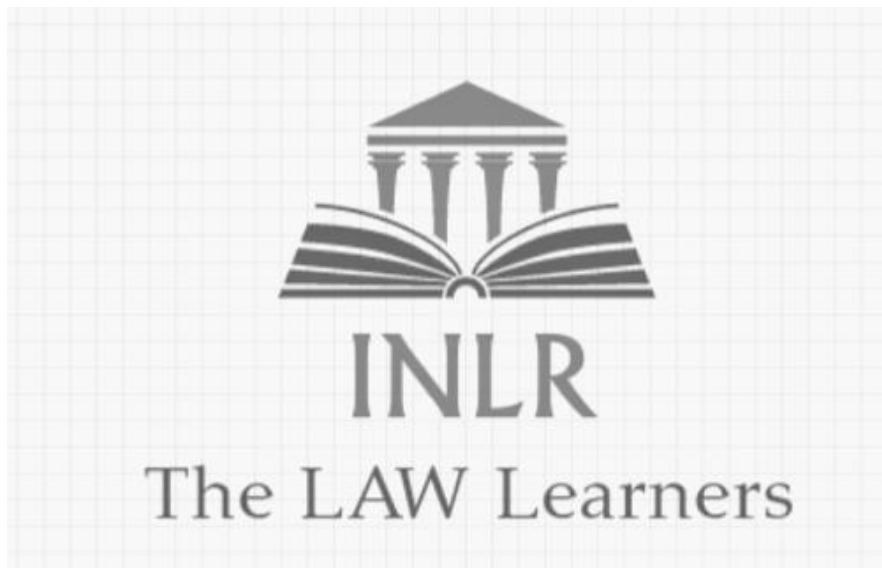




---

# INDIAN NATIONAL LAW REVIEW

---

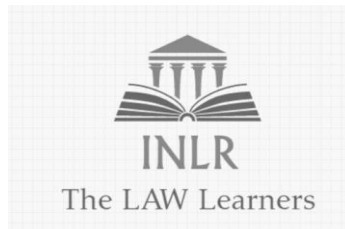


VOLUME 2- ISSUE 1

November ' 2020

---

INDIAN NATIONAL LAW REVIEW



## **ADVISORY BOARD**

**Mr. K.T.S Tulsi**

Member of Parliament, Senior Advocate & President of Criminal Justice  
Society of India

## **EDITORIAL BOARD**

### **EDITOR-IN-CHIEF**

**Prof. Dr. M.P. Singh**

Renowned Legal Jurist and Author, Former Vice Chancellor of NUJS Kolkata  
and Former Chancellor of Central University of Haryana

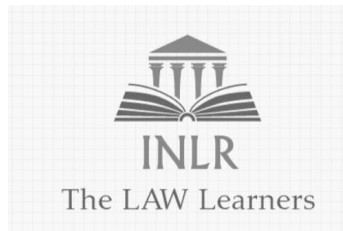
## **ASSOCIATE EDITORS**

**Hon'ble Justice Mr. Mohan Peires**

Former Chief Justice of Sri Lanka, Retd. Attorney General & Former Chairman  
of Seylan Bank

**Prof. Dr. G.S Bajpai**

Registrar and Professor of National Law University Delhi, President of Indian  
Society of Victimology & Chairperson at the Centre for Criminology &  
Victimology



**Prof. Dr. K. Jaishankar**

Founder President of South Asian Society of Criminology & Victimology,  
Founder of the Academic discipline Cyber Criminology, International  
Ambassador to the British Society of Criminology & Editor in Chief of two  
renowned Journals

**Prof. Dr. Mrinal Raste**

Former Vice Chancellor of Symbiosis International University & KIIT Law  
School, Former Dean Amity University, University of Pune, Ansal University  
and Alliance University, present Dean of NMIMS

**Prof. Dr. Bhavani Prasad Panda**

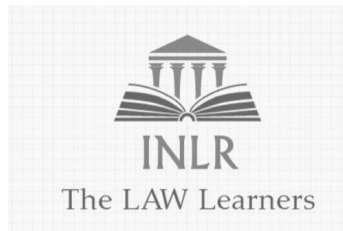
Former and Founding Vice Chancellor of Maharashtra National Law University  
Mumbai

**PUBLISHING EDITOR**

**Ms. Rhishika Srivastava**

Law Student, Gujarat University

[ Sunderpur, Near BHU, Varanasi ]

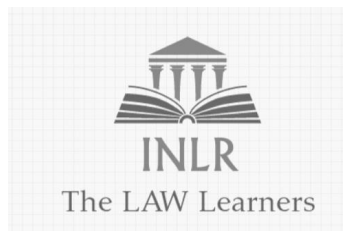


## **DISCLAIMER**

All the articles published in the Journal are original, un plagiarised and not previously published. No part of any article published in the paper can be reproduced or copied without the prior permission of the Editor-in-Chief or any other person authorized by him. If found to be violative of the fact, it shall lead to violation of Copyright Law. The Editorial Team of the Indian National LAW Review solely holds all the copyrights vested under the Articles in this publication.

The views expressed in the articles are purely and solely of the authors and the entire team of the Journal has no association with the same. Although all attempts have been made to ensure the correctness of the information published in the articles, the Editorial team shall not be held responsible for any errors that might have been caused due to oversight or otherwise.

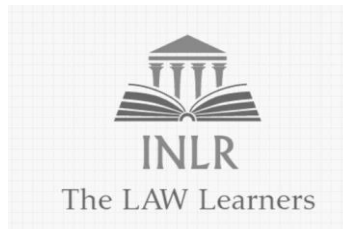
**© Indian National LAW Review, The LAW Learners : ALL RIGHTS  
RESERVED**



## INDIAN NATIONAL LAW REVIEW

Indian National LAW Review is the flagship Journal of The LAW Learners. We aim at make quality content available to our readers regularly and provide exciting opportunities to people who wish to publish their content. The LAW Learners publishes an ***OPEN ACCESS and FREE Journal***. It is published ***tri - annually*** and strives to impart organizational go-through on diversified legal aspects of the Country. The main focus of the Journal includes the need of practical interpretation to different provisions of Laws, that would go in line with the changing needs of the Society. Laws are the most dynamic and vital field of knowledge which works with the objective of providing impartial justice to the mass. It hence requires extensive knowledge and research of innumerable areas involving human lives and society as a whole. With this objective, our Journal aims to accelerate igniting powers of legal knowledge in the Legislative arena of the Nation.

The main focus of the Journal includes the need of practical interpretation to different provisions of Laws, that would go in line with the changing needs of the Society. The Journal aims to reach every section of Society to ignite ideas and interpretations in the psyche of the people. It strives to provide a fora for the Law Learners and others where they can express their thoughts and get a voice. The first issue has provided opportunities to the Top performers in our Certificate Courses and Internships to Publish their Write ups in the form of Articles, Essays, Case Analysis and Draft Legislations. The Law Learner's does not Charge any Fees for Publication in its e-Journal.



## MESSAGE FROM FORMER PRIME MINISTER OF INDIA, DR. MANMOHAN SINGH



Dr. Manmohan Singh  
to Editorial  
[Hide details](#)



From: Dr. Manmohan Singh [manmohan@gov.in](mailto:manmohan@gov.in)  
To: Editorial Board, INLR [INLR@thelawlearners.com](mailto:INLR@thelawlearners.com)  
Date: 26 Nov 2018, 10:37 AM  
[See security details](#)

To

The Editorial Board

Indian National Law Review

### MESSAGE

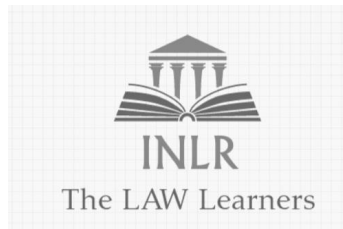
I am very happy to learn about the publication of the First Edition of the Tri-annual Open Access Free Journal "Indian National Law Review" by the law learners. I sincerely hope that the journal shall carry with itself new insights and ideas in the ever increasing and dynamic legal arena.

I send my best wishes for the success of the Indian National Law Review.

With kind regards,

Dr. Manmohan Singh  
Former Prime Minister

[Show quoted text](#)



## FROM THE DESK OF THE PUBLISHING EDITOR

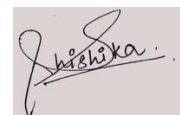
It gives me immense pleasure and joy to announce the second edition of Indian National LAW Review- Volume 1. INLR even before its arrival has been bestowed with praiseworthy words of esteemed and honourable authorities.

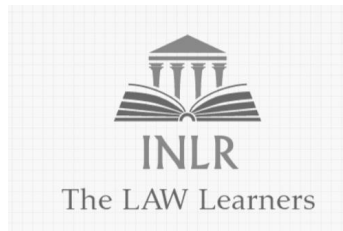
Adding to the words of praise, we have many of precious jewels in our editorial and advisory board which is certainly a feather in our cap. This however puts a greater responsibility on our part to make this Journal a successful, Thought provoking and enriching read for our readers.

I would also like to that this opportunity to let the readers know that INLR is a free and open access journal to present revolutionary ideas accessible around the world. Further the parent organization i.e. The LAW Learners is engaged in providing Free Certificate Courses to all the sections of the society with the aim to promote legal literacy and organizes various Workshops, Quizzes, Internships and the like for law students.

We promise that the content in the Journal shall be original high quality material and would definitely create an environment of healthy information exchange.

I on behalf of the entire team look forward for your opinions and feedbacks to the Journal.





## MESSAGE FROM SHRI K.T.S TULSI [ MEMBER OF PARLIAMENT AND SR. ADVOCATE]

### Message for the youth

**“The Youth of a Nation are the trustees of posterity”**

*Benjamin Disraeli*

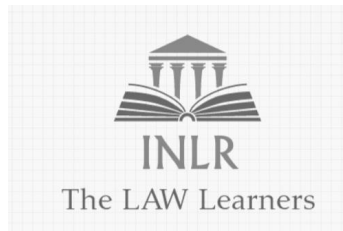
The youth is the future of the nation.

The very blueprint of the nation is laid down by the adolescent members of the society, how their minds are moulded is the collective responsibility of every citizen of the country.

The ethos, values and traditions of our heritage should be blended with the modern culture so that there is a balance of the old and the new, which will help them take India to newer horizons.

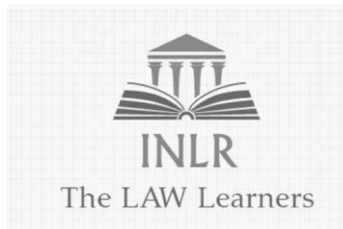
The youth of today, with its fresh ideas and opinions will soon have a positive impact on the society that will change the way the world looks at India.





## TABLE OF CONTENTS

<b>1. Independence of Judiciary: The Constitutional Provisions</b>	
BY ROHAN MOHANTO.....	10
<b>2. Analysis of the Government of India Act 1935</b>	
BY KOSHA DOSHI.....	21
<b>3. Break the culture of Secrecy and create a culture of Openness</b>	
BY DR.N. KRISHNAKUMAR.....	31
<b>4. The Legality of fully autonomous weapon system in situation of survival of the State: A Critical Perspective</b>	
BY ASHUTHOSH VINOD.....	88
<b>5. Modernising Police System: Need of the Hour</b>	
BY DR. N. KRISHNAKUMAR & DR. SANJU V.K. ....	103



VOLUME 2

ISSUE I

**INDEPENDENCE OF JUDICIARY: THE CONSTITUTIONAL  
PROVISIONS**

- Rohan Mohanto<sup>1</sup>

**ABSTRACT**

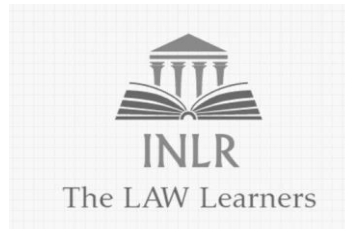
*It is rightly said an independent and accountable judiciary is the best safeguard of citizen's rights in a democracy. To ensure the rule of law the judiciary must be independent to take their decisions without any interference. This article aims to analyze the independence of the judiciary concerning the Constitutional provisions. The executive must safeguard the interest of the judiciary. In India, the discussion on the independence of the judiciary has always remained a heated topic for debate. Independence of the judiciary has lots of advantages, truly speaking in today's time judiciary is the only wing of democracy on which citizens still have confidence and they believe if they face any arbitrariness from the govt. the Court is there to protect their rights and safeguard them from such wrongful and unconstitutional act. All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary<sup>2</sup>.*

*However, it is true without executive backing the independence of the judiciary will become a dream. So to make Constitutional provisions more strong the executive must only interference to make the judiciary independent and not dependent. All the aspects related to the independence of the judiciary are thoroughly reviewed in this article.*

---

<sup>1</sup> Law Student, Shri Ramswaroop Memorial University, Institute of Legal Studies, Lucknow

<sup>2</sup> Quote, Andrew Jackson.



## 1. INTRODUCTION

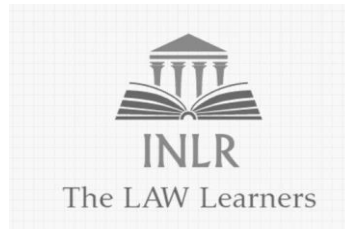
Independence of the judiciary is considered one of the main elements of the federal form of government. As the judiciary is the third pillar of democracy it is of paramount importance that it should be independent, and it shall work without fear or favor. Even the Constitution makers felt the need for the independence of the judiciary for the democratic working of the first and second pillars of democracy i.e. legislature and executive. Many times it has been seen that the government misuses its political power. But the independence of the judiciary cannot be secured till the time independence of individual judges are not maintained.

However, the concept of independence is a relative one and is generally applied in its functional terms.<sup>3</sup> Thus the judges' responsibility towards constitutional and legal norms forms the foundation and the real rationale for judicial independence<sup>4</sup>. Since the Constitution is the supreme law of the land the independence of the judiciary can only be assured though it, backed by legislations. As Supreme Court has the power to declare any law passed by parliament as an ultra virus, for doing this independence of the judiciary is important so the citizen of India can have faith in the judiciary. Therefore for rule of law to prevail, judicial independence is of prime necessity.

---

<sup>3</sup> Dinesh Singh Chauhan, Article "Independence of Judiciary: Constitutional Response (Legal Service India). <http://www.legalserviceindia.com/legal/article-1681-independence-of-the-judiciary-a-constitutional-response.html>

<sup>4</sup> Ibid.



### 1.1. Independent Judiciary a True Indicator of Rule of law in a Country

One of the essential components of a good democracy is the rule of law. The unlimited and arbitrary power of the government can be curtailed through the rule of law. In fact, the rule of law is a superior kind of law which is just and reasonable. Dicey very nicely explained the concept of the Rule of Law<sup>5</sup>. According to him, the Rule of Law means when:-

1. The government has no arbitrary power.
2. Equality before law.
3. Customs and traditions which are recognized by the courts must be the basis of the rights of the people.

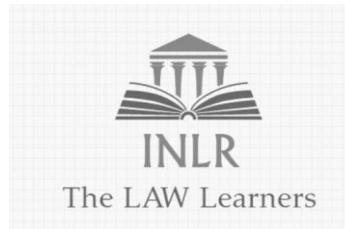
There is a direct relationship between the independence of the judiciary and rule of law. This simply means that a state is ruled by the law and not by the government. In **Keshavanand Bharti's** case, the Supreme Court rightly held that rule of law is a basic structure of the Constitution.

### 1.2. Importance of Principle of non-interference in the judiciary

This principle simply means that the state should not interfere in the working of the judiciary. The judiciary shall decide matters before them and only based on facts and only as per the law,

---

<sup>5</sup> Chapter 4 “JUDICIARY, RULE OF LAW AND DEMOCRACY: A CONCEPTUAL FRAMEWORK“ (Shodhganga, P. 107).



without any restrictions, improper influence, inducement, pressure, threat or interference by any other branch of democracy directly or indirectly.

As discussed earlier there should be no unwarranted and inappropriate interference by executive or legislature in the judicial process, nor its decision shall be subjected to revision. It is the duty of the State to take appropriate steps from time to time to protect this institution of Justice from any sort of danger in its independence.

### **1.3. Independence of Judiciary depends upon these three things:-**

#### **1. Independence in Decision Making**

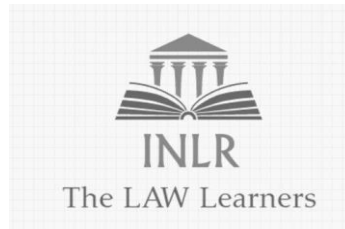
The Court should deliver judgment without any pressure and without any influence from the political or executive body.

