promoting transparency and accountability in the functioning of the public authority;

Provided, disclosure of information under this clause shall be notwithstanding anything contained in the Personal Data Protection Act, 2018

³⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India* W.P. (Civil) No.494 of 2012 decided on 28 Sep. 2018

³⁵ Personal Data Protection Bill, 2018 s.110

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

Explanation. - For the purpose of this section, the terms ‘personal data’, ‘data principal’ and ‘harm’ shall have the meaning assigned to these terms in the Personal Data Protection Act, 2018”

Therefore, a plain reading of the above provision reflects that if disclosure of an individual’s personal information causes harm to the data principal than the public interest in that information, such information may be exempted from disclosure. ‘Harm’ under the proposed Act includes bodily or mental injury; loss, distortion or theft of identity; financial loss or loss of property; loss of reputation, or humiliation; loss of employment; any discriminatory treatment; any subjection to blackmail or extortion; any denial or withdrawal of a service, benefit or good resulting from an evaluative decision about the data principal; any restriction placed or suffered directly or indirectly on speech, movement or any other action arising out of a fear of being observed or surveilled; or any observation or surveillance that is not reasonably expected by the data principal.³⁶

Taking into consideration the wider definition of the word ‘harm’, it would be very convenient for the data principal³⁷ to deny disclosure of personal data³⁸ and prove that his privacy outweighs public interest. This provision has attracted criticism from all corners of the state as it is believed that this provision may be used to deny information especially by the government officials.

The Bill also defines ‘data fiduciary’ as any person, including the state, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data.³⁹ Therefore, the

³⁶ *Supra* note 34 s.3(21)

³⁷ According to Sec 2(14) ‘Data Principal’ means the natural person to whom the personal data refers and includes an individual; a Hindu undivided family; a company; a firm; an association of persons or a body of individuals, whether incorporated or not; the State; and every artificial juridical person as well.

³⁸ According to Sec 2(29) of the Personal Data Protection Bill, 2018. ‘Personal data’ under the proposed bill includes data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information.

³⁹ *Ibid* s.2(13)

natural person here is the individual who shares his or her personal data with the state or company that is in a fiduciary capacity.

If the state or the non-state entities are collecting and storing our personal data, they fall under the category of data fiduciary. We as Data Principal should have the right to be informed about the purpose of data processing by the data fiduciary and should be alerted about data breaches.

In the fast changing digital environment, accountability relating to data protection and personal privacy should be ensured. The Privacy Act may run contrary to the rights available under RTI Act but they should harmoniously co exist. Therefore, maintaining a balance between the right to privacy and right to information would prevent its misuse and ensure good governance.

4.2.5. Failure in Providing Protection to Whistleblowers

All the agencies and institutions discussed above can function more effectively if there are people who can fearlessly come forward and report any maladministration taking place within the department. The people who fearlessly expose corruption by blowing whistles are known as “Whistleblowers”. Whistleblowers play a significant role in keeping the citizens informed preventing corruption and bringing transparency in governance. Transparency is a necessary precondition for democracy to flourish that leads to good governance and an informed citizenry can be more participative and active in the governance of the country taking the nation to greater heights.

The expression ‘whistle blowing’ has been defined as “the disclosure by organisation members (former or present) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.⁴⁰ Whistleblowers blow whistle to discourage employees from indulging in unethical and fraudulent acts and protecting the interest of the society as a whole. Good faith whistle blowers represent the highest ideals of public service and foster good governance.

⁴⁰ J.P.Near and M.P.Miceli, “Retaliation against Whistle-blowers: Predictors and Effects”, 137 *Journal of Applied Psychology*, (1986)

There are two kinds of whistleblowers- Internal and External whistleblowers.⁴¹ Internal whistleblowers may include an employee, superior officer or any designated officer within the organisation who discloses any illegal, immoral or illegitimate practice to the employer. The external whistleblower may be outside the organisation and may include lawyers, news reporters, law enforcement agencies or NGOs.

In every institution and organisation the whistleblowers play a major role in preventing corruption in both the public and private sectors and safeguarding public interest. Governments across the nations have shown concern for protecting the rights of the whistleblowers.

4.2.5.1. Whistleblower Protection in other Countries

Countries like U.S., U.K., Australia, Canada, South Africa and Japan have express provisions to protect whistleblowers in corporations or companies. In UK, the Public Interest Disclosure Act, 1998 was adopted from the Nolan Committee Report.⁴² It applies to all employees in the public, private and voluntary sectors and excludes the army and the police. The Act has amended Trade Union; Labour Relations (Consolidation) Act, 1992 and also the Employment Rights Act, 1996 that provides for protection to whistleblowers in the workplace. Further, this Act was amended by the Enterprise and Regulatory Reform Act, 2013. Under the new Act, the employment tribunal has the power to reduce any compensatory award it makes to the employee by 25% if it is found that disclosures are not made in good faith.⁴³

In USA, the Congress introduced the American Securities regulator's Whistleblower Programme to provide monetary incentives for individuals to come forward and report possible violations of the federal securities laws to Securities and Exchange Commission. This has showed significant success in attracting customers. Under the Sarbanes Oxley Act of 2002, all companies, including Indian, which are listed on US stock exchanges, are required to comply with the requirements of the Act. The Act requires that all publicly traded corporations shall create internal and independent audit committees establishing procedures for employees to file internal whistle-blower

⁴¹ *Indirect Tax Practitioners Association v. R.K Jain*, AIR 2011 SC 2234

⁴² Available at : www.legislation.gov.uk>1998(last visited on Sep 12,2018)

⁴³ *Ibid*

complaints, and procedures to protect the confidentiality of employees who file complaints. The Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 also deal with whistleblower protection in companies and corporations of the USA.

In Australia, the Corporations Act, 2001 and the Common Wealth Public Interest Disclosure Act, 2013 deal with protection to whistle blowers.⁴⁴ In South Africa, the Protected Disclosures Act, 2000 provides protection to the employees in both public and private sector who makes protected disclosures regarding the unlawful or irregular conduct of their employer or other employee. In Canada, the Public Servants Disclosure Protection Act 2007 deals with protection of persons who disclose wrongdoings in the public sector.⁴⁵ In Japan, the Whistleblower Protection Act, 2004 extends its protection to the life, body, assets and other interests of the general public by ensuring corporate and government compliance with laws and regulations.⁴⁶

4.2.5.2. Official Secrets Act and Protection of Whistleblowers

In India, the Supreme Court through the promotion of public interest litigations has empowered the whistleblowers by widening the rules of *locus standi*. Various cases on corruption, miscarriage of justice and matters relating to environment, health and safety have been brought forth by the public spirited persons since 90s. The concern for the protection of whistleblowers began when the Whistleblower Protection legislation was initiated by Mr. N. Vittal who was the Chief Vigilance Commissioner in 1993. He had requested the Law Commission to draft a Bill on the public officials who engaged in corrupt activities and protect persons who disclose such information.

A detailed study was carried out by the 179th Law Commission of India headed by B.P.Reddy where the legislations of different countries were studied in detail and a draft bill – Public Interest Disclosure (Protection of Informers) Bill on the protection of whistleblowers was introduced in 14.12.2001. Among other provisions the Bill proposed for providing safeguards to the whistleblowers against victimisation in the organisation.⁴⁷ Thereafter, the public Interest Disclosures and protection of Informers

⁴⁴ Available at: <https://www.legislation.gov.au> (last visited on Dec 5,2018)

⁴⁵ Available at: <https://www.canada.ca>(last visited on Dec 9,2018)

⁴⁶ Available at:www.cas.go.jp/hourei/data/WPA(last visited on Dec 9,2018)

⁴⁷ Public Interest Disclosure (Protection of Informers) Bill,2001 s.10

Resolution, 2004 was passed by the Government of India designating Central Vigilance Commission as the nodal agency to handle complaints on corruption.