#### **2. Personal Independence of Judges**

Judges are the representative of the judiciary so their personal independence is paramount and they should not be dependent on government or anyone. The judge should have full independence to decide any matter.

#### **3. Collective Independence**

Collective Independence means that the judiciary should have administrative as well as financial independence.



## **2. INDEPENDENCE OF JUDICIARY: A MATTER OF FAITH**

The need for Independent judiciary arise because of the following reasons:-

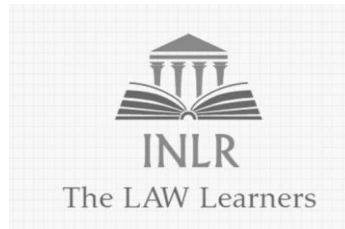
### **1. To keep a check on other pillars of democracy**

According to the doctrine of separation of power all the organs of democracy should work independently. The duty to ensure this is of the judiciary. At the same time, the judiciary must keep a check on the executive and legislature that they follow the Indian Constitution and work according to its provisions only.

### **2. Constitutional Interpretation**

The makers of our Constitution were very well aware that in future uncertainty will arise with the Constitutional provisions so the makers of ur Constitution ensured that the judiciary must be independent and competent enough to interpret the constitutional provisions in such a way that it is free from any prejudice. It was important for the judiciary to be independent to avoid any pressure from the executive. So the Judiciary was given the task to interpret the Constitution according to constitutional principles and standards.

### **3. To provide justice to everyone**



Judiciary is indebted by the Constitution to provide justice to everyone whether it is citizens or any other person. That justice should be free from any pressure or prejudice. The court must review all the aspects related to a particular case before delivering any judgment.

Judiciary is one of the most important and responsible parts of democracy which needs to be independent and free from any restrictions which may hamper the judicial process.

## 2.1. Constitutional Provisions

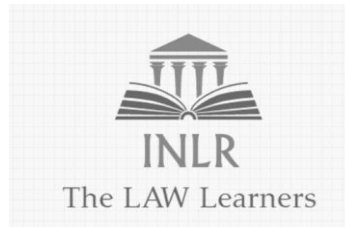
Even the framers of our Constitution were so clear that they felt an independent judiciary was critical to the success of the nation that why they accorded our Constitution with following provision to assure independence and superiority of judiciary.

- **Security of tenure:-** The judges of the Supreme Court and High Court cannot be removed from office except by the order of President by following the proper procedure stated in **Article 124(4)** and **Article 217** for the same. Neither parliament nor any other authority has the power to impeach judges of SC and HCs without a valid reason.

**Article 124 (2)** provides that the age of retirement of **SC Judges** shall be **65yrs** and **Article 217 (1)** provides that for **HC judges** age of retirement shall be **62 yrs** which is much more if we compare the same with other nations. Even **Article 128** provides that a retired judge can be reappointed with the consent of the President of India by Chief justice of India. **Article 217(3)** confers powers on the President, in consultation with the Chief Justice of India, to determine any question as to the age of a Judge of a High Court. It may be stated that **Articles 124(2-A)** and **217(3)** have to be read collectively.<sup>6</sup>

---

<sup>6</sup> Chapter 4 “Independence of Judiciary: A Constitutional Response” (Shodhganga) P. 176.



The **Judges' Inquiry Act, 1968** provides the procedure for the removal of judges of SC and HCs which is mandatory and need to be followed.

- **Salary and allowances of the judges are fixed and not subjected to vote of the Legislature:-** The salary and allowances of judges are fixed by the Constitution itself and are not subjected to altered by the legislature. These salary and allowances are paid from the Consolidated Fund of India. It is believed that salaries and allowances are the true indicators of independence of the judiciary that why Article 125 clearly states that judges' emoluments cannot be altered to their disadvantage except in the event of grave financial emergency.<sup>7</sup>

According to **Article 112(3) (d) (i)** the budget made by the govt. should have the provision for payment of salaries, allowances and pension to the retired judges of Supreme Court and **Article 202 (3) (d)** deals with expenditure in respect of the salaries and allowances of Judges of any High Court.

**In the First Judges Case,** <sup>8</sup> the Supreme Court very rightly opined that efficient functioning of the Rule of Law under the aegis, of which our democratic society can thrive, requires an efficient, strong, and enlightened judiciary. And to have it that way, the nation has to pay a price.

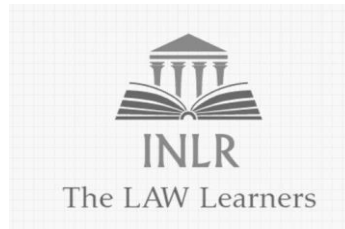
Chief Justice of India and Chief Justice of HCs have full power to decide in the matter concerning service of judicial officers or servants and the expenses of the Court.

---

<sup>7</sup> Ibid, P. 172.

<sup>8</sup> 1982 (2) SCC, 831.



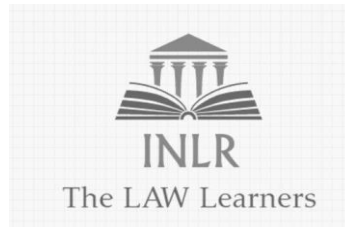


However, any new rules made regarding salaries or pensions or allowances or leave by Chief justice needs the approval of President and Governor accordingly as per Article 146 (2) and Article 229 (2) of the Indian Constitution.

- **Parliament can extend but cannot curtail the jurisdiction and power of the Supreme Court:-** The parliament is conferred power to enhance jurisdiction of the Supreme Court in civil matters. But parliament can only exceed the jurisdiction and cannot curtail its jurisdiction and power given under Article 138.<sup>9</sup> Therefore as per the Constitution parliament is conferred with power to increase the jurisdiction of the Supreme Court but it cannot reduce it.
- **No discussion about the conduct of the judges allowed in Parliament:-** Article 121 clearly states that no discussion shall take place in Parliament with respect of the conduct of any judges of the Supreme Court or High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the judges.<sup>10</sup> It is prohibited to discuss any conduct of judge or any decision of any Court in parliament this provision was included in the Constitution to ensure the independence of the judiciary and to protect the judges from any direct or indirect pressure from parliamentarians.
- **Power to punish for its contempt:-** Article 129 and Art. 215 of the Constitution gives power to the SC & HCs to punish any person for its contempt. This was very

<sup>9</sup> Team Legistify, “Independence of Judiciary under Indian Constitution” (Legistify, Sep. 28, 2018).  
<https://www.legistify.com/qna/answer/2243-independence-of-judiciary-under-indian-constitution/>

<sup>10</sup> Article 121, The Indian Constitution.



important to maintain the independence of the judiciary. The main motive of doing this is to protect the process of justice. Contempt can be divided into two civil and criminal contempt.

We have legislation which deals with the contempt that is **Contempt of Courts Act, 1971**. According to **Section 4** of the said Act, the fair and accurate reporting of any judicial proceeding shall not constitute contempt.<sup>11</sup> The Act also precludes fair criticism of judicial acts from being held as contumacious.<sup>12</sup> **Section 13** says no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.<sup>13</sup> But **Section 3** clearly states that a person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.<sup>14</sup>

- **Appointment and Promotion of judges:-** Although the appointment of judges is done by Executive (President) but the recommendation is sent by Collegium consist of judges as per **Article 124 (2)**.

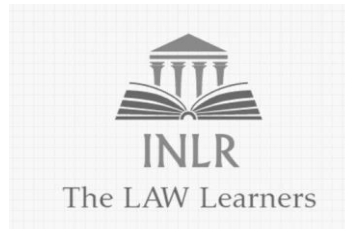
---

<sup>11</sup> Section 4, Contempt of Courts Act, 1971.

<sup>12</sup> Section 5, Contempt of Courts Act, 1971

<sup>13</sup> Section 13, Contempt of Courts Act, 1971.

<sup>14</sup> Section 3, Contempt of Courts Act, 1971.



Judges are promoted by President after recommendation are sent to him by the collegiums and after consulting Chief Justice. Consultation plays a very important role in the promotion of judges.

In **Sankal Chand Sheth's case**, the court very clearly explained the meaning of "consultation" as a full and effective consultation and does not mean mere formality.

- **Prohibition on practice after retirement:-** As per Article 124 (7) "No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India."<sup>15</sup>

However, a judge of the High Court can after retirement can practice in the Supreme Court or in any High Court in which he had not been a judge.

Thus independence of the judiciary depends too on the mode of appointment of judges, tenure security, and sufficient salary and privileges.

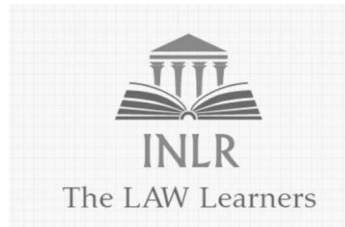
The judiciary shall have supreme jurisdiction over all the matter which is judicial and should have exclusive power to decide whether an issue raised before them is within its competence as per law.

### 3. INDEPENDENCE OF JUDICIARY IN RECENT TIMES

It seems that questioning the independence of judges has become a trend in the present time, especially by senior lawyers. Supreme Court every time is sitting to decide whether a criticism by any lawyer has devalued the importance and integrity of Court.

---

<sup>15</sup> Article 124 (7), The Indian Constitution.



## VOLUME 2

## ISSUE I

Recently a tweet by senior advocate Prashant Bhushan has spared a row and questioned the independence of the judiciary. According to a research paper of the US academics, judicial independence is a hallmark of a democracy and whenever the rights of the citizens are infringed they tend to knock the doors of the higher judiciary.

Executive by rewarding retired judges the post of governor or Rajaya Sabha nomination creates a doubt in the minds of people concerning judicial independence. Even judges tend to praise executive leaders in public also have a bad effect. A judge should avoid lauding any political figure when in office. Without any doubt, judges are the ambassadors of democracy.<sup>16</sup> Their deportment matters.

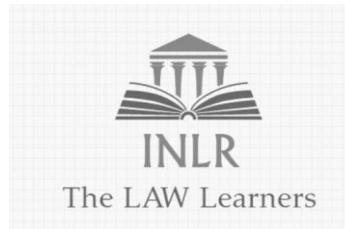
One of the effective remedies against the underhand conduct of judicial officers is Contempt of court. But the motive is not to protect the dignity of judges in their own eyes but in the eyes of citizens of India.

### 4. CONCLUSION

Independence of the judiciary is very important for the proper functioning of democracy as it is also considered a basic feature of the Indian Constitution which needs to be maintained at any cost. From the above research, it is very clear that the Constitution makers too believed the same. Judiciary not only safeguards the Constitution but also helps in maintaining the rule of law. To uphold the Independence of Judiciary, it is necessary to protect the judges so they can deliver fair

---

<sup>16</sup> Ashish Khetan, Opinion “Why Justice Arun Mishra Should Recuse Himself From Contempt Petition Against Bhushan” (WIRE, July, 23, 2020). <https://thewire.in/law/justice-arun-mishra-recusal-contempt-petition-prashant-bhushan>



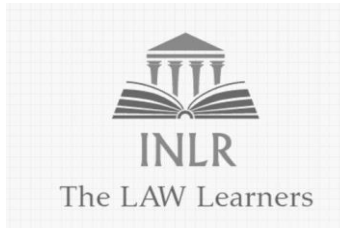
## VOLUME 2

## ISSUE I

judgment or orders without fear or favor. The heart of the judiciary is the judges only. So their interest needs to be protected therefore here it becomes the duty of the executive to step in and formulate laws to protect the dignity and integrity of the judges.

It is to be noted that the salary of the judges plays a very important role which keeps them motivated as low salaries attract direct attention of the judges as judges are humans too they too want appreciation for their hard work. So judges salary should be regulated keeping this point in mind as it is important for the smooth functioning of the judiciary. Since dispensation of justice is an uphill cum delicate task it must be cushioned with monetary incentives.

\*\*\*\*\*



VOLUME 2

ISSUE I

**ANALYSIS ON THE GOVERNMENT OF INDIA ACT, 1935**

- Kosha Doshi<sup>1</sup>

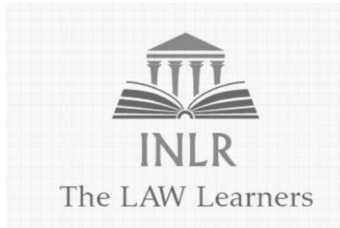
**ABSTRACT**

*Mr. Jinnah had once stated, “The Act is thoroughly rotten fundamentally bad and totally unacceptable.” The Government of India Act, 1935 emerged mainly due to the unsatisfactory response of Indians from the Government of India Act, 1919. The act brought in several changes and modifications in good and bad forms as it some aspects were further implemented in the current modern Constitution. Even with the criticism and opposition of various bodies, the Act was implemented for the easy of Britishers. The concept of dyarchy was abolished ad established at the Centre, the All India Federation concept arose, bicameralism was adopted and provincial autonomy was initiated. Although the Britishers brought forth these major concepts for the act, the act failed drastically in most areas.<sup>2</sup>*

---

<sup>1</sup> Law Student, Symbiosis Law School, Pune

<sup>2</sup>The Government of India Act [online] Av. at: <https://selfstudyhistory.com/2015/03/08/the-government-of-india-act-1935/>.



## 1. BACKGROUND

Lord Willingdon, the Viceroy and Governor General of India, during his government time took measures to suppress the Indian spirit of nationalism. About thousands of peasants from Uttar Pradesh along with congressmen such as Jawaharlal Nehru, Sherwani and Purushottamdas were imprisoned. People were arrested in the state of Bengal alongside the state of Uttar Pradesh. The government due to a chaotic situation issued an emergency power ordinance in Uttar Pradesh on the 14<sup>th</sup> of December, 1931.<sup>3</sup>

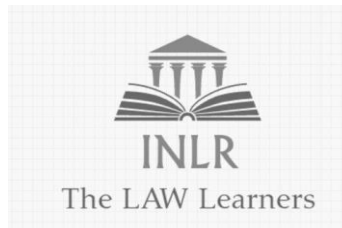
Three ordinances were issued on 24<sup>th</sup> December to continue suppressing the spirit of nationalism that had arisen in the citizens of India. Mahatma Gandhi protested to these ordinances and wanted to have an interview with the Viceroy. Having communicated the same to the Viceroy via a telegram stating that if no appropriate reply or action took place, he would conduct the Civil Disobedience Movement. Unfortunately, no reply was sought and the movement began. With the rise in the movement, 4 ordinances were issued on the 4<sup>th</sup> of January 1932 which were the Emergency Power Ordinance, Unlawful Instigation Ordinance, Unlawful Association Ordinance and the Prevention of Molestation & Boycott Ordinance.<sup>4</sup>

The Secretary of India, Samuel Hoare called these as “drastic and severe.” People were further punished; a lot of destruction took place along with lathi charges. The Civil Disobedience Movement continued with meetings, demonstrations, national flags being hoisted and so on. The Civil Disobedience movement began after Mahatma Gandhi returned after from the Second

---

<sup>3</sup> [https://shodhganga.inflibnet.ac.in/bitstream/10603/174777/10/10\\_chapter%204.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/174777/10/10_chapter%204.pdf).

<sup>4</sup> [https://www.constitutionofindia.net/historical\\_constitutions/government\\_of\\_india\\_act\\_1935\\_2nd%20August%201935](https://www.constitutionofindia.net/historical_constitutions/government_of_india_act_1935_2nd%20August%201935).



## VOLUME 2

## ISSUE I

Round Table Conference in London from 7<sup>th</sup> September 1931 to 1<sup>st</sup> December. The Third Round Table Conference was not attended by Mahatma Gandhi or by the Indian National Congress. Result of the Third Round Table Conference which took place from 24<sup>th</sup> November 1932 to 24<sup>th</sup> December was the White Paper, 1934. This proposal was introduced as a bill and passed in the Parliament which eventually resulted in the Government of India Act, 1935.<sup>5</sup>

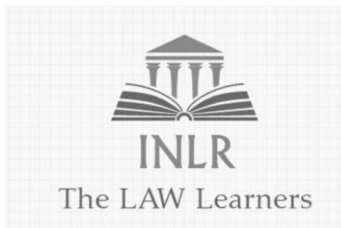
Indians wanted participation in the governance process after they had contributed to the Britishers in fighting the first World War. The Indians desired Constitutional change after the Government of India Act, 1919 which was based on the main concept of diarchy. Unsatisfied with the Government of India Act, 1919 as it fell short in fulfilling the national aspirations, seal and unification spirit of Indians. This eventually led to the discussion of the Rowlett Act and Anarchical & Revolutionary Crimes Act, later leading to the Simon Commission report. The round table conferences took place in 1920, 1931 and 1932 respectively. A Reforms Enquiry Committee, 1924 was formed by Sir Alexander Muddiman to suggest ways for effective working of the nation.

Review of the Simon Commission led to dyarchy abolition and formation of a responsible government but this idea was opposed by the Congress and soon the controversial difference increased. The Round Table Conference led to the concept of federal system that comprised of British Indian provinces and the princely states who could be part of the state by their will. A division of opinion came up between the Congress and the Muslim representatives. The joint parliamentary select committee was reviewed by Lord Linlithgow and the House of Commons approved the report. The White paper which led to the Government of India Bill

---

<sup>5</sup> Ibid.





consisted of 321 clauses and 10 schedules. It eventually received its royal assent and was passed on 2<sup>nd</sup> August, 1935.<sup>6</sup>

A report was formulated by the committee consisting of 20 representatives from British India out of which 7 were Indian states and 5 containing Muslims amongst them. The British feared that the implementation of the act would bring about an increase in the role the Indians played.

## **2. GOVERNMENT OF INDIA ACT, 1935**

The implementation of the Government of India Act, 1935 aimed at providing new dimensions in India and its related affairs. The sources of the Government of India Act, 1935 were the Nehru report, Lothian Report, Simon Commission Report, Third Round Table Conference, Joint Select Committees and the White Paper. Government of India Act, 1935 partly began operational in 1936 during the general elections and was fully implemented by 1937.<sup>7</sup>

### **2.1. Features**

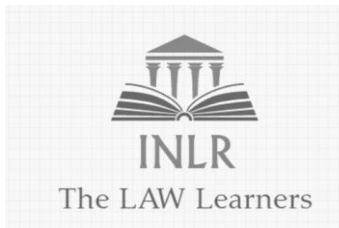
- All India Federation was introduced which was borrowed from the Canadian and Australian models.

This brought about introduction of 3 lists: Federal (59) under the Centre containing matters of defense, fundamental rights, uniform policy and interests of India all over; Provincial (54) under the Princely states having matters such as education, land revenues, exclusive jurisdiction of provincial legislation; and the Concurrent (36) under

---

<sup>6</sup> Indian Legal & Constitutional History- MP Jain

<sup>7</sup> VN Shukla's Constitution of India- Mahendra Pal Singh.



## VOLUME 2

## ISSUE I

both were on issues about Civil and criminal law topics like marriage, bankruptcy, labor welfare and procedures.

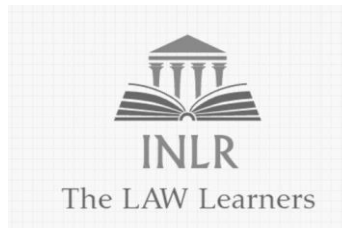
Federal legislature comprised on 3 aspects: The King represented by the Governor General that is the federal executive, the Council of states and the Legislative assembly. The Council of states consisted of the Upper House which was a permanent body with 1/3<sup>rd</sup> members retiring every 3 years. It comprised of 260 members wherein 156 were representatives of British India out of which 150 were elected on communal basis whereas the remaining 6 were nominated by the Governor General and not more than 104 Indian representatives.

The federal assembly had a serving term of 5 years comprising of 375 members out of which 250 were British Indian representatives whereas not more than 125 were nominated from the princely states. The states under the Governor's province were bound to be members of the federation whereas the Indian states were free and in case of joining needed to accept the Instruments of Accession.<sup>8</sup>

- The concept of Provincial autonomy came about where the provincial administration was responsible by the minister and controlled by the provincial legislatures. The Governor was bound to accept the advice of the ministry while the residuary powers were with the Viceroy.
- Dyarchy was abolished but was adopted at the Centre: Dyarchy meant double form of government which was imposed in 1919. The Governor General on behalf of the Crown had powers. The subjects were divided into 2 parts namely Reserved and Transferred. The reserved subjects consisted of religious affairs, defense, administrative tribal areas and external affairs where the Governor General was accompanied by 3 counsellors. In

---

<sup>8</sup> <https://byjus.com/free-ias-prep/government-of-india-act-1935/>.



## VOLUME 2

## ISSUE I

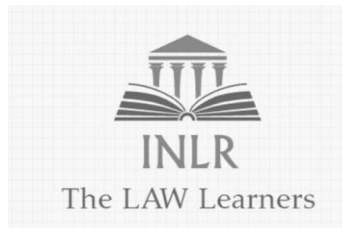
the Transferred subjects the Governor General was accompanied by a council of ministers with a strength of less than ten people.<sup>9</sup>

Wherein the department such as education came under the ambit of ministers through the provincial legislature. On the other hand, orders of finance were under the governors who were British appointed.

- Feature of bicameralism which was implemented in 6 out of 11 provinces namely Bengal, Madras, Bombay, Bihar, Assam and United Province.
- Communal representation with separate electorates for Scheduled Castes, labor and women took place. 41 seats were reserved for women who were subdivided in religious lines.
- Abolition of Council of India took place which had been established in 1858
- Franchise expansion to 14 percent of the population from 3 percent where almost 10 percent people gained voting rights.
- Supremacy of British Province
- Reorganization of provinces led to separation of Burma from India, Sind from Bombay, Bihar from Orissa and Aden from India. Separation of these as colonies where Burma separation was recommended in the Simon Commission and the Round table conference. In 1932 the Act was passed and Burma was separated in 1937.
- Establishment of Federal Court took place in 1937 at Delhi which comprised of the Chief Justice named Sir Maurice Gwyer and 6 other judges. The federal court had exclusive original, appellate and advisory jurisdiction between Centre and constituent units. Further allowance of 6 High Courts was granted which were established in Calcutta, Madras, Bombay, Allahabad, Lahore and Patna.

---

<sup>9</sup> <https://www.gktoday.in/gk/government-of-india-act-1935-all-breaks-no-engine/>.



## VOLUME 2

## ISSUE I

- Set up of Reserve Bank of India which brought control over currency and credit flow across the nation.
- Federal railway authority was set up with 7 members which were free from control of ministers and councilors who reported directly to the Governor General.
- Separate Public Service Commission were established: Federal, Provincial and Joint Public Service Commissions
- Elaborate safeguards and protective instruments for minorities were introduced.<sup>10</sup>

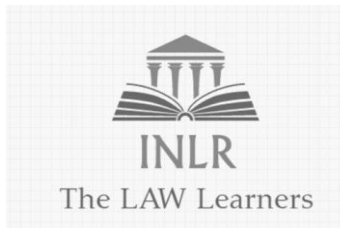
### **2.2. Analysis**

Dyarchy failed as there was pseudo control and the people governing were mere string puppets being controlled. The All India Federation was planned by Indian National Congress but it was never accomplished. Representative power was provided but the power was concentrated and in the hands of the British only. The defect in federalism was a jumble of dissimilar units. The heterogeneity of its units caused hardships. Difference in units such as population, status, area, political importance and so on were clubbed together with a motive that it would unite but it remained unfunctional.

Government of India Act, 1935 failed to provide flexibility to the people on a Constitutional level. The amendment rights and alteration power were in the domain of the British. Refusal to grant Indian rights to self-determine led to the crown making decisions, amendments and alterations in the Act. The rigidity and complex structure were contrary to the basic principle of federal policy. A structured proper federal structure was lacking in the act as majority of the power was with the Governor General and he was not responsible for the Central

---

<sup>10</sup> <https://blog.ipleaders.in/government-of-india-act-1935-2/>.



## VOLUME 2

## ISSUE I

legislation therefore it was not governed appropriately. The states received differential treatment due to their power extent in the federation. Since no rational division was made, it gave rise to mutual jealousy. Provincial autonomy in the Act which was a departure from the 1919 act was also not a success.<sup>11</sup>

Nowhere in the act was there a mention of the concept of having a preamble which was a threat as it was passed by the British and could hamper the rights and morals of people. The Government of India Act, 1935 did not mention the concept of Fundamental Rights anywhere and only spoke about supremacy of power directly or indirectly. No bill of rights was stated in the act which is contrary to the modern Constitution. The Governor enjoyed immense critical emergency powers which could be hazardous as the power went unchecked and would lead to mere abuse of the given power. The discretionary powers were overriding in nature and it was a serious threat. False equivalence was created with the dominant position with the British capital.

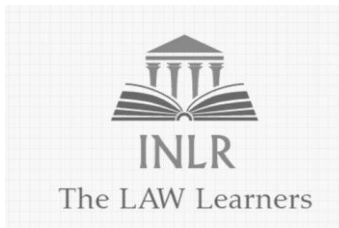
Federal budget comprised of 2 parts: 80 percent being non voteable which meant it would not be discussed or amended and the other 20 percent which was discussed in the Federal assembly and could be subject to alteration. This would lead to no accountability of expenditure on large scale. The provisions of federations were not implemented and no reference was made to grant dominion status to India. The concept of independence being provided to India in 1929 which was promised in the 'Simon Commission' was denied and the failure of it led to a downfall in the aspirations the act intended to provide.<sup>12</sup>

Separation of electoral provided and acted as an instrument disintegrating India and its citizens. The communal electoral system where a divide was made between Harijans and Hindus

---

<sup>11</sup> <https://blog.ipleaders.in/government-of-india-act-1935/>.

<sup>12</sup> <https://historypak.com/government-india-act-of-1935/>.



## VOLUME 2

## ISSUE I

acted like a poison in the atmosphere causing sectionalism and casteism. The major failure was that the act promised of welfare but was not implemented. The Act retained British control over major departments such as Indian Army, finances and foreign relations. Every political party of India condemned the Act for some aspect or the other.

In spite of the negative aspects, the Act played a significant role in the drafting of the Constitution in 1950. A huge chunk from the Constitution has been borrowed from the act especially the administrative provisions. It provided more freedom to British India for better governance with the end of dyarchy and a new aspiration to fulfil national aspiration spirit among Indians. The federal court now taken up as the Supreme Court is an integral feature of the act. Quite a few features of our current Constitution have been borrowed from the act. The concept of every state having a Governor elected from the Central Government is still continued. The Public Service Commission has been taken up in Article 315 of the current constitution. The concept of provincial autonomy and federal legislature have been taken up.<sup>13</sup>

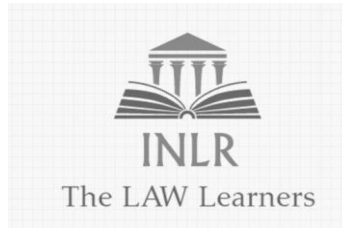
Developments after Act of 1935: After declaration of World War II the following took place: Cripps Mission, Wavell Plan, Cabinet Mission 1946 and the Mountbatten Plan.

### 3. VIEWS OF SCHOLARS

Indian National Congress- “Slave constitution that attempted to strengthen and perpetuate the economic bondage of India”. Andrew Muldoon- “The act was arguably the most significant turning point in the history of British administration in India”, “Continuation of British control of India and the deflection of the challenge to the Raj imposed by Gandhi, Nehru and the nationalist

---

<sup>13</sup> <https://www.gktoday.in/gk/government-of-india-act-1935/>.



## VOLUME 2

## ISSUE I

movement.” JA Callager – “Act was designed to revise the workings but not weaken the realities of British power.” Prof. Couplnd – “Great achievement of constructive political thought” C Rajagopalachari- “The new constitution worse than a dyarchy.” The act had a democratic appearance from the outside but was hollow from within. Nehru- “New charter of slavery, a machine with strong breaks and no engine”.<sup>14</sup>

### 4. CONCLUSION

Overall, the Government of India Act, 1935 was hinging on British political needs rather than Indian constitutional needs. Despite having opposition and criticism from various aspects and bodies, it had been implemented for the easy of the Britishers. An illusion of providing position, power and dominance to Indians with a downfall in its major concepts. The administration, provincial legislations and the Public Service Commission were implemented in the modern constitution which has benefitted drastically. But the Act failed to provide a concrete or substantive application on the principles it was laid down on.<sup>15</sup>

---

<sup>14</sup> <https://www.open.ac.uk/researchprojects/makingbritain/content/round-table-conferences-1930-1932>.

<sup>15</sup> <https://www.jagranjosh.com/general-knowledge/government-of-india-act-1935-main-features-1443011759-1>.

**BREAK THE CULTURE OF SECRECY AND CREATE A CULTURE OF OPENNESS**

- Dr. N. Krishna Kumar<sup>1</sup>

**ABSTRACT**

*Information contributes to knowledge. It also confers power. It is undoubtedly a great economic asset too. A proactive policy of disclosure will be in keeping with spirit of Right to Information Act. Information collected at huge cost, with tax payer's money, should be made available to the general public without having asked for it. This will improve the quality of the data as it will be subject to informed public scrutiny. The Supreme Court has in at least two constitution Bench decisions, held that citizens have the right to get information about all aspects of government functioning. RTI Act is a radical improvement on the relatively weak statute it seek to replace, the Freedom of Information Act 2002. It unequivocally confers on all citizens the right to access to information and correspondingly, makes the dissemination of such information an obligation for all public authorities.*

**Keywords:** Accountability, Appropriate Government, Democracy, Information, International Covenants, Public authority, Public Information Officer, Right to know, Sovereign.

---

<sup>1</sup> Assistant Professor, Government Law College, Thrissur.



## 1. INTRODUCTION

*“The Right to know is not meant for gratifying idle curiosity or more inquisitiveness but it essential for the effective functioning of democracy. Transparency and accountability are sine quo non in a genuine democracy.”<sup>2</sup>*

*Soli.J. Sorabjee*

In a democracy, the people being the real sovereign, they appoint governments as well as dismiss them. Information is a tool that empowers people to act more meaningfully as electors as well as elected representative of the people. If people are well informed they will be more vigilant and therefore, democracy is bound to become more vibrant.

Access to Information is an essential requisite of an open society.<sup>3</sup> The simplest definition of openness is the Right to Information that is easy and speed access to Right to Information.

About the various decisions taken by the government and the reasoning behind them recall what Abraham Lincoln said at the Gettysburg Address, way of the people, by the people and for the people. It is the basic postulate of democracy that government shall be based on consent of the government and governed.

The consent of the governed implies not only that consent shall be free but also that it shall be graded on an adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources.<sup>4</sup> Consequently, citizens, must have access to information ‘*Right to know*’ about the functioning of the government and public functionaries.

In democratic countries at the present moment, the accent is on open government,<sup>5</sup> of course, there are quite a few things which must be kept confidential in the interest of public security or national interest. Sometimes the law may impose secrecy upon the interests of the Individual. But then the secrecy ought not to be more than what is absolutely necessary.

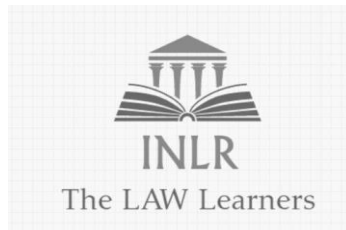
---

<sup>2</sup> B.N. Kirpal, Ashok. H. Desai, Gopal Subramaniam, Rajeev Dhawan and Raju Ramachandran (Ed.), *Supreme but No Irrifallible Essays in Honour of Supreme Court of India* (2004), p.354.

<sup>3</sup> S.P. Sathe, *Admiistative Law* (1996) p.196.

<sup>4</sup> Soli, J. Sorabjee, *Enforcing the Right to Know* (1986), p.10.

<sup>5</sup> Romana Shafeeq, “Right to Information; Transparency and Accountability”, *Kashimr University Law Review*, p.247 (2001). Also A.G. Noorani, “Law on Right to Information”, *Economic and Political Weekly*, Vol. 33, p.2826 (1998).



In a democracy, the citizens' right to know is assured rather than guaranteed. In fact the right is derived from the Government's accountability and answerability to the people. Therefore, no Government should think that people must be told only that much which thinks to be good for the people and safe for it. Despite some limitations, the RTI Act is guaranteeing the right to information ensuring participatory developmental process in the country.

This Act is the consummation of a process initiated with the adoption of our Constitution. We gave ourselves a sovereign socialist, secular, democratic republic accountable to all our citizens.

## **2. THE ACCOUNTABILITY UNDER THE ACT**

Accountability is based on the premise that citizens have access to information on the basis of which they can determine the justness, or otherwise, of actions of the state. Hence, the criticality of the right to information under this Act is nothing but the means for accessing it. We have kept these means simple, with overriding importance given to "public interest", sweeping thus indisputably is a fundamental right.

In keeping with the spirit of the Universal Declaration of Human Rights 1948, the preamble of the Constitution of India embodies a solemn resolve of its people to secure, inter alia, to its citizen the liberty of thought and expression. In pursuance of this supreme objective, Article 19(1) (a) guarantees to the citizens the right to "freedom of speech and expression", one of the fundamental rights listed in Part III of the Constitution.

These rights have been advisedly of out in broad terms diving scope for their expansion and adaptation, through interpretation to the changing needs and evolving notions of a free society. In many ways, this Act is the logical culmination of the dreams of our founding fathers.