The Second Administrative Reforms Commission also in its fourth Report 2007 made several suggestions on the protection of whistle blowers.⁴⁸ According to the report, whistleblowers exposing false claims, fraud or corruption should be protected by ensuring confidentiality and anonymity, protection from victimization in career, and other administrative measures to prevent bodily harm and harassment. It also provides that the legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by wilful acts of omission or commission. Acts of harassment or victimisation of or retaliation against, a whistleblower should be criminal offences with substantial penalty and sentence.

4.2.5.3. The Whistle Blowers Protection Act, 2011

In 2010, the Public Interest Disclosure and Protection of Persons Making the Disclosure Bill, 2010 was introduced in the Parliament which was replaced by the Whistle Blowers Protection bill, 2011 and was passed on 9th May 2014.

The Act aims to provide for a mechanism to investigate alleged corruption and misuse of power by public servants and also protect anyone who exposes alleged wrongdoing in government bodies, projects and offices. The Act excludes armed forces of the Union from its purview. It protects the persons making disclosures by penalising the person who reveals the identity of the complainant with a fine up to Rs. 50,000 or imprisonment that may extend to five years. The Act overrides the Official Secrets Act, 1923 unless such information jeopardizes the sovereignty, security and public order of the country. A consolidated Annual Report of the performance of the activities of the competent authority is to be submitted to the Central or State governments as the case may be.

Like the RTI Act, this Act also excludes application to private or corporate sector and includes only government employees. It does not reward the whistleblowers for making disclosure. The limited powers of the competent authority is one of the greatest hurdles in the proper implementation of the Act. The vagueness relating to the

⁴⁸ The Second Administrative Reforms Commission, 2005

interpretation of victimisation leads to ambiguity. Also, exclusion of employees of the State and absence of legal mechanism to protect the whistleblowers has been one of the major shortcomings in the Act.

4.2.5.4. Whistle Blowers Protection (Amendment) Bill, 2015

This bill has been introduced to Whistle Blower Protection Act, 2014 that has not been notified yet. The proposed Bill seeks to amend Section 4 of the Act taking away immunity from prosecution of the Whistleblower under the Official Secrets Act, 1923 and includes 10 exemptions in Sec 4(1A), whereby any matter that is certified by it as not being in “public interest” or affecting the “sovereignty and integrity of India” or related to “commercial confidence” or “information received in from a “foreign government” will remain outside ambit of inquiry under the law. Further, any public interest disclosure received by a competent authority will be referred to a government authorised authority if it falls under any of the above 10 prohibited categories. The decision of this authority will be binding. The Bill also provides a mechanism for receiving and inquiring into public interest disclosures against acts of corruption, wilful misuse of power or discretion, or criminal offences by public servants.

4.2.5.5. Legislations Promoting Protection to the Whistleblowers

There are various contemporary legislations that protect the whistleblowers in India that are discussed below:

(i) The Companies Act, 2013

Section 177(9) of the Companies Act and Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 requires every listed company to establish a vigil mechanism to report any unethical behaviour or other concerns to the management through an audit committee.

(ii) SEBI

Clause 49 of SEBI of the listing Agreement makes the top management directly accountable for all financial statements and internal controls of the organisation. After a series of scams from the corporate sectors, SEBI has also introduced whistle blowing policies for the employees and directors and has made it mandatory for the listed firms.

(iii) Competition Act, 2002

Section 46 of the Competition Act, 2002 of India grants power to the Competition Commission of India to provide a lesser penalty on any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have indulged in anti-competitive practices, if it has made a full and true disclosure in respect of the alleged violations. This provision provides leniency to the whistleblowers for disclosure of information.

These legislations provide inadequate protection to the whistleblowers and an effective legal mechanism is the need of the hour that should be vested with wide powers and extra territorial reach to the market watchdog of two companies having their offices outside India should be given the equal say as is with their parent companies. Furthermore, anonymity is required to be included under the Whistleblower Protection Act, 2011. It is imperative for the market regulator to put companies on a tight leash too so that a proper signal is being sent to the market not only at national level but at international level too.

Implementation of international standards on public and private sector for the protection of whistleblowers become also become necessary. There should be harmonious balance between data protection and whistleblower protection laws. Incentives should be introduced for the whistleblowers for exposing corruption. Furthermore, adequate protection to them will encourage them to serve the society in a better way.

In *Indirect Tax Practitioners Association v. R.K.Jain*⁴⁹, the Apex Court has lauded the role of the whistleblowers in the society by imposing a penalty of two lakh rupees dismissing the petition against the respondent who had published an editorial on the deficiencies and irregularities in the functioning of the Tribunal.

In *Manoj H.Mishra v. Union of India*⁵⁰, the appellant, Manoj Mishra was terminated for informing the media about an accident that took place in the power-plant where he worked as tradesman. The Court dismissing his appeal highlighted that one of

⁴⁹ *Supra* note 40

⁵⁰ (2013) 6SCC 313

the basic requirements of a person being accepted as a whistleblower is that his primary motive for the activity should be in furtherance of public good and not publicity. The court has pointed out that the appellant did not have “purity of intention” to qualify as a whistleblower. These judgements discourage the whistleblowers from exposing corruption as there is no such qualification mentioned in the Whistleblower Protection Act, 2011.

However, in *Manjeet Singh Khera v.State of Maharashtra*⁵¹, for the first time the right of the Agency to not disclose identity of the complainant and the details of the complaint was recognised by the Supreme Court.

The Supreme Court in its order dated 20th November 2014, has legitimised the practice of anonymous whistle blowing. It is noteworthy that the government in the past as well in the present are making all efforts to dilute the Act by proposing amendments to weaken the law. Such attempts should be discouraged and peoples’ participation in bringing amendments to the Act should be made mandatory.

4.2.5.6. Impact of Right to Information Act on the Rights of Whistleblowers

Many whistleblowers have lost their lives due to the failure of sustaining their anonymity. Therefore, right to information should ensure protection to the person who is providing such sensitive information. Whistleblowers must be protected in the same way as accomplices are protected in criminal law.⁵² Taking into consideration the attacks against the whistle blowers, people are discouraged to inform about the corruption within their respective departments. Therefore, protection to the RTI applicant and the whistleblowers are absolutely important to meet the very objective of the Act. The protection to whistleblowers should be extended to private sector as well.

Protecting the identity of the whistleblower fall under Sec 8(1) (g) of the Right to Information Act, 2005. It exempts disclosure of information if such disclosure identifies the source of information or endangers the life or physical safety of any person. Owing to large scale corruption in the private and public sector, the voices of whistleblowers are often silenced. Therefore effective implementation of the Whistleblower Protection

⁵¹ (2013) 9SCC 276

⁵² S.P.Sathe., Right to Information ,57 (LexisNexis Butterworths New Delhi)

Act and preserving the anonymity of the individuals who risk their lives can encourage people to expose corruption. Protection of Whistleblowers should be added to the RTI Act by making suitable amendments.

4.3. Lack of Accountability from the Institutions and Agencies

4.3.1. Resistance by Judiciary

The Indian Judiciary is the backbone of the democracy guaranteed by the Constitution of India. The Court is not only the sentinel of the people's Fundamental Rights, but also, a balancing wheel between the rights and social control.⁵³ J. Bhagwati had once stated that "*Concept of independence of the Judiciary is not limited to independence from executive pressure, it is much wider concept...it has many dimensions ,namely, fearlessness from the other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong*"⁵⁴

Judiciary in India has always encouraged transparency and accountability from all sectors of governance and recognised Right to know as an essential human right. It is surprising that the judiciary that had guaranteed the Right to information to the citizens has been seen to be going into reverse from its own role and refusing disclosure of information. The reluctance of the judiciary towards non-transparency has left the minds of the common man in suspicion. Corruption in judiciary is not a new phenomenon. The colossal powers given to the judiciary by the Constitution has hindered transparency and accountability and has witnessed many incidences of corruption and arbitrariness. Over the years judges have been found misusing their power and succumbing to the favours of the influential class. The declining standard of judiciary can be witnessed from the growing trend towards inclination to refuse disclosure of information relating to them. In the absence of a specific forum to complain, the judges often succeed in getting away without any action taken against them.