The Right to Information Act 2005 is one of the most progressive legislations in the world. The Act envisages a pro active role for them to spread awareness and build competencies. In the diverse and complex nature of our society; the information revolution has the potential to make the Act an effective tool of social change.

Right to Information is a fundamental human right and pre requisites for the realization of other human rights. Right to Information has become a friend in need, making life easier and

honorable for common people. Experts would argue that it is very difficult to break the culture of secrecy and create a culture of openness.

Evaluated answer sheets, Departmental Promotion Committee minutes, Annual Confidential Report, Transfer guidelines and what not-Right to Information becomes an efficient in-house grievance curbing mechanism.

Information contributes to knowledge. It also confers power. It is undoubtedly a great economic asset too. A proactive policy of disclosure will be in keeping with the spirit of Right to Information Act. Information collected at huge cost, with tax payer's money, should be made available to the general public without having asked for it. This will improve the quality of the data as it will be subject to informed public scrutiny.

In an Age of Information, maximum value is attached to information in the social, economic, cultural and political developments of the country. At the time of discussion on the Right to Information Bill at Parliament the then Prime Minister Dr. Manmohan Singh asked the country's civil servants to view the bill in a positive light. They should not see it as a "draconian law for paralyzing Government but as an interfacing, resulting in friendly, curing and effective functioning".<sup>6</sup>

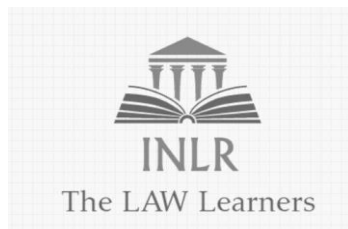
The development is, no doubt, healthy for ensuring good governance and curbing corruption. Each and every decision of the Government has now become available for public scrutiny and those in decision making process have to be very cautious as also judicious while exercising their powers. Though the right has not crossed its infancy, it is bound to have an effect once the content of the Act reads the people on the remote areas of the country. To convert the exercise into a meaningful one, feedback from unlighted citizens is highly essential.

### **3. BACKGROUND OF THE ACT IN INDIA**

The National Campaign for People's Right to Information (NCPRI) formed in the late 1990's became a broad based platform for the purpose, with members from diverse sections of the society. The NCPRI set up a small group and started the process of drafting a national law for the

---

<sup>6</sup> *The Indian Express*, May 12, 2005



right to information and in this process soon led to a collaboration with the Press Council of India.<sup>7</sup>

A draft bill of the Information Act was formulated by the Press Council under the guidance of the Justice P.B. Sawant, the then Chairman of the Press Council. It was presented to the Government of India, which set up another committee under the Chairmanship of H.D. Shorie. That Committee submitted another Draft.<sup>8</sup>

That draft became the basis of the Bill introduced by the National Democratic Alliance (NDA) government as the Freedom of Information Bill 2000. The Bill was passed by Parliament without any amendment and came to be known as the Freedom of Information Act 2002. However, before that Act was brought into force, elections to parliament were held in which the NDA Government lost power, and the new United Progressive Alliance (UPA) government took over.

The National Advisory Council (NCA), chaired by Mrs. Sonia Gandhi sent 36 proposed amendments for the unmodified Freedom of Information Bill 2004 which was tabled at Lok Sabha in December 2004 and was passed in May 2005. The UPA agreed upon a Common Minimum Programme (CMP) which states that the UPA government would provide a corruption free, transparent as well as accountable government at all times and make the Right to Information Act more progressive, participatory and meaningful. In pursuance of this, the Right to Information Act 2005 was passed by Parliament on 12<sup>th</sup> May 2005 and 13<sup>th</sup> May 2005.

Since its passage in October 2001, the Delhi Right to Information Act has come a long way in addressing accountability and transparency issues in several government departments across Delhi. At that time, non-governmental organizations, citizens groups, resident welfare associations, students and individual citizens were having many issues relating to mismanagement and corruption in various departments such as the Municipal Corporation, Delhi Jail Board, Registered Cooperative societies, Food and Supplies and many more and they could address many of them with the help of this Act. Some of these experiences have received considerable amount

---

<sup>7</sup> Amulya Gopalakrishnan “Information by Right” *Frontline*, January 2003.p.18

<sup>8</sup> Report of working Group of Right to Information and Promotion of Open and Transparent Government of India, Ministry of Personal Public Grievances and Pension, May 1997.

of media coverage and helped in propelling the Act and the experiences of using Right to Information into the wider Public domain.

## 4. JUDICIAL INTERVENTION AND PRONOUNCEMENTS FOR AN OPEN GOVERNMENT

The Supreme Court has in at least two constitution Bench decisions, held that citizens have the right to get information about all aspects of government functioning, via: Indira Gandhi's Election case,<sup>9</sup> where the court had rejected the government's claim of privilege on the blue book containing security instructions for the Prime Ministers, and the *Judge's Appointment* case<sup>10</sup> where the court rejected the claim of privilege of the Government on the correspondence between the Chief Justice of India and the Law Minister regarding appointment of the certain High Court Judges.

This was held on the basis of the fact that the fundamental right to speech and expression could be meaningful only if the citizens have an effective right to access towards information variable with the government. It was also pointed out by the Supreme Court that, in a democracy, all public servants exercise power only on behalf of the people and it would be an anathema if the information about what they did were hidden from the people. The Supreme Court has also held that the Right to Know is an integral part of the Right to Life and unless one has the Right to Information, the Right of Life cannot be exercised.

After these judgments, there has been several other judgments of the Supreme Court where it has upheld the right to information as a fundamental right, including, the *Election reforms* case<sup>11</sup> where the Bench had directed the Election Commission to compel disclosure by candidates of information regarding their criminal indicants as well as their assets and liabilities.

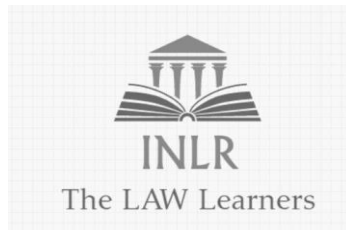
However, these initiatives and experiences associated with the Right to Information movement in Delhi and in other states in India require a more focused and consistent effort to

---

<sup>9</sup> *State of U.P. v. Raj Narain* (1975) 2 SCR 333.

<sup>10</sup> *S.P. Gupta v Union of India*, AIR 1982 SC 149L; 1981 Supp SCC 87.

<sup>11</sup> *Union of India v. Association for Democratic Reforms and another with PUCL and another v. Union of India and another*: 2002 (5) SCC 294



popularize the Act. With the passage of the Central Right to Information Bill in May 2005 the importance of taking this effective governance tool to the masses becomes even more significant.

## **5. RIGHT TO INFORMATION – POSITION IN VARIOUS COUNTRIES – A COMPARATIVE VIEW**

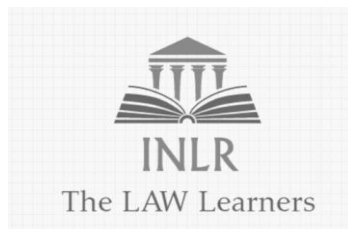
People's right to information has been widely accepted as a basic pre requisite for the effective functioning of a democracy. In recent years, many of the countries like Canada, Australia and New Zealand have passed laws providing for the right of access to administrative information. Over 40 countries across the world have comprehensive laws to facilitate access to state records and more than 30 are in the process of enacting such legislation. A comparative study of the legislations in various countries in this respect is made here:

### **5.1. U.S.A**

The United States enacted Freedom of Information Act (FOIA) in 1966 and introduced amendments in 1974 and 1986. This Act is applicable to government agencies. The first Amendment to the U.S. Constitution provided for the freedom of speech and expression. The country has already passed the Freedom of Information Reform Act 1986, with the same subject. But right of information is not absolute in USA.

Recently, the U.S. Supreme Court struck down two provisions of the Communication Decency Act (CDA), 1996, seeking to protect minors from harmful material on the Internet precisely because they bridge the freedom of speech protected by the first amendment. Moreover, the vagueness in the CDA's language, the ambiguities regarding its scope and difficulties in adult age verification, make CDA infeasible in its application to a multifaceted and unlimited form of communications such as internet.

The Americans having a strong belief in the healthy effects of "openness" and "publicity" have developed a strong antipathy to the inherent secretiveness. The Constitution of America does not contain any specific provision of access to administrative documents, but such a right has been conferred by statutes like the Administrative Procedure Act, 1946 and the Freedom of Information Act, 1966.



As Schwartz emphasizes, “Americans firmly believe in the healthy effects of publicity and have a strong antipathy to the inherent secretiveness of government agencies”.<sup>12</sup> The Right to Information Act begins with the obligation on the government agencies to publish (in the Federal Register) information about the organization of the agency; functions; procedure; the persons/officials from whom information can be collected; the availability of forms; the scope of information available; the substantive rules and statements of general policy or interpretations of general applicability adopted by the agency and amendments thereof.

A person will be affected by information which must be published but is not done so, only to the extent of the cutely and timely notice of the terms of the information. Reasonably available information to the class of persons affected is deemed to be published in the Register when it is incorporated by reference in the same with approval of the Director of Register.

There is a duty on the agencies to provide certain documents for public inspection and copying. The Act contains minimum tests for fees. Fees have to be limited to reasonable standard charged for search, duplication, and review when requested for commercial use.

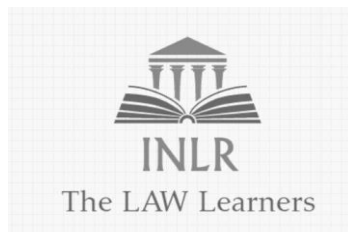
The Sunshine and Advisory Committee Acts in the US add to the laws that augment the legal regime in favour of openness. The Sunshine Act requires agencies such as the Nuclear Regulating Commission and the Equal Employment Opportunity Commission to announce their meetings early and open them to the public unless the specific exemptions apply to particular discussions. In similar terms, the advisory Act requires meetings of outside groups advising Federal agencies to be open to public and subjects advisory committee records to the Freedom of Information Act. In U.S.A., the affirmative rights to acquire information are considered as a corollary of the First Amendment Freedoms.<sup>13</sup>

In *Lament v. Post Master General*, the Supreme Court invalidated a provision of a statute conferring power on the Post Master General to detain mailings printed or prepared in a foreign country and found by the secretary of treasury as communist political propaganda. Such matching was delivered only after a request from the addresses.

---

<sup>12</sup> Schwrtz, *Administrative Law* (1984), p.14

<sup>13</sup> Thomas Emerson, *Legal Foundation of Right to Know*, 2016 Washington University Law Quarterly, p.2



The limitation was held to be a restriction on the unfettered exercise of First Amendment rights<sup>14</sup> Justice Brennan observed: “It is true that the First Amendment contains no specific guarantee of access of publications. However, the protection of the Bill of Rights goes beyond the specific guarantee to protect from congressional abridgment those equally fundamental personal rights, necessary to make the express guarantees fully meaningful. The dissemination of ideas will accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers”.

Later in *Stanley v. George*<sup>15</sup> while upholding the right of an individual to read pornography in the privacy of his home, the Supreme Court held that it was already established that the Constitution protected the right to receive information and ideas. The First Amendment was held to involve not only the right to speak and publish but also the right to hear and learn and to know.<sup>16</sup> Thus freedom of speech necessarily protects the right to receive information.<sup>17</sup> Thus; the trend in United States is in favour of allowing an affirmative First Amendment right.<sup>18</sup>

## **5.2. United Kingdom**

After a Draft Bill of 1999 and a following consultative process through the year 1999, the UK Government developed a Draft of the Freedom of Information Bill 2000. The Act is lengthy and has seven (7) schedules.

Most notably, the Act contains twenty-five sections detailing kinds of information exempt from public accessibility. This is the biggest drawback. Almost any information can be brought under the vast list of exemptions which include exemptions from information related to national security to information “likely to prejudice conduct of Public affairs.”

---

<sup>14</sup> *Ibid.* p.401

<sup>15</sup> 22 L. d.29,542(1969)

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *United States v. Richardson*, 41 L. Ed. 2d 678 (1974). Also *Sehle Singer v. Reserust*, 4r 1 L. d. 705 (1974) p. 727, United States. Richardson, 41 L. Ed. 21678 (1974)p. 204



The discretion is left with the ministers and other public officials of the Government. The Act does contain detailed, provisions regarding the Information Commissioner and the Information Tribunal, laying down-complaint, enforcement and appeal provisions.

The Act also makes the act of altering records to prevent disclosure of information an offence. But there is no public interest defense to provide cover to officials to release information regarding instances of malpractice in the government.

In England though the democratic traditions are deep rooted, yet the thrust of legislation in this direction has been not on information but 'Secrecy'. The present law in England contained basically in the Official Secrets Acts of 1911, 1920, 1939. Broadly speaking it is the Official Secrets Act 1911 which governs the subject matter substantially this Act is said to have been conceived in hysteria, when England faced the prospects of a great war. It seeks to make everything secret, even those matters which should not to be secret.<sup>19</sup>

In England Judiciary has approved openness in Government and it, is achieved by refusing the government's claim of Secrecy. In 1962, by an administrative decision, the reports of the inquiry inspectors regarding planning permission were made open to the public.<sup>20</sup>

In 1968 the House of Lords in *Conway v. Rimmer*<sup>21</sup> established its jurisdiction to order the disclosure of any document and to hold a balance between conflicting interests of secrecy and publicity. This decision enlarged the public access to administrative Information but on the other hand the Official Secret Act, 1923 makes almost all kinds of documents secret and punishes anyone who leaks them out. A consolation against the rigorous provision is section 10<sup>22</sup> of the Contempt of Court Act, 1981. This section provides a protection to the press and media from the disclosure of source of their information.

Article 10 of the convention for the Protection of Human and Fundamental Rights provides for freedom of speech and expression. It also includes freedom to hold opinion and to receive and import information and ideas. The U.K., being a party to the convention, violation of any Articles

---

<sup>19</sup> Jain and Jain, *Principles of Administrative Law*, (1995) p.900

<sup>20</sup> Donald, C. Rawat, *Administrative Secrecy in Developed Countries*, Mac Millan, London, (1979) pp.185-86

<sup>21</sup> (1968) .A.C.910.

<sup>22</sup> Section 10 of the Act reads, "no court may require a person to disclose nor is any person guilty of contempt of court for refusing to disclose, the source of information, contained in a publication for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".

of the Convention could be successfully challenged before the European court of Human Rights. Thus convention may help indirectly for the protection of freedom of information.

### **5.3. Sweden**

Swedish Freedom of Information Law (a literal translation of the notice term indicates the Freedom of Printing Act) passed in the year 1766 is considered to be the oldest and earliest legislative recognition of Right to Information. The insight rendered by David Goldberg's article<sup>23</sup> quite leanly reveals that this legislative attempt was more pertinent to Freedom of Printing and Information particularly, that of State documents.

It is a proven historical fact that the cry for freedom of information has literally emanated from the rift and fight between Swedish Parliamentarians. In a way, the evolved principles i.e.; "All state documents are a prior public unless declared secret under special laws," has undoubtedly and indisputably influenced the global campaigns pertaining to Right to Information.

Sweden has been enjoying the right to know since 1810. It was replaced in 1949 by new Act which enjoyed the sanctity of being a part of the country's constitution itself. The principle is that every Swedish citizen should have access to virtually all documents kept by the state or municipal agencies.

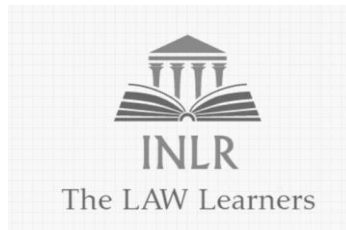
### **5.4. Canada**

In Canada, the Access to Information Act allows citizens to demand records from federal bodies. This is enforced by the Information Commissioner of Canada. There is also a Complementary Privacy Act, introduced in 1983. The purpose of the privacy Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal government institution and that provide individuals with a right of access to that information. It is a crown copyright complaint for possible violations of the Act may be reported to the privacy Commission of Canada.

The various provinces and territories of Canada also have legislation governing access to government information; in many cases, this is also the provincial privacy legislation. From the

---

<sup>23</sup> [www.humanrightsinitiative.org/programmes/i/rti/articles/top\\_advicact](http://www.humanrightsinitiative.org/programmes/i/rti/articles/top_advicact)



above discussion it is to be concluded that the legislation in favour of right to information is very effective and act as a preventive vaccine against corruption.

## **6. RIGHT TO INFORMATION AND THE INTERNATIONAL COVENANTS**

### **6.1. United Nations Charter**

The Charter of the United Nations, which was set up in 1945, in its preamble, clearly proclaims that it was established in order to save succeeding generations (of humanity) from the scourge of war, and to reaffirms faith in fundamental human rights, in the dignity and worth of the human person. The right to Information was recognized as its inception in 1946, when the General Assembly resolved that; ‘freedom of information is a fundamental human right and the touch stone for all freedoms to which the United Nations is concentrated.’<sup>24</sup>

In the year 1993, the United Nations Commission of Human Rights established the office of the United Nations Special Rapporteur on any freedom of opinion and expression. As early as in 1995, the Special Rapporteur noted that ‘the right to seek or have access to information is one of the most essential elements of freedom of speech and expression.’<sup>25</sup> In the annual report of the year 2000 it was printed out that the right to information was not only important for democracy and freedom, but also for facilitating public participation and realization of the right to development.

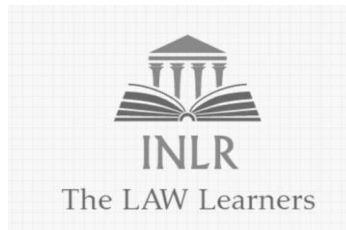
### **6.2. Universal Declaration Of Human Rights, 1948**

The Right to Information gained prominence of the global level when the Universal Declaration of Human Rights was adopted in 10 December 1948 providing everyone the right to seek, receive and impart information and ideas through any media and regardless of frontiers.

---

<sup>23</sup>United Nations General Assembly, Resolution 59(1), 65<sup>th</sup> Plenary Meeting, 14 December 2016

<sup>25</sup> Report of the Special Rapporteur, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, United Nations Document E/CN4/1995/31, 14 Decembr 2015, Para 35.



Article 19(2) of the Universal Declaration of Human Rights States that ‘Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ There are two other supporting provisions in the Declaration. Article 20 confers the right to peaceful assembly and of association, and Article 21 (a) gives the right to take part in the government of the country.

### **6.3. The International Covenant On Civil And Political Rights, 1968**

Article 9 of the International Covenant on Civil and Political Rights, 1966 states that everyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

By virtue of Article 19 of the International Covenant on Civil and Political Rights, 1966, the Press and the public may be excluded from all or part of a trial for reasons of public. Order or national security in a democratic society or when the interest of the private lives of the parties so requires or the extent strictly necessary in the opinion would prejudice the interests of justice, but any judgment rendered in a criminal case or in a suit of law shall be made public except in the interest of juvenile persons and the guardianship of children.

Article 19 of the International Covenant on Civil and Political Rights, 1966, states that,

- (i) Everyone shall have the right to hold opinions without interference,
- (ii) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art or through any other media of his choice.

However, the exercise of the rights provided for in the second paragraph of this Article is subjected to the following restrictions;

- a) for respect of the rights or reputation of others;
- b) For the protection of national security or of public order or if public health or morals.

#### **6.4. The Common Wealth**

The Commonwealth, a voluntary association of 54 countries, has taken concrete steps to recognize human rights and democracy as part of its fundamental political values. These include fundamental human rights, and the individual's inalienable right to participate in the democratic process. In the year 1980, the law ministers of the commonwealth countries at their meeting held at Barbados stated that 'Public participation in the democratic and government process would be most meaningful when citizens had adequate access official information'.<sup>26</sup>

#### **6.5. European Convention On Human Rights**

The European Convention on Human Rights was adopted on November 1950, and came into force on 3 September 1953. Article 10 of the European Convention of Human Rights states that,

- (i) Everyone has the right to freedom of expression. Maybe this ought to include freedom to hold opinions, and to receive and impart information and ideas without interference by public authority and irrespective of frontiers
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or such penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

From the above mentioned articles of various conventions we can see the Right of Information is implicit in the freedom of expression and public opinion. Right to Information or right to know is thus a universally accepted tenet and is provided as an in alienable right of human being.

---

<sup>26</sup> <http://www.artic119.org/pdfs/publication/foisurvty.pdf;sitevisited> on 25.11.2015

## 7. INTERNATIONAL ORGANIZATIONS AND RIGHT TO INFORMATION

International Organizations have also begun to formally recognize the right to information as against public bodies. Since international financial institutions impact domestic policies, and develop international policies requiring conformity of the states with it, it is necessary that they become transparent towards civil society organizations.

The Rio Declaration of 1992 put enormous pressure on international institutions to adopt policies that encourage public participation, and access to information. The United Nations Development Programme (UNDP) adopted Public Information Disclosure Policy in 1997.<sup>27</sup> The World Bank,<sup>28</sup> the African Development Bank Group<sup>29</sup> the Asian Development Bank<sup>30</sup> and the European Bank for Reconstruction and Development<sup>31</sup> have all implemented disclosure policies. The above survey shows how transparency has been adopted in various democratic countries, and international financial institutions.

## 8. STATUTES PROVIDING RIGHT TO INFORMATION

### The Indian Contract Act, 1872

The Indian Contract Act, 1872 provides for the right to information in it. Section 17 of the Act says that, in contractual relations, particularly in transactions of sale of goods, the seller is bound to disclose the latent defects of the goods to the buyer. This will help to avoid future disputes.

### Consumer Protection Act, 1986

---

<sup>27</sup> *Public Information Disclosure Policy*, UNDP, 2017.

<sup>28</sup> *World Bank Policy on Disclosure of Information* (Washington DC World Bank 2014)

<sup>29</sup> *Disclosure of information policy*, African Development Bank Group

<sup>30</sup> *Confidentially ad Disclosure of Information*, Asian Development Bank, 2014

<sup>31</sup> *Policy on Disclosure of Information*, European Bank for Reconstruction and Development 2016.

The Consumer Protection Act, 1986 provides the right to information. Under section 6 (6), the consumer has right to be informed about the quality, quantity, potency, purity, standard and price of goods. By this the consumer could be protected against unfair trade practices.

### **Special Marriage Act, 1954**

The Special Marriage Act, 1954 also provides for the right to information. A person who had married without giving vital information could be prosecuted for cheating. There are statutory provisions prescribing punishment for giving fake information which could be the basis of a marriage.

### **The Prasar Bharati (Broadcasting Corporation of India) Act, 1990**

The Parsar Bharati (Broad casting Corporation of India) Act, 1990 provides for receiving information from the public. Under this Act, as media including newspapers have a duty to allow reader or writers to reply to criticism or adverse information about them.

In some other statutes there are provisions against misinformation. For example, Section 3 of the Drugs and Magic Remedies (objectionable Advertisement) Act 1954 prohibits advertisement of certain drugs for treatments of certain diseases and disorders. In Companies Act, a company registered under the companies Act must give information to its shareholders. Section 62 of the statute speaks about the civil liabilities of company for misstatement on prospectus. Section 63 prescribes criminal liability for misstatement in prospectus.

From the above mentioned statutes we can see that the Right to Information Act is an effective measure against Corruption. The law itself has be hailed as a land mark in India's drive towards more openness and accountability

## **9. RIGHT TO INFORMATION: POPULAR MOVEMENTS**

The Right to information was demanded as essential to people's grassroots demands such as the right to work, the right to obtain famine relief, or the right to receive minimum wages. It showed the awakening of the people and the growing popular concern about corruption and misuse of power by the power wielders, this demand did not come from the relatively educated

sections of the people, but from workers and parents who although lacked formal education, were acquiring grass roots consciousness of their entitlements as citizens.

Famine relief and rural development works are a source of relief to the rural population of India a notable example of the people's movement is the that of 'Rajasthan Mazdoor Kisan Shakti Sangathan' (MKSS), which is an organization comprising peasant and workers was formed with the leadership of Aruna Roy, who had resigned from the Indian Administrative Service to work with the Social work and Research Centre (SWRC). .

In India, the pioneering steps were taken by the Mazdoor Kishan Shakti Sangathan (MKSS). The MKSS has fought diligently on the issues of accountability and transparency and succeeded in demonstrating that critical link between lack of transparency and corruption and in initiating substantiate changes. The MKSS succeeded in ensuring in Rajasthan, and forced Master rolls, bills and vouchers pertaining to construction activity undertaken in past years to be opened to public scrutiny.

In the year 1996, a meeting was convened at the Gandhi peace foundation in New Delhi where the National Campaign for people right to Information (NCPRI) was formed. It had as its members, activist, journalist, lawyers, professionals, retired civil servants, and academicians.

In Maharashtra, Anna Hazare a social activist who had practiced indigenous model of rural development in Ralegan Siddhi, a village near Pune, realized that development works suffered from corruption, and the only way to compact it was to obtain the Right to information, in his struggle against corruption he went on fast until death to secure the law on the right to information.

The Maharashtra Legislative Assembly passed the law in 2000, but Anna Hazare was not satisfied because the law left too many loopholes. He pressed for an entirely new law in its place, the Government of Maharashtra had to concede that demand and ultimately pass a new Act in 2002. Similarly, several states passed laws to provide for the right to information.

Some other movements have also contributed to the making of the Right to Information Act, in the 1980's, various movements gathered momentum, which challenged the establishment's paradigms of development for instance, the resistance of women in the Chipko movement to tree cutting in Uttarakhand, the opposition in silent valley project in Kerala, and the groups fighting for the rights of the victim of the Bhopal gas Tragedy, have raised issues regarding the rights of the



marginalized people. The Narmada Bachao Andolan fought against construction of big dams in general, and asked for greater transparency in their cost benefit analysis.

The above discussed movements espoused the power of the people against the power of the state, and there were non-violent, proletarian, struggles against this information and for equitable distribution of material resources<sup>32</sup>, which is one of the important ‘directive principles of state policy’<sup>33</sup>.

### *Right to Information in India: Constitutional Basis –Article 19*

In Indian Constitution there is no specific constitutional right to freedom of information, the chapters on fundamental Rights and Directive Principles of the State Policy seem to be totally silent on the subject, However, through Judicial Activism, the court have started carving out this right in Article 19 (1)(a) which confers the right to freedom of speech and expression?

The Supreme Court has through a series of decisions vastly expanded the scope of the right of freedom within its ambit the right to information through a direction In this regard seems to have begun as early as in Hamdard (Devakhana v Union of India)<sup>34</sup> however, it was Justice K.K. Mathew in *State of U.P v. Raj Narain*<sup>35</sup> who expounded with force that in ‘Government Responsibility’ like ours where all the agents of the public must be responsible for their conduct.

In this case, the Raj Narain who challenges the validity of Mrs. Gandhi’s elections required disclosure of Blue Books which contained the tour programme and security measures taken for the Prime Minister. Though the disclosure was no allowed.

Justice Mathew held that the people of this county were entitled to know the particulars of every public transaction in all its hearing. It was only in 1981 that ‘right to know’ matured to the status of a constitutional right in the celebrated case of *S.P Gupta v. Union of India*.<sup>36</sup>

---

<sup>32</sup> See Sanjay Sanghvi, “The New Politics of Environmental Socialism” S.P. Sathe, Sathya Naryan (Ed.), *Liberty Equality and Justice, : Struggle for a New Social Orders*, 2003 (P.23)

<sup>33</sup> *Constitution of India*, article 39 (b)

<sup>34</sup> AIR 1960 SC 554 (3)

<sup>35</sup> AIR 1975 SC 885

<sup>36</sup> AIR 1982 SC 149 at P.158.160

In this case again the question arose with regard to the claim for privilege laid by the Government of India in respect of disclosure of certain documents including correspondence between chief justice of India and the chief justice of Delhi High Court in connection with the conformation of Justice Kumar, who was additional Judge of the Delhi High Court.

In the words of Justice Bhagwati, the Concept of open Government is the direct emanation from the right to know which seems to be in the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the constitution. The rationale of this view in the views of the same learned Judge is that right to information or access to information is basic to the democratic way of life.

In practice real democracy cannot function without a free and unfettered exercise of this right. Therefore, the disclosure of information regarding the functioning of Government must be the rule and secrecy is justified only where the strictest requirement of public interest demands<sup>37</sup>.

However it is submitted that both Justice Mathew and Bhagwati in *S.P Gupta v. Unions of India*<sup>38</sup> had not given an account on how the 'right to know' could be founded under the freedom of speech and expression. They were further silent on the relationship between the restriction which should be placed on the right to know and the restrictions existing under article 19 (1) (a) of the Constitution.

The Right to know was further developed in the *Sheela Barse v. Union of India*<sup>39</sup> where in the appellant of social worker approached the court for appropriate remedy while highlighting the sad condition of the children detained in jails pending trials. The Supreme Court issued direction for release of information to her regarding such under trials kept in different parts of the country. It is pertinent here to note that the court did not attract the right to freedom of speech and expression to confer the right to know.

Thus once a need has been shown by a person having proper standing, he would be able to seek the information from the Government. Again, in *Pune Environmental Case*<sup>40</sup> the Court spoke of the importance of people's participation and upheld their right to know.

---

<sup>37</sup> AIR 1982 SC 149

<sup>38</sup> *Ibid*

<sup>39</sup> AIR 1986 SC 1773

<sup>40</sup> *Bombay Environmental Action Group v. Pune Cantonment Board* AIR 1996 SC 172

Again, relying on the principle laid down by Justice Mathew and Justice Bhagwati, the Rajasthan High Court, while allowing a public spirited Citizens requesting for information relating to the sanitation conditions of his home city and whether the local authorities were performing its obligation and primary duties faithfully in accordance with law, applied the principle of right to know based on freedom of speech and expression. The High Court while accepting the exception to the right to know of citizens held that they had a faller, right to know regarding sanitation and allied matters<sup>41</sup>.

*Other Constitutional Provisions Apart from Article 19 (1) (a)*

It will be of great significance to mention here that the Right to Information cannot be located exclusively in Article 19 (1) (a) of the constitution. Indeed, it is to be ground in several other provisions also. For Example, every person who is detained is entitled to know the grounds of his/her detention<sup>42</sup>.

A Government Servant is entitled to know why he/she is being dismissed or removed or reduced in rank and to give an opportunity to make representational against the proposed action<sup>43</sup> Not Giving information may violate the principle of natural justice and could lead to arbitrary action which violates the right to equality and accordingly hit by Article 14 of the constitution<sup>44</sup>. So it will be imperative to have right to know how government decisions were taken in order to avoid discrimination and arbitrariness.

Recently, while widening the scope of right to information further the Supreme Court has held that the right to information emanated from the right to person liberty and procedure established by law, guaranteed by Article 21 of the Constitution.<sup>45</sup>

Indeed it will be fallacious to hold that the Right to information is included only in Article 19 (1) (a) of the constitution. Since it will indirectly restrict that right only to citizens since the rights under Article 19 are vested only in citizens .Rather, such right must vest in every human being irrespective of his/her citizenship. If, the Right to information is to be treated as a human right of need not be restricted to citizens.

<sup>41</sup> *L.K Kootwal v. State of Rajasthan* AIR 1988 Raj. 2

<sup>42</sup> Article 22 (1) of the Constitution of India

<sup>43</sup> Article 3 11 (1) SC C

<sup>44</sup> *E.P. Royappa v. State of Tamilnadu* AIR 1974 SC 341

<sup>45</sup> *Essar Oil Ltd. v. Halar Utakarsh* AIR 2004 SC 1983

The Right to inform and the right to be informed are co extensive. In modern constitutional democracy, it is axiomatic that the citizens have a right to know about the affairs of the government which having been elected by them, seek to formulate sound policies of Governance aimed at their welfare

### *Citizens Right to Access to the News Papers*

The Supreme Court recognized the citizens right to access to a news paper in *Bennett Coleman v. Union of India*<sup>46</sup> when it struck down the news papers control order, whereby allotment of newsprint to a newspaper was restricted on the basis of the sales of such paper during previous years .While striking down the said order, the court observed that such restriction on the use of the newsprint imposed an unreasonable restriction on the freedom of press, because it could not give as much reading material only the news papers right to freedom of speech was infringed. But the reader's right to read was also curtailed. The reader's right to access to the reading material in a newspaper was his/her right to information which was implicit in the right to freedom of speech.

### *Voters Right to Know the Antecedents of the Candidates*

Further the Supreme Court in a landmark Judgment, *Union of India v. Association for Democratic Reforms*<sup>47</sup> while widening the horizon of article 19 (1) (a) of the constitution held that freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinion and there is no reason to hold that freedom of speech and expression would not cover right to get material information which regard to a candidate who is contesting election for a post which is of utmost importance in the democracy

The Right to know the antecedent of the candidate standing for election to House of Parliament or a State legislature, a Panchayat or a Municipal corporation is a pre – condition to the exercise of a citizen's right to vote. Thus people have a constitutional right to know the antecedents of the candidate contesting the election.