In India, judicial records are often refused by the judiciary inspite of its not being excluded under the Act. Many courts have impliedly provided the exclusion of judicial

⁵³ *Sahara India Real Estate Corpn. Ltd. v. SEBI*, AIR 2012 SC 3829

⁵⁴ *S.P.Gupta v. President of India*, 1981 Supp SCC 1987

records from the purview of the Act. An example of such instance may be found in Rule 5(a) of the Delhi High Court (Right to Information) Rules, 2006 which states, “*such information which relates to judicial functions and duties of the court and matters incidental and ancillary thereto*” is exempted from disclosure of information. A general order passed in administrative capacity of the court or any rules made by a court are not exempted under the Act.

Independence of Judiciary being one of the basic features of the Constitution of India ensures a fixed tenure of service to every judge of the superior court. The power of judicial review of administrative and legislative actions enables them to discharge their constitutional responsibilities without fear or favour. The procedure of removal of a judge is deliberately made rigid to ensure protection to the judges.

It is to be borne in mind that judiciary as one of the three organs of the state is also subject to accountability however the nature of accountability may vary. The provision for appeal, revision and review of orders enumerated in the constitution ensures accountability of judiciary in respect of its judicial functions and orders. The procedure of impeachment under which two thirds of the members of each House of Parliament can vote for the removal of the judge who is guilty of proved misbehaviour or misconduct are clearly laid down under the Constitution. However, in matters relating to the disclosure of their assets, their appointment and transfers and also information with regards to the disclosure of judicial records and proceeding are not immune from disclosure and subject to public scrutiny under the Act.

Also, a literal interpretation of the term “public authority” puts the judiciary under the purview of the RTI Act, 2005. Since the courts function as public authorities, the judges are accountable to public in matters relating to their appointment, promotion and disclosure of their assets and other personal information that are of public interest. Although the Registrar of the Supreme Court can be categorised as an independent public authority, the Chief Justice of India and the Supreme Court of India being the same cannot deny any information to public. The last decade witnessed strong resistance from the judiciary whenever the citizens approached for accountability from the courts.

It is interesting to note that the Supreme Court has framed its own rules – the Supreme Court Rules (SCR) 1950 with regard to dissemination of information regulating the practice and procedure of the Supreme Court under Article 145 of the Constitution. It was repealed and replaced by the SCR 1966 and further in 2013 with effect from 19th August 2014.⁵⁵ It is seen that the judiciary as one of the three organs of the government enjoys a different status from the other two branches. Information relating to their assets, liabilities, appointment, transfer and disclosure of records are beyond public scrutiny.

With the advent of the Right to Information Act and citizens' curiosity with regard to the functioning of the Judiciary, there has been strong resistance from the judges whenever information is demanded from them. Therefore, a discussion on the development on the disclosure policies of the Judges become pertinent.

4.3.1.1. Disclosure of Assets and Liabilities

According to the latest information published in the official website of the Supreme Court of India, only 7 out of 31 judges have declared their assets in the official website of the Supreme Court.⁵⁶ The Supreme Court Judges are to follow the Resolution 1997 on declaration of assets which are not implemented effectively.⁵⁷

The controversy relating to the disclosure of assets of judges have created serious doubts in the minds of the people. This came to light when the Central Information Commission had asked the Supreme Court to disclose to an RTI applicant whether the judges were declaring their assets to their respective Chief Justices in accordance with the 1997 Resolution on Judges Assets..

Since these rule making powers are provided for the purpose of ensuring the implementation of the Act, the Supreme Court cannot refuse disclosure of information. The Registrar General of the Supreme Court filed a writ petition as an institution against

⁵⁵ The Supreme Court Rules, 2013 vide GSR.367(E)

⁵⁶ Available at: <https://www.sci.gov.in/assets-judges> (last visited June 8, 2019)

⁵⁷ 1997 Resolution was adopted on May 7, 1997 which requires every judge to make a declaration of all assets voluntarily.

the Central Information Commission before a single Judge of the Delhi High Court against the decision of the CIC.⁵⁸

The Court went in favour of the CIC and held the Chief Justice of India is a public authority under the Act and all power, judicial or executive, exercised by the judiciary is subjected to accountability. This decision was challenged by the Supreme Court through its Central Public Information Officers and received a Stay Order by the Supreme Court after being upheld by the Delhi High Court and is still pending.

Meanwhile, the Union Government came up with a Bill – “The Judges (Declaration of Assets and Liabilities) Bill, 2009” to keep the declarations of assets by the members of higher judiciary secret. The Bill laid down provisions for the High Court judges to disclose information to the Chief Justices of the High Courts and the Supreme Court judges to declare the assets to the Chief Justice of India. This also included the assets belonging to their dependents. The bill was opposed by the opposition and lapsed due to dissolution of the 15th Lok Sabha. Also, another legislation Judicial Standards and Accountability Bill, 2010 that was passed by Lok Sabha in 2012 providing for mandatory declaration of assets and liabilities of Judges that never came into force. Therefore, it can be said that declaration of assets by the judges although mandatory before the Chief Justice is conveniently hidden from the citizens defeating the very objective laid down under the RTI Act, 2005. However, voluntary disclosure of assets by a handful of judges in the Supreme Court website is a welcome step in this regard.

4.3.1.2. Disclosure of Information relating to Appointment of Judges

Article 124 of the Constitution of India lays down the establishment and Constitution of the Supreme Court of India consisting of a Chief Justice of India and seven other judges which were later increased to thirty by the Parliament.⁵⁹ These judges are appointed by the President of India after consultation with the Chief Justice of India who gives his opinion after taking into account the views of four senior colleagues. This power of appointing Supreme Court judges is known as Collegium System. The senior most judge is appointed as the Chief Justice of India which although not mentioned in the Constitution is a well established convention. The appointment, transfer, discipline

⁵⁸ *CPIO v Subhash Chandra Agarwal* W.P.No.288/209, decided on 2.9.2009

⁵⁹ The Constitution of India, 1950, Art.124

and all other service conditions of the judiciary is placed entirely in the hands of the judiciary; the executive is expected to make or issue formal orders only.⁶⁰

The Chief Justice of India has been assigned the general power of superintendence and the responsibility of acting on corrupt judges rests on him. Therefore, accountability from the Chief Justice with regards to the appointment of the judges and their transfers becomes necessary for the citizens to be aware of judicial accountability is sine qua non in a democracy. The judges should not hesitate in disclosing information that relate to them. The resistance and reluctance of the judges and the secrecy that surrounds the appointment of senior judges create doubts in the minds of the citizen and gives room for corruption. An undisclosed criterion of choosing judges by the judges reflects an increasing democratic deficit.

The Apex court has observed that the appointment of Judges was not an executive act but the result of consultation process which must be observed in word and spirit.⁶¹ The court further held that the concept of primacy of the Chief Justice of India is not really to be found in the Constitution. This decision was overruled by a majority of 7 to 2 bench where the independence of judiciary was upheld and the procedure for the appointment of judges was laid down.⁶²

In 2002, a proposal for constituting a National Judicial Commission comprising not only the legal fraternity but also the executive was suggested. To give effect to the suggestion, amendment was made to the Constitution inserting Article 124 A, by the 99th Constitutional Amendment Act, 2014. The Act provides for establishing a National Judicial Appointment Commission replacing the Collegium System that would be responsible for the appointment of judges. The Composition of NJAC comprise of – (i) the Chief Justice of India as Chairperson, (ii) two other senior most judges of the Supreme Court, (iii) the union Law Minister, (iv) two eminent persons to be nominated by the Prime Minister, the CJI and the Leader of Opposition of the Lok Sabha. The

⁶⁰ Consultative Paper on Superior Judiciary; National Commission to Review the Constitution ;Justice Jeevan Reddy; Justice H.R. Khanna Available at ;<http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (last visited on September 25, 2018)

⁶¹ *S.P.Gupta v. Union of India* AIR 1982 SC 149

⁶² *Supreme Court Advocates-on-Record Assn. v. Union of India* AIR 1994 SC 268

procedure for the constitution and functioning of the Commission was laid down in the National Judicial Commission Appointment (NJAC) Act, 2014.

The constitutional validity of the Acts was soon in question before the Apex Court. The Court declaring that the presence of executive members in the NJAC violated the independence of the judiciary and violated the principle of separation of powers between the executive and the judiciary which is the basic feature of the Constitution, held the Amendment Act and the formation NJAC as unconstitutional.

Further, specific guidelines were issued by the Court requiring the eligibility criteria and procedure for selection of judges to be made transparent and put up on the website of the court concerned and the department of justice.⁶³ The Collegium system has attracted immense criticism for its lack of accountability and transparency.

4.3.1.3. Disclosure of Judicial Proceeding and Records

Judicial proceedings and records fall under the definition of ‘public records’⁶⁴. It empowers the citizens to demand such information from the judiciary even if he is not a party to the proceeding.⁶⁵ In *Registrar Supreme Court of India v. R.S. Mishra*⁶⁶ a writ petition challenging the order of the CIC application seeking inspection of certain judicial records was rejected by the Public Information Officer of the Supreme Court. The applicant was directed to apply under Order 12 of the Supreme Court Rules, 1966 with the requisite fee payable under the Rules. Although the RTI Act has overriding power over all legislation, primacy was given to the Supreme Court Rules. Such instances do not in any way help improve the image of and confidence in the institution, which plays a pivotal role in improving the governance structure in the country.⁶⁷

On the other hand, there have seen judgements that have encouraged disclosure of information. In *Union of India v. R.S.Khan*⁶⁸, while dealing with an RTI application for disclosure of file notings on documents regarding resolution by all

⁶³ *Supreme Court Advocates on Record Association and Ors. v Union of India* W.P. (Civil) No.13 of 2015

⁶⁴ The Right to Information Act, 2005 s.2(i)

⁶⁵ *Shri Y.N.Prasad v. PIO, Ahlmad Evening Court* CIC/DSESJ/A/2016/305423 decided on 16.10.2017

⁶⁶ W.P.(C) 3530/2011

⁶⁷ Dr. Sairam Bhat “Right to Information Vs. Independence of the Judiciary: A Relook, 43 Vol.XXXIX (4) 2012

⁶⁸ 2010 [173]DLT 680

Supreme Court judges on wealth declaration, the court held that unless file notings are specially excluded from the definition of Sec 2(f), there is no warrant for proposition that the word 'information' does not include file notings. Similar approval came in the case of *D.K. Mishra v. Ministry of Law and Justice*⁶⁹, where the Guwahati court directed the CPIO to disclose the information sought by the appellant relating to appointment of judges of the concerned court. These judgements have made wider impact on the accountability of the judiciary.

The Contempt of Courts Act, 1971 defines and limits the powers of the courts in punishing contempt of courts and regulates their procedure. Contempt of Court can be civil or criminal. In civil contempt there should be either wilful disobedience of any judgement, decree or order or other process of court. Criminal contempt constitute publication of any matter that scandalises or lowers the authority of the courts. Matters *sub judice* in the court are forbidden from publication and might amount to contempt of court. Some of the provisions of the Act prevent the press from exposing the corruption in the judiciary. It also refuses registering a First Information Report against a judge without the permission of the Chief Justice of India. When the High Court acquits the contemner, no appeal lies. Exemplary costs may be awarded instead of imposing a fine.

In *Shakuntala Sahadevram Tewari v. Hemchand M.Singhania*⁷⁰ it was stated by the Apex court that to keep the administration of justice pure and undefiled and to maintain the dignity of the court at all costs, the contempt of court should be used but sparingly. Proceedings of contempt are summary in nature and are also sui generis.⁷¹ Prashant Bhushan, a senior lawyer has opined that *the power of contempt needs to be circumscribed as the High Courts and Supreme Court are abusing and misusing their power of contempt*.⁷² Over the years, the judges have used the Act as a shield to protect themselves and by punishing the honest critics.

At present, the Judges (Inquiry) Act, 1968 govern the procedure for complaints against judges of the Supreme Court and High Court. Under this Act, only an MP can

⁶⁹ MANU /CI/0008/20090

⁷⁰ (1990) 3 Bom CR 82

⁷¹ Golcha Advertising Agency v. The State of Maharashtra 1990 (2) Bom CR 262

⁷² "Courts misusing power of Contempt: Prashant Bhushan" available at http://www.google.co.in/amp/s/m.timesofindia.com/city/nagpur/courts-misusing-power-of-contempt-prashant-bhushan/amp_articleshow/63059921.cms (last visited on September 9, 2018)

make such complaints through a motion presented in Lok Sabha or Rajya Sabha. Moreover, another legislation, the Contempt of Courts Act, 1971 empowers the Supreme Court and the High Courts to punish acts of contempt. In addition to this, Sec 77 of the Indian Penal Code provides protection to the judges when acting judicially in the exercise of any power which he believes in good faith is given to him by law.⁷³

4.3.1.4. Impact on the Right to Information Act, 2005

There is a strong resistance from the courts when accountability is expected from them as public authorities. RTI applications are often turned down by the judiciary when it concerns them. The Supreme Court Rules (SCR), 1966, rules supersedes the RTI Act disregarding the very objective of the Act which clearly lays down that the Act would have overriding effect on other legislations.

However, it is also true that not all kind of information should be disclosed by the judiciary. It will be detrimental if common people are given information they are not supposed to know. Every detail about the honourable judges should not be passed on. Moreover, information relating to the parties to a proceeding and also of people who may be affected by such disclosure should be discouraged. There should ideally be a balance between the right of non disclosure and right to information. The US Supreme Court has held that *‘every court has supervisory power over records and files and can deny access when it would be used for improper purposes’*⁷⁴

In India, exemptions are explicitly laid down in the Right to Information Act, 2005 that encourages non-disclosure of information of judicial proceedings pending in the courts and the tribunals.⁷⁵ Other than the exempted information, relating to administrative functions of the judiciary should be disclosed and made accessible to public.

4.3.2. Dominance of political parties

Political parties play a key role in the functioning of the Indian democracy. History has been witness to the fact that ideologies of ruling political party have a strong

⁷³ Indian Penal Code, 1860 s.77

⁷⁴ *Nixon v. Warner Communications, Inc.* 435 U.S. 589 [1978]

⁷⁵ The Right to Information Act, 2005 s.8(1)(b)

impact on the various policies of the government. Although political parties have no reference in the Constitution other than the Tenth Schedule they are the ones who contribute largely in the governance of the country by controlling and influencing public policy linking the institutions of government to economic, ethnic, cultural, and religious and other societal groups. Accountability from the political parties is a sine qua non for a democracy to flourish. The frequent elections and the selection of candidates for allocating tickets by the political parties dominated by criminals and persons from the business world with strong economic background has lowered the image of political parties before the citizens to a great extent.

In *Union of India v. Association for Democratic Rights*,⁷⁶ the rights of voters to know about the antecedents of political parties and their leaders was in question for the first time. The Apex Court directed all candidates seeking election to Parliament or a state legislature to disclose information from them and their spouses and dependents about their assets. The Election Commission was also directed to ask for disclosure from candidates on affidavit about their criminal record, assets and liabilities and educational qualifications as necessary part of the nomination paper.

Although the Right to Information Act does not explicitly mention political parties under the definition of “public authority”, it has been brought under the ambit of the Act by general interpretation. The CIC in its judgement on June 3, 2013 had brought six political parties under the purview of the RTI Act.⁷⁷ The Contrary to this Order, the Election Commission issued an Order keeping these parties out of the purview of the Act.⁷⁸ Although the Order of the CIC has not been challenged in the higher courts but the political parties have refused to entertain the RTI applications directed at them.