---

<sup>46</sup> The Supreme Court observed, '... the right to freedom of speech and expression also includes the right to educate, to informs and entertaining and also the right to be educated'

<sup>47</sup> AIR 2002 SC 2112.

This historical Judgment has further advanced and confirmed the theory of right to know as a fundamental right of the citizens enshrined under article (19)(1)(a) of the Constitution. It will be relevant here to note that the government brought an ordinance and subsequent an Act to substantially multiply the apex mandate of the Apex Court, that the requirement of giving information by the candidate contesting the election is essential for democracy.

However the Supreme Court dealing with the constitutional validity of this amendment, in *Peoples Union of Civil Liberties v. Union of India*<sup>48</sup> held that Act as unconstitutional. It was argued that the Right to information was a derived right and not an original fundamental right and therefore it could be restricted by legislative action. The Supreme Court refuted this argument and observed that “the fundamental rights enshrined in the Constitution have no fixed contents. From time to time, this court has filled in the Skelton with soul and blood and made it vibrant”<sup>49</sup>.

It is obvious from the above that there is a trend world while to have increasing openness in the system of governance. Various factors like changing socio-economic milieu, increased awareness of the public about their rights, the need to have a full accountable and responsible administration. Though complete openness is neither feasible nor desirable, a balance approach to openness is government functioning has to be diverged.

The Judicial decision discussed above made the Right to information a fundamental right it has been our experience that mere judicial declaration of a right being fundamental right is not enough to make it a reality. Although the court has held that the right to information is a fundamental right, but every person cannot every time go to the courts to enforce his right by way of folding writ petition. Since information being a subject on the concurrent list, both the centre and the states are competent to bring legislation to ensure that all citizens have the ‘Right to information’

Precisely keeping in view of the above the Central Government enacted Right to information Act, 2005 which has come into force on 12<sup>th</sup> October 2005, which provides inter-alia, a detailed and elaborate mechanism to provide information, setting up of central information commission etc. many states have already brought such legislation.

---

<sup>48</sup> (2002) 5SCC 399.

<sup>49</sup> Id. at. P. 438 -39.

The right to information will require a continuous public education and also education of the civil servants who will ultimately act as information officers under the new Act of 2005. The right to information must not acquire adversarial character between the citizen and the state. Both must co-operate so as to make democracy more meaningful.

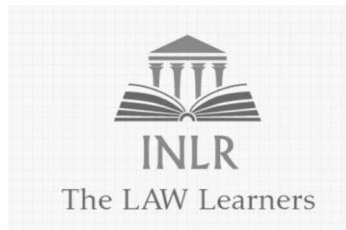
Further we have the mindset and cure the administration, not only from colonial state to welfare state but to a democratic, participatory, vibrant and accountable state. Let one draw final curtain with the core message that the Right to information if honestly conferred and sincerely conferred could bring about major changes in the governance. Let India not step into this new century with the backlog of illiteracy, poverty and exploitation.

The overall impact of these decisions has been to establish clearly that the right to freedom of information or the public's right to know is embedded in the provision guaranteeing fundamental rights in the constitution. Various legislations in India provide for the right to access information in specific contexts. Section 76 of the Indian Evidence Act 1872, contains what has been termed a 'Freedom of Information Act in Embryonic form' this provision required public officials to provide copies of public documents to anyone who has a right to inspect them.

The Factories Act, 1948, provides for compulsory disclosure of information to factory workers regarding dangers including health hazards and the measures to dangerous materials. The Environment (protection) Act 1986, and the environmental impact assessment regulations provide for public consultation and disclosure in various circumstance, For example, the environmental impact assessment regulation allow for a procedure for public hearings and publication of the executive summary of any proposal for any project affecting the environment by the person seeking to execute the project althorns, this provision is meant to facilitate citizen in pelt, input is too limited and environmental groups have had to go to the court to get more complete disclosure.

### *Objects & Scope of The Right to Information Act in India*

The basic object of the Right to information is to empower the citizens, promote transparency and accountability in the working of the Government, contain corruption and make our democracy work for the people in real sense. An informed citizenry will be better equipped to keep necessary vigil on the instruments of government and make the government more



accountable. The Act created a practical regime through which the citizens of the country may have access to information under the control of public authorities. The Government of India always lays emphasis on making the lives of its citizens easy, smooth and making India truly democratic and keeping this in mind the Right to Information Act has been established.

The Act is applicable to all constitutional authorities, including the executive, legislature and judiciary; any institutions or body established or constituted by an act of parliament on a state legislature or an order of notification of appropriate government. In special circumstances bodies “owned, controlled or substantially financed” by government, or non Government Organization “substantially financed, directly or indirectly by funds” provided by the government are also covered.

Private bodies are not acting within the Act’s ambit directly. However, information that can be accessed under any other law in force by a public authority can also be requested for. In a landmark decision on 30<sup>th</sup> November 2006 the Central Information Commission also reaffirmed that privatized public utility companies continue to be within the Right to Information Act their privatization notions standing. The Act also explicitly overrides the official secrets Act and other laws enforced on or before 13 October 2005 in the event of any inconsistency.

### *Relevance of the Act*

The Right to Information is not an elite issue. It is a day to day issue relating to the legal right of an individual, often making a difference between drudging and dignity, or some times between life and death. As we know the information has an unlimited potential since it is the life – blood that sustains political, social and business decisions information is a key to keep pace with progressive trends in the post modern world.

This Right, like all rights is not absolute. The citizen should have access to information on all matters of governance save those related to national security and other reasonable restraints prescribed by the constitution. While the right is guaranteed by the Constitution, we still need a legislation to create institutional mechanisms enabling us to enjoy the right meaningfully, without recourse to constant agitation.

Right to Information Act 2005 is a landmark for good governance and can help the common citizens especially the poor and under privileged to get their dues from government. In recent years, there has been almost unstoppable global trend towards recognition of the right to information by counties, inter governmental organizations, civil society has been recognized as a fundamental human right, which upholds the inherent dignity of all human beings. The Right to Information forms the crucial underpinnings of participatory democracy – it is essential to ensure accountability and good governance. Without information, people cannot adequately exercise their right as citizens to make informed choices.

Prime Minister Manmohan Singh, while speaking on the Right to Information bill in the Lok Sabha said: “The Legislation would ensure that the benefits of growth would flow to all reactions of people, eliminate corruption and bring the concerns of the common man to the heart of the all processes of governance.”<sup>50</sup>

Shri Suresh Pachauri, Minister of state in the Ministry of Parliamentary affairs said in the Lok Sabha “An era of transparency and accountability in governance is on the anvil, Information and more appropriately access to information would empower and enable people not only to make informed choices but also participate effectively in decision making process.”<sup>51</sup>

With such optimism the Lok Sabha passed the Right to Information Bill on 11 May 2005. It was passed by the Rajya Sabha on 12<sup>th</sup> May 2005. It received the assent of the President on 20 June 2005. It is called the Right to Information Act 2005.<sup>52</sup>

The Bill in its preamble states that the Act is passed because “democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. While some sections of the Act came in to effect immediately<sup>53</sup>, the rest of the Act came in to force on the 120<sup>th</sup> day since its enactment<sup>54</sup>

---

<sup>50</sup> *The Hindu*, 12, May, 2005, P.1

<sup>51</sup> <http://164.100.24.208/1s/1xdeb/1s14/ses4/100505.html> : site visited on 25.11.2005

<sup>52</sup> Right to Information Act 2005, S.1 (2)

<sup>53</sup> Section 1(3) provides that the following provisions, namely S.4(1) (Every Public authority to maintain all records, publish within 120 days from the enactment of the Act particulars, powers etc, of its organization), S 5 (1) and S 5 (2) [Public authority to designate officers as Central Public Information Officers or State Public



The provisions which became effective immediately on the enactment of the Act are those which required the authorities to take steps for facilitating access to information without which the implementation of the rest of the provision of the Act would not have been possible. The provision which lays down a firm date for the Commencement of the Act is indeed a novel provision.

Usually, an Act leaves it to the Government to issue a notification declaring the day on which the Act is to come in to force. But sometimes the Government has taken too long to do so<sup>55</sup>. Section 3 of the Constitution (forty-fourth Amendment) Act 1978 had amended clause (4) of Art 22 of the constitution requiring only sitting judges to be members of the advisory committee on preventive detention. That Amendment has not been given brought into effect by the executive till today.

In fact, in *A.K.Roy v. India*<sup>56</sup> the Supreme Court expressed its inability to issue mandamus to the Government to bring that clause in to effect. Since there had been a strong force of public opinion behind the right to information legislation it was insisted that it should not be left to the mercy of the Government to fix the date of its commencement.

Some state Acts have been repealed. Where the state Act has not been repealed, both the central and the state Act will operate simultaneously. In case of a conflict, the central law will prevail. Where the state acts have been repealed, some problems of administration have arisen. For example, under the Maharashtra Right to Information Act, application made under that Act and not yet disposed of will have to be renewed. This could have been avoided if the repealing legislation had provided that an applications legally filed under the Maharashtra Act will be deemed to have been filed under the central Right to Information Act.

---

Information Officers and Assistance Public Information Officers], S. 12 (the Central Government to constitute Central Information Commission), S.13 (term of office and conditions of service of the Information Commissioners), S.15 (State Government to constitute State Information Commissioners), S.16 (term of office and conditions of service of the State Information Commissioners), S.24 (Act not to apply to certain organizations) S.27 (power of the Central Government to make rules) and S.28 (power to make rules by the competent authority which shall come into force immediately).

<sup>54</sup> Section 1 (3)

<sup>55</sup> S.P. Sathe, *Administrative Law* (2004), 7<sup>th</sup> edn, pp. 33&34.

<sup>56</sup> (1982) 1 SCC 271; AIR 1982 SC 710.

### *Information Explained*

Information has been defined as any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulations, orders, log books, contracts, reports, papers, samples, models, and data materials held in any electronic form and information relating to any private body which can be accessed by public authority under any other law for the time being in force.<sup>57</sup>

Record includes any document, manuscript and file any microfilm, microfiche and facsimile copy of a document; any reproduction of image or images embodied in such microfilm (whether enlarged or not); and any other material produced by a computer or any device.<sup>58</sup> The right to information means the right to access any material or record described above which is held by any public authority and includes the right to inspection of work, documents and records, taking notes, extracts or certified copies of documents or records, taking certified copies of materials, obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through print out where such information is stored in a computer or in any other device.

### *Right to Information*

Since the Supreme Court has held that the right to information was included with in Right to Freedom of speech guaranteed by Article 19(1)(a) and since that right is guaranteed only to citizens, most of the state laws on RTI have provided for citizens alone to be entitled to seek information. The freedom of Information Act (FOIA) of 2002, which is now repealed<sup>59</sup>, also gave the Right to seek information only to citizens” The two model bills submitted by the press council as well as the consumer Education and Research Council, Ahmedabad had given the right to ‘persons’. The Shourie Committee had however, restricted it to citizens.

---

<sup>57</sup> Section 2 (f)

<sup>58</sup> Section 2 (i)

<sup>59</sup> Section 11

The 2005 Act also restricts it to citizens.<sup>60</sup> An applicant seeking information does not have to give any reason as to why such information are sought except such details as may be necessary for contacting her.<sup>61</sup> Thus there is no requirement of *Locus standi* for seeking information.

### *Liability to Provide Information Public Authority*

Every public authority is liable to provide information. Public authority has been defined as any authority or body or institution of self government established or constituted – (a) by or under the constitution; (b) by any other law made by parliament; (c) by any other law made state Legislature; (d) by notification issued or order made by the appropriate government and includes any (i) body owned controlled or substantially financed, (ii) non-government organization substantially financed, directly or indirectly by hands provided by the appropriate Government.<sup>62</sup>

In the Above definition, all the categories mentioned above except those mentioned in sub-clause (d) (i) and (ii) come within the definition of the word ‘state’ in Article 12 of the Constitution. Since the Supreme Court has held that the right to information is included within the right to freedom of speech and expression guaranteed by Article 19(1)(a) and it may be included even in Articles 14 and 21, that right is constitutionally available against authorities of bodies which come within the meaning of the word ‘state’ in article 12 of the constitution. The Categories of authorities described in sub – clause (d) are liable to give information by virtue of the provisions in the RTI Act.

It may be noted that the definition of the public authority which is liable to give information is under in some state Acts that in the Central Act. Those Acts have made every private organization receiving aid from the state liable to give information and some statutes have included even bodies registered under the Acts such as the Companies Act and the Co-operative societies Acts within the purviews of the RTI of their State.

---

<sup>60</sup> Right to Information Act 2005, Section 3

<sup>61</sup> *Ibid*, S.6 (2)

<sup>62</sup> Section 2 (h)

The Act does not apply to the intelligence and security organization specified in the second schedule.<sup>63</sup> However, the information pertaining to the allegation of corruption and human rights violation shall be given only after the approval of the Central information Commissioner.<sup>64</sup> The Central Government may, by notification in the official gazette amend the schedule by including in it any other intelligence or security.

Organization established by that Government and omitting from it any organization already specified in it and on the publication of such notification the organization shall be deemed to be included or omitted, as the case may be from the Schedule<sup>65</sup> Every notification so issued shall be laid before each house of Parliament.<sup>66</sup> The Act also does not apply to the Intelligence and Security Organization Established and notified in the official gazette by the state government.<sup>67</sup>

However, Information pertaining to allegations of corruption shall not be excluded from disclosure.<sup>68</sup> Information pertaining to violations of human rights shall be provided only after the approval of the state Information Commissioner<sup>69</sup>

### *Administrative Structure of the Information Regime*

#### **Appropriate Government:**

Appropriate Government in relation to public authority which is established, constituted, owned, controlled, or substantially financed by the central government or a Union Territory administration shall be the Central Government and for a public authority established, constituted, owned, controlled or substantially funded by the state government, shall be the state government.<sup>70</sup>

---

<sup>63</sup> Section 24 (1)

<sup>64</sup> Section 24 (1) Second Proviso

<sup>65</sup> Section 24 (2)

<sup>66</sup> Section 24 (3)

<sup>67</sup> Section 24 (4)

<sup>68</sup> Section 24 (4) First Proviso

<sup>69</sup> Section 24 (4) Second Proviso

<sup>70</sup> Section 2 (a)

### Competent Authority

Each public authority is headed by a competent authority who acts on behalf of the public authority. The competent authority means the Speaker in the case of House of the people or the Legislative assembly of a state and the Chairman in the case of the Council of the States and a Legislative Council of a State; the Chief Justice of India in the case of the Supreme Court and the Chief Justice of High Court in the case of High Court; The President or the Governor as the case may be in case of other authorities established or constituted by or under the constitution; the administrator appointed under Article 239 of the constitution by the president for union territory.<sup>71</sup>

### Public Information Officers

Every public authority shall within one hundred days of the enactment of the RTI Act, designate as many officers as the Central Public Information Officers (CPIO) or the State Public Information Officers (SPIO) as the case may be, in all administrative units or offices under it as may be necessary do provide information to persons requesting for the information.<sup>72</sup>

Every Public authority shall designate an officer, within 100 days of the enactment of RTI ACT, at each sub divisional level or other sub district level as a central or state assistant public information officer (ACPIO or ASPIO), as the case may be, to receive applications for information or appeals for being forwarded to the CPIO or SPIO.<sup>73</sup> The Act nowhere states about the required qualification of the public information officers and assistant information offices and how they are to be designated.

Since the Act uses the word “designate” it means that the information officers and assistant information officers are to be appointed from amongst the existing civil servants. This creates doubts in people’s minds as to how for such officers will be oriented towards providing information.

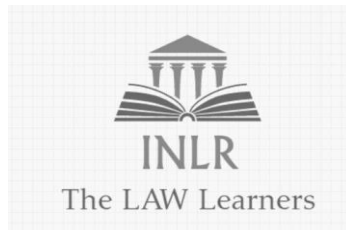
### Duty to Provide *Sou Motu* Access to Information

---

<sup>71</sup> Section 2 (e)

<sup>72</sup> Section 5 (1)

<sup>73</sup> Section 5 (2)



The Act does not merely oblige the public authority to give information on being asked for it by citizens but requires it to *suo moto* make the information accessible. This is the most important provision which provides for an information regime. Section 4 (1) (a) requires every public authority to maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under their Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems that access to such records is facilitated.