In India there are seven political parties recognised as National Political Parties including - the Congress, the Bhartiya Janta Party, the Bahujan Samaj Party, the Communist Party of India, the Communist Party of India- Marxist, the Nationalist Congress Party and All India Trinamool Congress. In addition to these national political parties, there are several regional /state parties existing in India.

⁷⁶ AIR 2002 SC 2112

⁷⁷ “Political parties under RTI: Election Commission contradicts CIC directive” The Hindu 27 May, 2018

⁷⁸ *Ibid*

Once respected for their ideologies and principles, these parties today are losing their credibility. Those people who have the genuine concern for the state are ousted from the mainstream politics owing to internal disputes and differences. Earlier politics was dominated by rich and affluent class who wanted to contribute to the society but today it is dominated by hard core criminals and has become a family business. The mushrooming of the regional parties and the emergence of coalition government has resulted in political instability in the Centre and the states. The National Commission to Review the Working of the Constitution recommended that there should be a comprehensive legislation regulating the registration and functioning of political parties or alliance of parties.⁷⁹

4.3.2.1. Legal Framework for the Accountability from Political Parties

The political parties in India are accountable to the Election Commission of India and are primarily governed by under the two legislations - the Representation of People's Act, 1951 and the Income Tax Act, 1961.

(i) The Representation of Peoples Act, 1951

According to the Representation of People Act, 1951, it is mandatory for all the political parties to get registered with the election commission for its registration as a political party.⁸⁰ Once registered with the Election Commission of India, under the Representation of Peoples Act, 1951, the political parties get entitled to several benefits.

To be recognised as a national political party, it has to fulfil the following conditions - (i) the party should win 2% of seats in the Lok Sabha (11 seats) from at least three different states; (ii) at a General Election to Lok Sabha or Legislative Assembly, the party polls 6% of votes in four states and in addition it wins four Lok Sabha seats; (iii) the party gets recognition as State Party in four or more States.

For the State Parties the criteria for such recognition includes: (i) At General Elections or Legislative Assembly elections, the party has won 3% of seats in the legislative assembly of the state (subject to a minimum of three seats); (ii) At a Lok

⁷⁹ National Commission to Review the Working of the Constitution Available at: legalaffairs.gov.in/ncrwc-report (last visited 18 Dec, 2018)

⁸⁰ Representation of Peoples Act, 1951 s.29A

Sabha General Elections, the party has won 1 Lok Sabha seat for every 25 Lok Sabha seat allotted for the State; (iii) At a General Election to Lok Sabha or Legislative Assembly, the party has polled minimum of 6% of votes in a state and in addition it has won 1 Lok Sabha or 2 Legislative Assembly seats; and (iv) At a General Election to Lok Sabha or Legislative Assembly, the party has polled 8% of votes in a state.⁸¹

Failure to fulfil these conditions in the subsequent elections would make them lose their position as recognised parties.

The Act allows the political parties to receive voluntary contributions from anyone including corporate and excluding contributions from foreign sources such as from citizens of foreign country, foreign company, corporation, foreign trust etc. Corporate donors are eligible to claim exemption on its donation to political parties under sec 80GGB. It is obligatory on the part of all political parties to submit an annual report to the ECI on all contributions in excess.

(ii) The Income Tax Act, 1961

The Income Tax Act exempts political parties registered with the Election Commission of India from paying income tax.⁸² However, they are required to file their income tax returns annually with their audited accounts, income and expenditure details and balance sheet to the Income Tax Department.⁸³

Sources of income of political parties includes donations from individuals, companies or institutions. Other sources include income received from sale of coupons, membership fee collected and interest earned from the major sources of income from the respective political parties. For each Financial Year, the political parties are required to submit a contribution report giving details of the donors (any person or private companies) making a contribution exceeding Rs.20,000 to the Election Commission of India. Other donations to political parties including income from sale of coupons, party rallies and public meetings below Rs.20000.⁸⁴

⁸¹ The Representation of People Act, 1951 s 29 A

⁸² The Income Tax Act, s.13A

⁸³ *Ibid* s.139(4B)

⁸⁴ *Ibid*

In addition to this, Sec 29A read with Article 324 and Rules 5 and 10 of **Conduct of Election Rules, 1961** and the Election commission has issued **Election Symbols (Reservation & Allotment) Order, 1968** **Review on the Working of Constitution in 2002** recommended accountability and statutory audit of the amounts the political parties spent on elections.

(iii) Role of the Election Commission

The Constitution of India empowers the Election Commission to conduct fair election and bring transparency in the process of election of a candidate seeking election or re-election. ⁸⁵The Election Commission has the power to register or deny the registration of any association of people as a political party or assign it status of a national party. After formation of a political party these associations are to register themselves as political parties. In such matters, the Election Commission's decision is final. In *Mohinder Gills case*,⁸⁶ it was reiterated by the Supreme Court that the EC is vested with the power to pass orders on all contingencies not already provided for in an enacted legislation.

In *A.C.Jose v. Shivam Pillai*⁸⁷ and *Kanhaiah Lal Omar v.R.K.Trivedi*⁸⁸, the Hon'ble court confirmed the residuary power of the Election Commission to regulate the conduct of the candidates contesting elections. It reiterated that a Member of Parliament has duties towards the citizens, their constituents and the Parliament. He also has certain duties towards his political party. Similarly, a Member of Legislative Assembly has a larger role in the development and progress of his constituency. He is the face of the political party he represents. ⁸⁹

The Tenth Schedule of the Constitution empowers the political parties to have a greater control on their members preventing defections to other parties and maintaining stability in governance. The caste based politics has emerged as a potential trick to win elections over the years. Today, there are over 600 political parties registered with the Election Commission of India. There are occasional splits taking place within the parties

⁸⁵ The Constitution of India,1950,Art.324

⁸⁶ *Mohinder Singh Gill v. Chief Election Commissioner* AIR 1978 SC 851

⁸⁷ (1984) 2 SCC 656

⁸⁸ (1985) 4 SCC 628

⁸⁹ *People's Union for Civil Liberties v. Union of India* W.P. (CIVIL) No.490 of 2002

owing to differences resulting in mushrooming of these parties. There are procedural lapses with regard to proper registration and recognition of parties.

4.3.2.2. Right to Information Act and Independence of Political Parties

Democratic bodies and their instrumentalities should be held accountable to the people through the Right to Information to fulfil this objective of the Act. In 2013, the CIC under an Order had brought the Political Parties under the purview of the Act. In response to such order, the Parliament had proposed an amendment to the Act keeping the Political parties out of the purview of the Act but did not succeed.

Recently, another RTI application revealed the donations received by political parties in the form of electoral bonds. Also the anti defection laws have been found to be inadequate to deal with defections and horse trading has become a common phenomenon. The institutions of Lokpal and Lokayuktas have not been able to set up successfully. Therefore, bringing the political parties under the purview of the Act is an essential requirement.

4.3.3. Influence of Media

Media is one of many domestic accountability mechanisms that have the unique ability to enhance dramatically the visibility and effectiveness of other accountability mechanisms within society.⁹⁰ By providing news and information, the media brings issues to the public and facilitates public debate and discussion and provides opportunities for broad-based participation in actual policy processes.

Denial of freedom of press is denial of liberty and denial of basic human right. Press/Media works as an agency for the people to gather news for them. It has a responsibility to pass on factually accurate information for larger public interest. They should honestly work and take care to investigate the authenticity of the news before publishing it to avoid irreparable loss to individuals. A country where illiteracy is widespread, radio and television have become the important medium of communication;

⁹⁰ Accountability and Democratic Governance by OECD available at: www.oecd.org/governance/accountability-and-democratic-governance-9789264183636-en.htm (last visited on 23rd December, 2019)

the media should avoid yellow journalism.⁹¹ The Press Council of India (PCI), has pointed out that “*the media has an adversarial role to the extent that it questions authority, all authority, to look at the other side, This must be understood as a relationship of creative tension and accepted as a democratic necessity.*”⁹² A long battle has been fought in India since independence to ensure this right to its citizens.

4.3.3.1. Regulation on the Freedom of Press

Press/Media is considered the fourth pillar of democracy where it acts as a watchdog, scrutinising the role of the government and exposing corruption. Freedom of press includes freedom of publication, dissemination and circulation. There would be violation of the liberty of the press not only when there is a direct ban on the circulation but also when some action on the part of the government adversely affects the circulation of the publication.⁹³ If restrictions are imposed on the media on investigating and publishing information then the democracy is under serious threat.

Freedom of press has always been a bone of contention for the government. Therefore keeping the press under control has been a common trait among all the governments that came to power. Lack of access to information also leaves reporters open to government allegations that their stories are inaccurate and reliant on rumour and half-truths instead of facts.⁹⁴ The Emergency era is considered as the darkest days our nation had ever experienced since independence. However, the judiciary came forward and upheld the freedom of press.

In the *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*,⁹⁵ the Court stated, that “*The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgements.*”

⁹¹ Yellow Journalism coined in 1897 to characterize the sensational journalism that present little or no legitimate well-researched news while instead using eye-catching headlines for increased sales.

⁹² “Press Council Rejects Army Complaint Against”, *Outlook*, 27 December 1999

⁹³ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124

⁹⁴ Angela Wadia, *Global Sourcebook on Right to Information* 258, (Kanishka Publishers, 1st edition 2006)

⁹⁵ (1985) 1SCC 641

However, it is to be noted here that freedom of Press is not absolute and subject to reasonable restrictions provided under Article 19(2) of the Constitution of India. In spite of express restrictions enshrined under the Constitution of India, there appears to be very little restraint on the media.

Today news reporting has become a lucrative business. The news agencies decide as to how much truth is to be dishd out to the public. The reporters deliberately distort facts to gain popularity in the form of TRP ratings. The persisting unaccountability of media has encouraged the reporters to blackmail people and extort money from them.

In *Sanjoy Narayan v. High Court of Allahabad*,⁹⁶ the two judge Bench dealt with a contempt petition in respect of publication of an incorrect report in a newspaper which tarnished the image of the Chief Justice of a High Court. The Court made the following observations: “*The unbridled power of the media can become dangerous if check and balance is not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person’s fundamental right to privacy*”. Therefore, the press /media should have the right to access information and also the duty towards the society to disseminate information that is believed to be true and abstain from indulging in fake news.

Taking into consideration the inadequate restraint in the media with regards to the administration of criminal justice, The Law Commission of India, in its 200th Report on Trial by Media⁹⁷ released in 2006 has suggested significant amendments to the Contempt of Courts Act, 1971. On the recommendations The Commission has recommended a law to debar the media from reporting anything prejudicial to the rights of the accused in criminal cases from the time of arrest to investigation and trial.

⁹⁶ (2011) 13 SCC 155

⁹⁷ Law Commission of India 200th Report on Trial by Media Free Speech and Fair Trial under Criminal Procedure Code, 1973 August 2006 Available at: lawcommissionofindia.nic.in>rep2000 (last visited on 14th Dec, 2018)

4.3.3.2. Crisis of Credibility of Indian Media

India ranks 138 on the World Press Freedom Index 2018⁹⁸ and it clearly reflects the abysmal fall in the ethical standards of journalism in India. Murder of journalist Gauri Lankesh and other journalists, frequent physical threats to journalists and excessive government control truncates the freedom of press. A report by Transparency International suggests that countries with the least protection for press and non-government organisations (NGOs) also tend to have the worst rates of corruption.⁹⁹ In spite of an independent media with ample powers, our country is leading in corruption.

The journalists and reporters as a moral obligation should not indulge in corrupt practices and bring forth only authentic news. The mushrooming of media houses have encouraged competition among the publishing houses resulting in the deterioration of quality news. Print media is more reliable than broadcast media as print media gets time to delve deep into issues before publishing it whereas broadcast media is more spontaneous in its reporting. With the growing use of internet and online newspaper replacing the printed version of news dailies, it becomes imperative for the media to have an unbiased approach towards reporting. Paid news is another phenomenon that curbs freedom of press. Today many mainstream media houses publish articles in exchange of payment.¹⁰⁰ The jurisdiction of the Press Council of India is confined only to the print media. It is imperative that a similar autonomous organisation be created for the electronic media as soon as possible.¹⁰¹ Today most of the media houses and publishing houses are owned by ministers and politicians and keeping media outside the purview of the Act gives it enough room for abuse of power.

⁹⁸ Available at :https://rsf.org/en/ranking_table (last visited on 9 Sep, 2018)

⁹⁹ Corruption Perceptions Index 2017- Transparency International Available at: <https://www.transparency.org>feature> (last visited on 4 Nov, 2018)

¹⁰⁰ The Press Council of India (PCI) defines paid news as any news or analysis appearing in print or electronic media for consideration in cash or kind. Available at: <https://www.prsindia.org/report-summaries/issues-related-paid-news> (last visited on June 25, 2018)

¹⁰¹ *Supra* note 11 374

4.3.3.3. Impact of Right to Information on Media

Enactment of the Right to Information Act has been a boon to the Press/Media. The information that was denied earlier by the government under the garb of secrecy is now made available. There is now little scope for refusal of information from the agencies of the government, Earlier the public authorities denied most of the information under the garb of the Official Secrets Act, 1923 and would often level charges of serious crimes against the journalists for reporting corruption. Also, cases on human rights violation and corruption taking place in the defence and other organisations have come to light. Since, the Right to Information Act, 2005 has an overriding effect on the Official Secrets Act, it has given a practical approach to this right enabling the journalists to unveil the iron curtain of the government officials and collect information that were denied disclosure earlier. The Act has empowered the press/media to a considerable extent and has brought forth issues that were considered confidential earlier. However, corruption in the media has also not gone unnoticed.

The right to information can work as powerful tool in discovering the authenticity of the source of the news and making media transparent in its working, thus making them accountable to public. Unfortunately, majority of the print and electronic media houses do not fall under the category of “public authority” under the Act. It is unfortunate to keep the media outside the ambit of the RTI Act, 2005 as many lives are lost and images of people tarnished due to biased reporting. Making the media accountable would help people in securing their rights. Initially the media had shown a lot of interest in eliminating corruption but today there seems to be a liaison between the government and media and the citizens are very often served filtered news.

In answering whether RTI Act is applicable to Print and electronic media, the Chief Information Commissioner, Yashovardhan Azad, stated that “*the electronic and print media as a whole, cannot be declared as a public authority until it is substantially financed by the government and hence do not come under the purview of the RTI Act*”.¹⁰²To come under the ambit of the RTI Act, requisite conditions mentioned under the Act are to be fulfilled.

¹⁰² *Shri Kanhaiyalal Chhabulal v. Press Council of India* CIC/DS/A/2013/002288-YA

Media is flooded with unverified and biased news. Targeting at the electronic media and websites, former Chief Justice of India, Dipak Mishra had said that “journalists cannot write anything they imagine and behave as if they are sitting in some pulpit”.¹⁰³ Therefore, there is an immediate need to bring amendment to the Right to Information Act by making changes in the definition of the term “public authority” bringing the press/media under its ambit whether funded substantially or not. Therefore, an institutional framework establishing a regulatory body with substantial power bringing it under the ambit of the RTI Act can curb the menace of corruption to a great extent.