Section 4 (1) (b) requires the public authority to publish within 120 days from the enactment of this Act: (i) the particulars of its organization functions and duties; (ii) the powers and duties of its officers and employees; (iii) the procedure followed in the decision making process, including channels of supervision and accountability; (iv) the norms set by it for the discharge of its function; (v) the rules, regulations, instructions manuals and records, held by it or under its control or used by its employees for discharging its functions; (vi) a statement of the categories of documents that are held by it or under its control; (vii) the particulars of any arrangement that exists for consultation with formulation of its policy or implementation theory. (viii) a statement of the boards, councils, committees, and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public or the minutes of such meetings are accessible for public;

(i) A directory of its officers and employees;

(ii) The monthly remuneration received each of its officers and employees, including the system of compensation as provided in its regulations;

(iii) The budget allocated to each of its agencies, indicating the particulars of all plans, proposed expenditure and reports on disbursements made;

(iv) The manner of execution of subsidy programmes, including the amounts allocated and the details of the beneficiaries of such programmes;

(v) Particulars of recipients of concessions permit of authorization granted by it;

(vi) Details in respect of the information, available to or held by it; reduced in and electronic form;

(vii) The particulars of facilities available to citizens for obtaining information offices;  
(viii) Such other information as may be prescribed by rules; and thereafter updated every year.

Section 4 (1) (c) requires publication of all relevant facts used while formulating important policies or announcing the decisions, which effect the public.

Section 4 (1) (d) requires the public authority to provide reasons for its administrative or quasi judicial decisions to the affected persons. The Section further states that it should be a constant endeavour of every public authority to take steps in accordance with the requirement stated is S. 4 (1) (b) described above to provide as much information *suo moto* to the public at regular intervals through various means of communication, including internet, so that the public have minimum resort to use this Act to obtain information.<sup>74</sup>

Every information as mentioned above shall be disseminated unduly and in such form and manner which is easily accessible to the public.<sup>75</sup> All materials shall be disseminated taking into consideration of the cost effectiveness, local language, and the most effective method of communication in the local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer (CPIO) or the State Public Information Officer (SPIO) as the case may be, available free or at such cost of medium or the print cost price as may be prescribed.<sup>76</sup>

For the purpose of the foregoing provisions, the word ‘dissemination’ means making known or communicated to the public through notice boards, news papers, public announcement, media broad casts, the internet or any other means, including inspection of officers of any public authority.<sup>77</sup>

The whole purpose of this provision is to make information accessible without a citizen having to ask for it. A citizen will then have comparatively few queries to make and that makes the operation of the right to information practicable. But that does not make the individuals query

---

<sup>74</sup> Section 4 (2)

<sup>75</sup> Section 4 (3)

<sup>76</sup> Section 4 (4)

<sup>77</sup> Section 4 , Explanation

less important. The success of the Act depends upon how seriously the administration takes the provision of section 4 (1). Civil society organizations will have to be vigilant so that these provisions do not become more in ritual form and help to achieve their purpose. There is no legal sanction against a public authority, which does not fulfill its obligations under section 4 (1).

#### Attending to Requests for Information:

Every Central Public Information Officer (CPIO) or State Public Information Officer (SPIO), as the case may be, shall deal with requests from persons seeking such information and render reasonable assistance to the persons seeking such information<sup>78</sup> she may seek the assistance of any other officer, as she may consider necessary for the proper discharge of her duties.<sup>79</sup> Any officer whose assistance has been sought shall render such assistance and shall be treated as a CPIO or SPIO, as the case may be, for the purposes of the contravention of any of the provisions of the Act.<sup>80</sup>

A person who desires to obtain information, shall make a request in writing or through electronic means in English or Hindi or the regional language along with the fees as prescribed by rules may be, of the concerned public information officer (CAPIO) or the State Assistant Public Information Officer (SAPIO) so as the case may be, specifying the particulars of the information sought.

Where such request cannot be made in writing, the CPIO or SPIO, or CPAIO or SPAIO, as the case may be, shall render all reasonable assistance in reducing the request on writing<sup>81</sup> where information is to be given to a requester who is sensorial disabled, the CPIO or SPIO, as the case may be, shall provide assistance to enable such person to access information including providing such assistance as may be appropriate for the purpose.<sup>82</sup>

---

<sup>78</sup> Section 5 (3)

<sup>79</sup> Section 5 (4)

<sup>80</sup> Section 5 (5)

<sup>81</sup> Section 6 (1)

<sup>82</sup> Section 7 (4)



The Act envisages pro-active CPIO or SPIO so that persons are not denied access to information due to their inability to frame. An information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.<sup>83</sup>

#### Time Limit for Providing Information

The CPIO or SPIO, as the case may be, on receipt of a request for information shall, as expeditiously as possible, and in any case within 30 days of the receipt of the request, either provide the information on payment of prescribed fee or reject the request for any of the reasons for which such information can be refused under the Act.<sup>84</sup>

The period of 30 days may be extended in the following cases:

- (i) Where application for information or appeal is given to an assistant public information officer, a period of five days shall be added in computing the period of 30 days response.
- (ii) Where an application is made to a public authority for information which is held by another public authority or the subject matter of which is more closely connected with the functions of another public authority the public authority to which such application has been made, shall transfer the application or such part of it. As may be appropriate to that public authority and shall inform the applicant immediately about the transfer. Such transfer shall be made as soon as practicable but in no case later than five days from the date of receipt of the application.<sup>85</sup> The period of thirty days will commence from the day of such transfer to the concerned public authority.
- (iii) Where a decision is taken to provide information on payment of any further fee representing the cost of providing the information, the CPIO or SPIO as the case may be, shall intimate to the person who has sought the information giving details of the additional fees together with calculations used for arriving at the

---

<sup>83</sup> Section 7 (9)

<sup>84</sup> Section 7 (1)

<sup>85</sup> Section 6 (3)

amount in accordance with the fee prescribed by rules, and request her to deposit the fee. The time between the giving of such intimation and the depositing of the fee shall not be taken in to account while counting the period of thirty days within such information is required to be given. Where, however, the information sought concerns the life and liberty of a person, it shall be provided within forty eight hours of the receipt of the request.<sup>86</sup>

- (iv) Where an intelligence or security organization included in the second schedule or an intelligence or security organization notified by the state government is asked to furnish information pertaining to the alleged violations of human rights, such information must be provided within 45 days.

#### Fee to be Charged:

The fee shall be such as may be prescribed by rules.<sup>87</sup> An application for information must be accompanied with the prescribed fee.<sup>88</sup> Where information is provided in printed or electronic format, the applicant shall pay such fee as may be prescribed.<sup>89</sup>

The prescribed fee, including the fee mentioned above, shall be reasonable and no fee shall be charged from persons who are below poverty line as may be determined by the appropriate authority. Furthermore, the person requesting the information shall be supplied such information without charging any fee if the information officer fails to give it within the stipulated time limit.<sup>90</sup> The concerned person who has requested information should be told where and when an appeal could be filed against the decision regarding the additional fees.<sup>91</sup>

#### *Information Concerning a Third Party*

---

<sup>86</sup> Section 7 (1) Proviso

<sup>87</sup> Section 6 (1) read with s.27 (2) (b)

<sup>88</sup> Section 6 (1)

<sup>89</sup> Section 7 (5)

<sup>90</sup> *Ibid*, Proviso

<sup>91</sup> Section 7 (3)

Where the CPIO or SPIO intends to disclose any information or record on a request made under this Act. This relates to and was supplied by a third party, and has been treated as confidential by the third party, it shall within five days of the receipt of such request give a written notice to such third party inviting her to make a submission in writing or orally regarding whether such information should be disclosed and such submission shall be kept in new while taking a decision regarding the disclosure of such information.<sup>92</sup> Except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure out weighs in importance any possible harm or injury to the interest of the third party .<sup>93</sup>

Where a notice is served on the third party regarding the disclosure of information pertaining to her, she will be given an opportunity to make a representation against the proposed disclosure within ten days.<sup>94</sup> Prior to taking any decision regarding the disclosure of information pertaining to the third party the CPIO or the SPIO shall take such submission in to consideration.<sup>95</sup> The disclosure of such information regarding a third party will further subject to the provision providing for non disclosure of information relating to privacy of a person.<sup>96</sup>

The authority shall within 40 days since the receipt of the request, after having given an opportunity to the third party to make a submission, take decision as to whether the information concerning such third party can be disclosed and give in writing a notice of its decision to the third party<sup>97</sup> such notice shall include the statement that the third party is entitled to appeal against the decision to the appellate authority mentioned therein.<sup>98</sup> Such appeal shall be made within 30 days from the date of the above order<sup>99</sup> information shall ordinarily be provided in the form in which it

---

<sup>92</sup> Section 11 (1)

<sup>93</sup> Section 11 (1) Proviso

<sup>94</sup> Section 11 (2)

<sup>95</sup> Section 7 and S11 (3)

<sup>96</sup> Section 8 (1) (j)

<sup>97</sup> Section 11 (3)

<sup>98</sup> Section 11 (4)

<sup>99</sup> Section 19 (2)

is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety of preservation of the record In question <sup>100</sup>

Exemption from Disclosure of Information starts with a non obstante clause. It says that notwithstanding anything continued in the RTI Act, there shall be no obligation to give any citizen information regarding following matters.

- (a) information the disclosure which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interest of the state, relations with foreign state or which will lead to incitement to an offence. This sounds rather omnibus and might hamper access to information since the discretion lies with the bureaucrats to exclude from disclosure various documents in the name of the security of the state or the sovereignty and integrity of India. Such exemption including (2) of Article 19 of the constitution are addressed to the Parliament and State legislatures but under the RTI acts they are addressed to the public information officer or at the most the public information commissions. Moreover, this is bound to be a highly litigated passion since the interpretation of such a clause might produce arrows of law inviting judicial intervention under Article 226 or 227 of the Constitution. The PIO's could be extra cautious to withhold a good deal of information under this clause which will negate the right to Information substantially. Almost all the states have exempted disclosure of inter-departmental or intra – departmental notes, correspondence and papers containing advice or opinion projections and assumptions relating to internal. Policy analysis, if such disclosure harms the frankness and candor of internal discussions. The central Act does not expressly exclude such inter – departmental communications. But whether departmental files or notes made there should be accessible is controversial.
- (b) Information which has been expressly hidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court.

---

<sup>100</sup> Section 7 (9)

We have already considered how the law of contempt of court has charged in England to accommodate the public interest in the dissemination of information<sup>101</sup>

- (c) Information, the disclosure of which would cause breach of privilege of parliament or state legislature.
- (d) Information including commercial confidence, trade secrets, or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information.
- (e) Information available to a person in his fiduciary relationship unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.<sup>102</sup>
- (f) Information received in confidence from foreign government.
- (g) Information, the disclosure of which would endanger the life or physical safety of any person or identity the source of information or assistance given in confidence for the enforcement or security purposes.
- (h) Information which would impede the process of investigation or apprehension or prosecution of offenders.
- (i) Cabinet papers including records of deliberations of the council of ministers, secretaries and other officers. However the decisions of the council of ministers the reason there of, and the material on the basis of which the decision were taken shall be made public after the decision has been taken and the matter is complete, or over. An exemption to this further provided in the second proviso which says that those matters which come under exemptions specified above shall not be disclosed.
- (j) Information which relates to personal information the discussion of which has no relation to any public activity or interest, or which would cause an

---

<sup>101</sup> *A.G v. Times Newspapers Ltd.* 1974 SCC 273

<sup>102</sup> *XV Hospital Z* (1998) 8 SCC 296

unwarranted invasion of the privacy of the individual unless the CPIO or the individual unless the CPIO or the SPIO, as the case may be is satisfied that the larger public interest justified the disclosure of such information. Information which cannot be denied to parliament or a state shall not be denied do any person.

The Act however, clearly does not override the Official Secrets Act 1923, by providing that notwithstanding anything is the official Secrets Act 1923, nor any of the exemptions stated above, a public authority might allow access to information, if public interest in disclosure outweighs the harm to the protected interest.<sup>103</sup>

The only doubt that arises in our mind is how far the PIOs will be able to arrive at a proper decision after balancing the competing interests in the disclosure against the public interest in secrecy except the information which is exempted from disclosure under (a), (b), and (j) above, any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which request is made shall be provided to any person making a request.<sup>104</sup>

Where a question arises as to the date to the date from which twenty years is to be computed, the decision of the central Government shall be final. This will of course be subject to appeal provided unclear under the RTI act.<sup>105</sup>

### *Rejection of Request for Information*

A request may either be granted or rejected by the CPIO or the SPIO, as the case may be.<sup>106</sup> If no information is provided within the prescribed time limit, the request is deemed to have been refused.<sup>107</sup> Where a request is rejected, the CPIO or the SPIO, as the case may be shall communicate to each person making the request

---

<sup>103</sup> Section 8 (1)

<sup>104</sup> Section 8 (2)

<sup>105</sup> Section 8 (3) Proviso

<sup>106</sup> Section 7 (1)

<sup>107</sup> Section 7 (2)

- (i) The reason for rejection;
- (ii) The period within which an appeal may be preferred against such rejection.<sup>108</sup>

A CPIO or a SPIO may reject a request for an information if such disclosure would involve breach of copyright subsisting in a person other than the state.<sup>109</sup> This provision should have been part of S.8, which list the information that is exempted from being given.

Where a request for information is rejected on the ground that its disclosure is exempted, information, which is exempted, may be separated from the information not so exempted and the CPIO or the SPIO, as the case may be, may provide information which can be given without giving the exempted part of the information. Here the doctrine of severability will apply.<sup>110</sup> Where access is granted to a part of the record, a notice shall be given to the requester stating that only that part of the record which is severable from the part that is exempted from disclosure is being given which reasons for the decision.

The name and designation of the person giving the decision the details of the fees calculated and the amount which the requester has to amount which the request has to deposit shall also be communicated. The notice shall also state that the requester has a right to have the above decision reviewed by a competent authority as provided in the Act.<sup>111</sup>

The Act does not provide for rejection of a request, which is omnibus or pertains to information, which is available elsewhere. Such provision exists in state statutes, such provision would have helped the information officers toward off requests made by busy bodies merely to cause harassment.

### Immunity from Legal Action and Exclusion of Courts

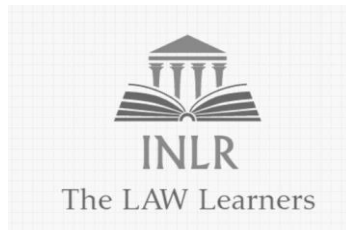
---

<sup>108</sup> Section 7 (8)

<sup>109</sup> Section 9

<sup>110</sup> section 10 (1)

<sup>111</sup> Section 10 (2)



No suit, prosecution or other legal proceeding shall lie against any person for anything which is done in good faith or intended to be done under this Act or the rules made under it.<sup>112</sup> It is further provided that no court shall entertain any suit, application or other proceeding in respect any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act.<sup>113</sup> This of course does not affect the power of the High Court to entertain petitions under Article 226 of the Constitution, several questions of law are likely to come up and the High Courts and the Supreme Court may have to give authentic rulings on them.

### *Information Commission*

The pivotal organization which controls and monitors all authorities created under the Act to make service of replying information to the citizens is the Central Information Commission at the Union level and the State Information Commission at the, State level.

### *Constitution of the Central Information Commission*

The Central Information Commission to be constituted by the Central Government through a Gazette Notification. The Central Information Commission shall consist of Chief Information Commissioner and such other Information Commissioners not exceeding ten in number. The office of the Central Information Commission shall be at Delhi and the Central Information Commission may with the precious approval of the Central Government establish its offices in any other places in India.

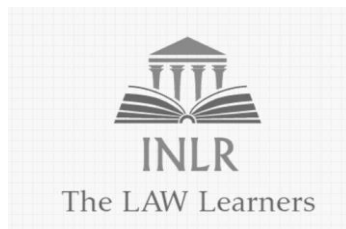
The Act says that a person of evidence in public life with wide knowledge and experience in law, science, management, journalism, mass-media, administration and governance can only be appointed as Information Commissioners. Yet, it goes on to add that members of Parliament, Members of Legislatures, persons holding office of profit, or connected with any political party or carrying on any business or profession are not eligible for appointment. The Appointment committee includes Prime Minister, Leader of the opposition in the Lok Sabha .

---

<sup>112</sup> Section 21

<sup>113</sup> Section 23





As per the provisions of the Act, the Central Government constituted the nine members CIC under Mr. Wajahat Habibullah, Former Secretary, and Ministry of Panchayath Raj as Chief of the Information Commissioner. The other eight members of the Commission are Mr. A.N. Tiwari, Prof. M.M. Ansari, Mrs. Annapurna Dixit, Mr. Satyananda Mishra, Mr. L. Sharma, Mr. Shailesh Gandhi, Mrs. Deepak Sandhu and Mrs. Sushma Singh.

The Signals animating from recent appointments of information Commissioners are anything but comforting. Civil servants in India spend a life time guarding official information and it would be ludicrous if they alone are given statutorily secure positions of information Commissioners, with attendance power and pelf Cabinet Minister to be nominated by the Prime Minister.