4.3.4. The Impact of Civil Society Organisations

Civil Society is considered as a vital institution that strengthens our democracy. Civil Society includes Non-Government Organisations, independent mass media, think tanks, universities and social and religious groups that are independent of the state, voluntary and at least to some extent self-generating and self-reliant.¹⁰⁴

In India the civil society has played a significant role in strengthening participatory democracy by acting as a watchdog on the performance of the state, the behaviour and action of the public officials, uplifting the marginalised sections of the society, by regulating and monitoring the development work, keeping a check on the abuse of power by political parties and also the electoral process. History is witness to the fact that the civil society activists are often resisted by the government because of their inquisitive approach towards the functioning of the government. In response to this, the credibility of the civil society is also under the scanner of the government. The government has got a whole battery of legal powers and an organizational framework with enormous authority backing it; civil society activists are purely voluntary amateurs.¹⁰⁵

¹⁰³ Chief Justice of India criticises section of media for irresponsible journalism, available at: <https://m.hindustantimes.com/india-news/there-are-limits-supreme-court-criticises-section-of-media-for-irresponsible-journalism/story-IZYulq80oLTokAoKQokKaP.html> (last visited 15 May 2018)

¹⁰⁴ Lokanath Suar “Our Civil Society Emergence and its Impact”, 2 *Indian Bar Review*, Vol XXXVIII(3) (2011)

¹⁰⁵ N.Vittal, *Ending Corruption? How to Clean up India*, 206 (Penguin books 2012)

Recently, the Supreme Court of India has passed an order regarding arrest of five activists against whom incriminating evidence were found that suggested elaborate communication with members of the banned Communist Party of India (Maoist) or CPI(M). These arrests have widened the gap of the civil society and the government.¹⁰⁶

The contributions made by Anna Hazare and his Campaign against corruption; Medha Patkar and her involvement in Narmada Bachao Andolan and Aruna Roy and her experience with MKSS cannot be forgotten. There are other notable persons like Arvind Kejriwal, co-founder of Parivartan and others who have parted their ways and joined politics. Staging demonstration against the government with regard to environmental matters are very common. Pushpa Kapila Hingorani and her husband Nirmal Hingorani fought for Husainara Khatoun case and set a benchmark in the history. Their contributions have benefitted the public and created pressure on the government from time to time.

Today Non-governmental Organisations have become highly diversified and specialised in carrying out various social and welfare activities including humanitarian welfare, environmental concern, healthcare, education and other basic human rights. They are the watchdog of democracy and they have contributed where government expressed its inability for actions. They hold immense potential for social action and change.

Their role becomes more important because the areas where the government cannot reach, the NGOs reach out. They are either fully funded or substantially funded or sometimes run with the help of foreign funding.

The activities of NGOS include advocacy or pressure group activity that encompasses direct action, research and education and project involvement. Over the last few decades the number of NGOs has multiplied globally. India alone has more than 3 million NGOs carrying out various activities.¹⁰⁷ It has been observed that corruption, manipulation, power and control are not the exclusive preserve of government

¹⁰⁶ “Elgaar Parishad case Highlights: SC directs Pune police to keep activists under house arrest till Sep 6”
The Indian Express ,Aug 30,2018

¹⁰⁷ *Supra* note 107

institutions, and NGOs are certainly not free from it.¹⁰⁸ There is little cooperation and interaction among the NGOs functioning in India. Absence of a specific legislation and monitoring machinery, widespread corruption has surfaced in the functioning of the NGOs over the years. Allegations of corruption in these NGOs have led to cancellation of licences of many of them. Lack of accountability is one of the main reasons for such a step by the government.

In the absence of a specific legal mechanism to regulate fund utilization of these NGOs who receive government grants, have resulted in abysmal fall in their credibility.

4.3.4.1. Legislations Governing NGOs in India

In India, the NGOs can be registered under the **Indian Trust Act, 1982** or the **Societies Registration Act, 1860**. They can also be registered under the **Companies Act, 2013**. The **Foreign Contribution (Regulation) Act, 2010** regulates the receipt and usage of foreign contribution by NGOs in India. **The Council for Advancement of People's Action and Rural Technology (CAPART)** is a major agency that works in close coordination with rural NGOs. In recent years CAPART also has come under scrutiny.¹⁰⁹

The registered NGOs, whether substantially or partially financed or not, are controlled by laws, notifications, orders by the Central or State Governments. The NGOs that are funded by the foreign agencies are substantially controlled by the State to monitor the funds received by them in public interest. The office – bearers of NGOs directly or indirectly funded by the State are “public servants” under the Prevention of Corruption Act, 1988. Therefore they come under the definition of ‘public authority’ under sec-2(h) of the Act irrespective of being financed by the state or by foreign agencies.

4.3.4.2. Accountability of NGOs under the Right to Information Act

According to the RTI Act, the non-governmental organisations substantially financed directly or indirectly by the funds provided the appropriate government fall

¹⁰⁸ Vimala Ramachandran, Equality Among Unequal Parties: Relationship Between NGOs and Government, *The Administrator*, 121 Vol.XI, July-September (1995)

¹⁰⁹ Available at: capart.nic.in (last visited on January 5, 2019)

within the scope of “Public Authority”.¹¹⁰ Therefore, being a public authority, these NGOs are under an obligation to disclose proactively all kinds of information making them accountable to public.¹¹¹ However, the information disclosed by the NGOs is very limited and sometimes incomplete. The details on the webpages regarding the mechanism of the organisation and the financial management is often ambiguous defeating the purpose of online transparency. The right to information empowers citizens to have access to such information concerning funding details and fund utilization certificates that these NGOs have to submit with the government. The objective of the Right to information act is defeated if the information is not made public.

In *Professional Assistant for Development Action (PRADAN) Vs. The Jharkhand State Information Commission*¹¹² on the question whether the NGO PRADAN would fall under Section 2(h) of the Right to Information Act, 2005 or not, the Information Commission stated that since substantial amount is received as fund from the government agencies, the NGO would fall under the purview of the Act. In the absence of legislative machinery to regulate the mushrooming of NGOs, there is often strong resistance towards accountability and transparency from them.

There are umpteen number of NGOs that are functioning with foreign grants. As the Act does not define the term “substantially financed”, it has resulted in serious ambiguities in dealing with corruption taking place within these organisations. The burden of proof of showing that the particular organisation falls under which category lies on the applicant seeking information. The Organisation in response can deny such a status with valid reasons. While interaction among voluntary organisations as well as interaction between the government and voluntary sector is minimal, interaction between grant – receiving voluntary organisations and foreign funding agencies is considerable.¹¹³

A report of the Intelligence Bureau (IB) has revealed that foreign funding agencies are often ignorant of national efforts and are responsible for promoting non-

¹¹⁰ The Right to Information Act, 2005 s. 2(h)

¹¹¹ *Id.*s. 4

¹¹² W.P. (C) 4376 of 2009

¹¹³ Santosh Kumar Panigrahi “Role of the NGOs in the Empowerment of the Disabled” 87 (1st edn. 2004 Radha Publications 2004)

priority programmes which have been detrimental to the progress of the nation. There have been instances when such funding agencies have painted exaggerated pictures of the poverty, malnutrition and ignorance of developing countries in the course of their fund-raising campaigns, thereby insulting national pride and honour.¹¹⁴

Many NGOs in India have been initiating action by the government adopting legal tools like PILs. Therefore, there is an urgent need to make amendments in the Act to remove the ambiguities relating to the interpretation of public authority bringing within its ambit the NGOs funded by the foreign government.

Moreover, compliance with the provisions of the Act by proactively disclosing information and displaying and updating them in the respective offices would eradicate major problems with regard to the credibility of these NGOs. Further, making amendment in the Act and bringing within its ambit all NGOs whether substantially funded or not would lead to more transparency in the functioning of these NGOs. In addition to this, a comprehensive law specifically dealing with the registration, functioning and funding of these NGOs can bring in remarkable changes in the transparency regime of India.

4.3.5. Impediments from the Banking Sector

Banks play an important role in the development of a nation by facilitating the flow of funds in our economy. Banks carry out day to day financial transactions and various other functions like stabilizing financial systems, ensuring financial resources etc. Banking is interconnected with every other sector of our economy.

India's central banking institution that regulates its currency and credit systems is the Reserve Bank of India which was established on April 1, 1935 and was nationalised on 1 January 1949.¹¹⁵ Since then it has been carrying out various functions that include regulating the issue of bank notes and keeping of reserves for securing monetary stability in India.¹¹⁶

¹¹⁴ *Ibid*

¹¹⁵ Available at : <https://m.rbi.org.in> (last visited on January 5, 2019)

¹¹⁶ Reserve Bank of India Act, 1934, Preamble

Indian banks are either public or private. To protect the customers from unfair trade practices of the banking industry, all scheduled Commercial Banks, Regional rural Banks and Scheduled Primary Co-operative Banks are covered under the Banking Ombudsman Scheme, 2006.¹¹⁷ Under the scheme, a quasi judicial authority carries out the responsibility of resolving customer complaints against deficiency in public and private sector banking services. One can file a complaint before the Banking Ombudsman for settlement of the complaint by agreement between the complainant and the bank named in the complaint. Currently, there are 21 functional banking ombudsman offices in India.¹¹⁸

In India, only Nationalised or Public sector banks are covered under the RTI Act. These banks have been reported among leading government bodies in rejecting RTI pleas.¹¹⁹ Although the private banks in India have been kept out of the purview of the Act, in public interest such information can be demanded from the RBI.

The public sector banks fall under the definition of “public authorities” and are under an obligation to disclose information to the public, subject to certain exemptions. Banks have been denying information on the basis of this exemption very often which defeats the very purpose of the Act.

In matters seeking information relating to the purchases of computers and other accessories by the bank, exemption under Sec-8(1) (d) was denied by the Information Commission.¹²⁰ A landmark judgement that removed all doubts about the disclosure policies of the banks came in *Reserve Bank of India v. Jayantilal N Mistry*,¹²¹ in which the disclosure of information required by the Reserve Bank of India during the inspection of private and public banks and financial institutions were demanded through various appeals before the Central Information Commission. The information was denied under sections 8(1) (a), 8(1) (d) and 8(1)(e) which was rejected by the CIC and the RBI was directed to disclose information about the Non-Performing Assets (NPAs) to the RTI applicants. Thereafter, the RBI filed writ petitions before the Bombay and

¹¹⁷ *Supra* note 121

¹¹⁸ *Ibid*

¹¹⁹ “Public sector banks among leading government bodies in rejecting RTI pleas” *The New Indian Express*, 19th April 2018 Available at: www.newindianexpress.com>apr (Last visited January 6, 2019)

¹²⁰ *N.Anbarasan v. Indian Overseas Bank, Chennai*, 286/IC(A)/2006

¹²¹ AIR 1 SC 2016

Delhi High Courts and finally escalated before the Supreme Court of India. The Apex Court went in favour of the RTI applicant by holding that RBI cannot deny giving information on the ground of economic interest, commercial confidence and fiduciary relationships with other banks. The Court further observed that inspection reports, documents etc. fall under the definition of 'information' as defined under sec-2(f) of the RTI Act, 2005.

This judgement has brought in a wave of transparency in the area of banking which has been overwhelming. Taking into consideration the poor health of the public sector banks and its unwarranted confidentiality, transparency from the banking sector can erode the fear from the account holders. It is noteworthy that when the public sector banks default, government is forced to take over the failing banks and compensate the depositors increasing the tax burden on the nation resulting in less funding for other development projects. Ergo, a comprehensive mechanism to scrutinise and regularly audit the banking sector by independent third parties becomes essential. Necessary amendments by expressly bringing both the private and public sector banks under the ambit of the RTI Act becomes necessary.

Till date the names of the bank defaulters have not been made public. The justification given by the RBI Bank that they have a fiduciary relation with the other banks was rejected by the Apex court. Mr. Venkatesh Nayak, a renowned RTI Activist was denied information when he approached the Reserve Bank of India demanding copies of deliberations of the Governors of the RBI Board that led to demonetisation on the 6th of November 2016.¹²² In response to his application, the bank claimed several exemptions under Sec-8(1) of the Act. The opacity by the government has posed a serious threat to the democratic principles of our country.

4.4. Challenges Ahead

From the above discussion it is clear that the RTI Act has brought in a sense of accountability among the public officials in various sectors. The policies of the government which were carried on by the various institutions in confidentiality have come under public scrutiny since the inception of the Act. The government in the last

¹²² The Researcher had a telephonic conversation with Mr.Nayak on these issues. The matter is pending with the Second Appellate Authority presently.

decades has taken up various welfare measures extending services and benefits to the marginalised groups including farmers, youth, poor women, children and other sections of the society. It has enacted various laws and launched various schemes for uplifting the disadvantaged class of the society including the MGNREGA 2005; Right to Free and Compulsory Education (RTE) Act, 2009; Food Security Act, 2013; Integrated Child Development Scheme (ICDS); Mid –Day Meal Scheme; Atal Pension Scheme; Ujjwala Scheme, Pradhan Mantri Awas Yojana; Ayushman Bharat etc. However, instances of corruption in implementing the policies have been a common affair. These welfare measures are carried out with the cooperation and coordination of the Central and State governments through public officials who often do not discharge their duties efficiently resulting in deep rooted corruption. In this regard, the RTI Act has empowered the citizens to question the public authorities about their functioning yet very few people avail this opportunity.

During elections many promises and manifestos are released, disclosure of assets and liabilities are made public but a report card is not carried with them to show whether their promises are fulfilled or not during their re-elections. RTI Act gives this opportunity to the citizens. Pro active disclosure of the achievements and failure in providing a report card of the tenure they served can lead the country to a transparent method of contesting elections.

Over the last few years, crucial changes have taken place in the governance of India including violation of the separation of powers, government's interference with the autonomy of independent institutions like RBI and CBI and CIC, the demonetisation drive, hasty implementation of GST, mandatory linking of Aadhar invading right to privacy, financial scams in the nationalised banks and many more.

History is witness to the fact that post independence even after the various rights were guaranteed by the Constitution, the citizens had to fight long battles to enforce their fundamental rights. Like all other rights, enforcing right to information has also not been easy. The government has been tight lipped about the disclosure information justifying the decisions taken by the various ministries in this regard.

Access to public documents is a fundamental right of citizens and the public officials are mere custodian of public documents. The expenses of maintaining public information and also employing people for the same is borne out by the tax payers. Also, the exemption clause under the Act is always resorted to when sensitive information that may tarnish the image of the government is demanded by the citizens. Therefore, in addition to the impediments discussed above there lies significant challenges that effect the implementation of the Act in the field of employment, food security, education, environment protection etc.

4.5. A Sum up

It is evident from the above discussion that every institution carrying out public functions has resisted disclosure of information until it is imposed upon them. The provisions of the Act has been deliberately misconstrued by these entities to avoid free flow of information and create a barrier for the citizens to approach government offices. Absence of transparency and accountability has indeed given way to corruption, nepotism and favouritism in India. Although the Act expressly brings under its purview the legislature, executive and judiciary, the three organs have been consistently averse to disclosure.

The institution and agencies carrying out public functions often get away without being held accountable because of the ignorance of the citizens and also due to ambiguities in the law. Although private sector has been excluded from the purview of the Act, such information may be made available in public interest. The difference of opinions of the Information Commissioners in this regard had narrowed down the scope of this provision.

Further, the long list of exemption is also a major hurdle in the implementation of the Act. Taking into consideration the diminishing credibility of government and its various institutions, it is important to develop a more focused approach to effectively implement the Act and operationalise other contemporary laws so that an integrated effort is formulated to fight corruption.

Moreover, to realise the goals of democracy, all these institutions should function in a socially responsible manner to promote good governance. In the absence of

an inadequate legal mechanism to regulate the functioning of these institutions and agencies, the RTI Act can play a crucial role in unearthing information and fighting corruption.