The term of office of the Chief Information Commissioner and the Information Commissioner shall be five years or, up to the completion of 65 years. The term of the Chief Information Commissioner shall not be extended, even where he has not completed the age of 65.<sup>114</sup>

The salary and allowance payable to Chief Information Commissioner shall be on par with the election Commissioner<sup>115</sup>, subject of course to general rules as regards the payment of salaries and allowances when the concerned officers are reappointed earning salaries, allowances payable to them shall not be varied to their disadvantage after they are appointed and continuing in service. The Central Government shall make all necessary arrangement for the office of the Central Information Commission and for the staff appointed therein.

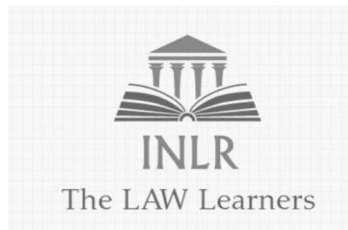
The Chief Information Commissioner or any Information Commissioner can be removed from his position on grounds of proved misbehavior or incapacity after an enquiry is held and report submitted by the Supreme Court on the reference made to it by President. If the report of the

---

<sup>114</sup> for the words "for a term of five years from the date on which he enters upon his office", the words "for such term as may be prescribed by the Central Government" is substituted by The Right To Information (Amendment) Act, 2019

<sup>115</sup> As substituted by the Right To Information (Amendment) Act, 2019, S. 16(5) of the Act states that the salaries and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall be such as may be prescribed by the Central Government:

Provided that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall not be varied to their disadvantage after their appointment.



Supreme Court is adverse to the delinquent, the president shall remove the Chief Information Commissioner or Information Commissioner forthwith. The president may terminate the services of the Chief Information Commissioner or any Information Commissioner if he finds him.

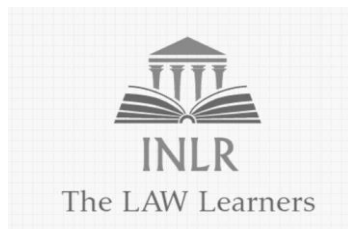
- (1) as an adjudicated insolvent; (2) as having been connected of an offence involving moral turpitude; (3) as engaged in any paid employment outside the service; (4) as unfit to hold office by reason of any infirmity of mind or body; or (5) has acquired any financial or other interest which prejudicially affects its function as Chief Information Commissioner or Information Commissioner.
- (2) The President may suspend the Chief Information Commissioner or the Information Commissioner during the pendency of any reference made by him to the Supreme Court. There is no question therefore of the President suspending the Chief Information Commissioner or the Information Commissioner even before any reference is actually made.

### *The State Information Commission*

The State Information Commission will be constituted by the state government through a Gazette Notification. State Information Commission shall consists of state Chief Information Commissioner and such number of State Information Commissioner as the Governor may appoint their appointment is made on the recommendation made by a committee appointed to select their names, such committee shall consist of the Chief Minister who shall be its chairman, the leader of the opposition/leader of the largest political party other than the party in power and another Cabinet Minister nominated by the Chief Minister. The Governor shall appoint the recommended candidates.

The general control and Superintendence of the Commission shall vest in the State Chief Information Commissioner and the other State Information Commissioners shall assist the State Information Commissioner the State Information Commissioner shall be autonomous and the Commissioner shall function as independent authorities and the Chief Information Commissioner shall act without being in the need by any person or authority outside the Act.

The State Information Commissioner shall not hold any office of profit or carry on any business or profession and they shall not be connected with any political party. The last condition



is a new condition not prescribed in analogous legislation and the addition of this condition may be a significant improvement.

The headquarters of the State Information Commission shall be at such place as the state Government may specify. The State Chief Information Commissioner and the state Information Commissioner may remit their offices by resignation tendered to the Governor. They may be removed on grounds of proved misbehavior or incapacity only after a reference is made to the Judge of the Supreme Court for enquiry and report. If the report recommends their removal the Governor shall order their removal.

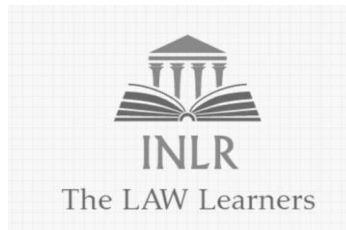
The salaries and allowances payable to the Chief Information Commissioner shall be on par as the Election Commissioner of the Central Election Commission and the salaries and allowances payable to the state Information Commissioner shall be on par with the Chief Secretary of the State Government.

The salaries and allowances payable to the State Chief Information Commissioner and State Information Commissioner shall not be varied to their disadvantage after their appointment. The State Government can vary them if the variation is to their advantage.

The State Information Commissioner and the State Information Commissioners are high officers. They are statutorily appointed under the provisions of this Act directly by the Governor and they are accordingly free from the control of the Executive.

Therefore, their suspension and removal can't be affected through normal process applicable to other employees of the Government. If they are to be removed on account of any misbehavior or incapacity there shall be an enquiry conducted against them by a Supreme Court Judge and it is on the report submitted to the Governor if it is unfavorable to them the Governor shall remove them.

In case, if it is proposed to terminate the service other than by removal for proved incapacity or misbehavior it can be done by the Governor, if it is proved to his satisfaction that the delinquent is adjudged as an insolvent or was convicted for an offence which involves moral turpitude, or it is found to have been engaging in any paid employment other than his office or is found to be in a bad mind or has acquired financial interest in any business, trade or avocation which is likely to affect prejudicially his functions as State Chief Information Commissioner / State Information Commissioner. They may be suspended by the Governor during the period



when any enquiry against them is under progress with the Judge of Supreme Court on charges of in capacity or misbehavior.

*Powers and Functions of the Information Commissions: Appeal and Penalties*

Section 18 of the Act dealt with powers and functions of Information Commissioners. The duty of the Central Information Commission and the State Information Commission is to receive and inquire into complaints from any persons provided there is a reasonable ground.

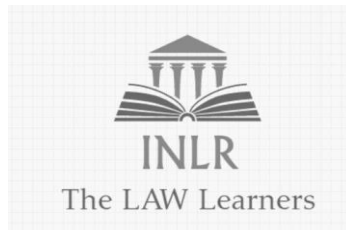
The following are the ground for complaints –

- (a) The state or Central Information officer had refused to accept the application or the appeal or there was no such officer appointed.
- (b) The person was refused access to any information or he was not given any response or access to the information within the prescribed time or he / she was asked to pay a fee which he / she considers. Unreasonable and is not willing to pay the same or if / she feels that the information given to him/her is incomplete, misleading or false and to any other matter related to obtaining access to information under this Act.

The Central Information Commission or the State Information Commission have the same powers as the Civil Court under the Code of Civil Procedure, 1908 for summoning, enforcing attendance of witnesses and compelling them to give oral or written evidence under oaths. It has also power to produce documents or things, to give affidavit, discovery and inspection of documents or requisition of any documents from any other courts, issuing summons for examination of documents and witnesses or any other matter prescribed. The Central or the State Information Commission during an inquiry may examine any record under the control of the public authority without any problem.

*Appeal*

Section 19 deals with Appeal. Any persons can make an appeal if a response has not been received by him/her within 30 days or submitting the application as prescribed in Section 7 or if he/ she is aggrieved by the decision of the Central or State Public Information Officer. In both the cases, he/she has to appeal to a senior ranked officer within 30 days from the date of expiry or



after receipt of such decision. If such officers are satisfied then even after expiry or 30 days the appeal can be admitted.

An appeal is to be made within 30 days by the concerned third party against an order under section 11 that is disclosure of their party information. A second appeal is to be made to the Central Information Commission within 90 days from the date of such decision made or received and its decision will be binding.

If sufficient cause can be shown, the Central and State Information Commission will receive it even after the expiry of the ninety days. If the appeal is related to third party information disclosure then Central and State Information Commission will give sufficient opportunity to hear the third party. In any appeal case to justify the denial, the burden of proof is on the shoulder who denies the request.

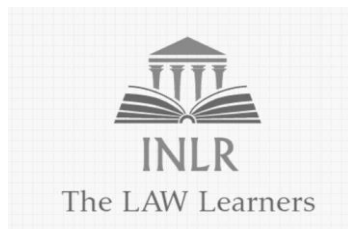
An appeal has to be disposed off within 30 days from the receipt of the case or it can be extended to a maximum of 45 days from the date of filing stating the reasons in writing.

The Central Information or the State Information Commission has the power to make the public authority to take any steps for providing access to any information in the prescribed form, to publish authority to take any steps for providing access to any information in the prescribed form, to publish certain information, to train its officers on right to information and give an annual report and also make required changes for proper maintenance, management of records.

It can compel the public authority to compensate the complaint for any loss or damages. Central or State Information Commission has the power to impose penalty as prescribed in this Act and it can reject the application also. It shall give notice of its decision both to the complainant and the public authority and also stating the right of appeal and shall decide the appeal as prescribed.

#### *Penalties – Section 20*

The Central Information Commission or the State Information Commission, while deciding on any complaint or appeal of the opinion that the Central Public Information Officer or the State Public Information Officer has without any reasonable cause refused the application or has not furnished the information within the stipulated time or willfully mislead or misguided the complaint with false or incorrect or incomplete information or destroyed the information within the stipulated time or willfully mislead or is guided the complaint with false or incorrect or



incomplete information or destroyed the information which was requested, then a penalty of Rupees 250 per day will be imposed on the officer till he receives the application or provides the information requested but the total penalty should not exceed twenty five thousand rupees.

The officer will be given a chance of hearing before penalty is imposed but the burden of proof lies on his / her shoulder to prove that he/she acted reasonably and diligently. Disciplinary action will also be taken against him/her under the applicable service rules.

### *Impact of the Act on Official Secrets Act 1923 and Indian Evidence Act 1872*

The Official Secrets Act 1923 is India's anti espionage Act held over from British Colonization. It States Clearly that any action which involves helping an enemy state one cannot approach, inspect, or even pass over a prohibited government site or area.

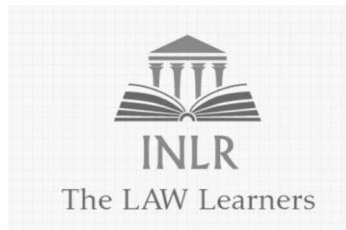
The disclosure of any information that is likely to affect the sovereignty and integrity of India, the security of the state, or friendly relations with foreign state, is punishable by this act.

The Official Secrets Act enacted, in 1923 still retains in Original form, apart from some minor amendments in 1967. These Provisions have been roundly criticized. The Central Civil Service Rules 1964 bolster the provisions of the official secrets Act by prohibiting government servants from communicating any official document to any one without authorization.

Section 123 of the Indian Evidence Act, 1872 also prohibits the giving of evidence from unpublished official records without the permission of the head of the relevant department, who is free to grant or to withhold such permission as he or she thinks fit.

The official Secrets Act is many of several Acts of the United Kingdom Parliament for the protection of official information, mainly related to national security. The latest revision is official secrets Act 1989 (1989 chapter 6), which removed the public interest defense by repealing section 2 of the Official Secrets Act 1911.

Punishment unclear the Act ranges from three to fourteen year imprisonment. A person prosecuted under this Act can be charged with the crime even if the action was unintentional and not intended to endanger the Security of the state. The Act only empowers persons in position of authority to handle Official Secrets and others who handle it in prohibited areas or outside them are liable for punishment. In the OSA clearly 6, information



from any governmental office is considered official information hence it can be used to overrule freedom of information requests.

#### **Iftikhar Gilani Case -2002:**

In June 2002, journalist Ifrikhar Gilani was arrested for violating the OSA 1923. He was charged under the Obscenity Act added to it. The first military report suggested that the information he was accused of holding was “secret” despite being publicly available. The second military intelligence report contradicted this, stating that there was no “official secret”. Even after this, the government denied the opinion of the military and was on the verge of challenging it when the contradictions were exposed in the press.

The military reported that “the information contained on the document is easily available” and “the document carries no security and the information seem to have been gathered from open sources”.

On January 13, 2003, the governments withdrew its case against him and Gilani was released the same month. Now the official Secrets Act, 1923 has been overturned by the Right to Information Act, 2005 except in cases where the nation’s security and sovereignty are threatened<sup>116</sup> that is, majority of the provisions of the Officials Secrets Act, 1923 have been water down by the provisions of Right to Information Act 2005. In this context there arises a fundamental question whether Official Secrets Act. 1923 is no more relevant and whether it is desirable and advantageous to repeal the official Secrets Act, 1923.

#### ***Judicial Approach to the Right to Information Act -2005***

Right to Information Act has become a weapon in the hands of citizens to badger and make authorities respond to their queries and problems. It injected an element of transparency to governance in a way that would have been unimaginable earlier. Just after its enactment the Supreme Court of India sought exemption from RTI Act. Arguments forwarded by the Supreme Court to seek exemption may be evaluated one by one.

#### ***The RTI Act might Interfere with the Independence of Judiciary***

---

<sup>116</sup> Deepthi Kapoor, “Shaking the Steel” *The week*, October 30, 2015, P.54

The Independence of judiciary from the executive and Legislature as well as independence of each and every judge within the judiciary is considered as a necessary condition for a free society and constitutional democracy. It ensures the rule of law and realization of human rights and also the prosperity and stability of a society.

Therefore, the Constitution provides for the independence not only of the Supreme Court but also of the High Courts and the subordinate courts. The Supreme Court has also held more than once that the independence of judiciary is a basic structure of the Constitution and any attempt to curtail it directly or indirectly even by an amendment of the Constitution is invalid.<sup>117</sup> At the same time, it is true that independence of the judiciary should also be maintained and ensured from inside the judiciary.

The purpose of the RTI Act is to make public authorities transparent and accountable being transparent and accountable does not mean interference with independence. In fact, the purpose of the independence of judiciary as well as transparency and accountability by access to information through the RTI act is one and the same. It is best to serve the citizens of this country with accountability, transparency and without any unwanted obstructions. For that, independence of judiciary is needed. Now, when purpose of both is the same and one it is unimaginable that the RTI Act might interfere with the independence does not mean absence of accountability responsibility and transparency.

The Supreme Courts argument for exception is at adds in its role. The courts are meant to be a sentinel of democracy, providing a check on the other organs of government in that sense, it is supposed to stand up for citizen's right against encroachment by the state. Whatever goes on in court is, of course, recorded and available to the public. The Supreme Court's logic that it must be exempt from RTI on the ground that its authority would be undermined holds little water.

The Court must be the most accountable institution in any democracy because of its vital role as watchdog. In fact, judges must be held to standards that are higher than other government officials. That will ensure that the court, like any other institution is accountable to the people.

---

<sup>117</sup> *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1980 SC 1789; *S.P. Gupta v. Union of India*, AIR 1982 SC 149; *P. Sambhamurthy v. State of Andhra Pradesh*, AIR 1987 SC 663; *Kichoto Holohan v. Zachillu* AIR 1993 SC 412 S.C; *Advocates on Record Assn V. Union of India*, AIR 1994 SC 268.



The infinite fact remains that many judges have lost their conscience because of curious sense of independence without accountability. We want a judiciary whose body and soul are beyond purchase, partiality and corruption, and whose performance is free, fearless and fair.<sup>118</sup>

### *Judiciary is a Constitutional Body*

Another argument forwarded by the judiciary is that it is a constitutional body. If on the basis of this argument, the RTI Act is made inapplicable to the Judiciary, then the other two organs, i.e. Executive and Legislature will also claim this privilege and the entire purpose of passing this Act will not be fulfilled.

Further, object and purpose of the RTI Act is to provide for setting out the practical regime of right to information under the control of public in order to promote transparency and accountability in the working of every public authority. Again, Section 2 (h) of the RTI Act defines the term “public authority”. According to it, ‘public authority’ means any authority or body or institution of self government established or constituted

- a. By or under the Constitution and
- b. By any other law made by the Parliament

This section makes it very clear that judiciary is well within the ambit of RTI Act. Section 2 (e) of the Act defines term competent authority, who are empowered under section 28 of the act to make rules to carry out the provisions of the Act. It provides literally:

- (ii) The Chief Justice of India in the case of the Supreme Court.
- (iii) The Chief Justice of the High Court in the case of a High Court.

So, unless Section 2 (h), 2 (e) (ii) and (iii) are amended by the parliament or be declared unconstitutional by the competent court, it will have full authority to cover judiciary.

Founding fathers have entrusted greater responsibility on the judiciary than the other two organs of the state. It has been established as final interpreter of the constitution as well as guardian of the Constitution. So out of all three organs of the state judiciary be more responsive, accountable and transparent.

---

<sup>118</sup> Justice V.R Krishna Iyer, “Needed Transparency and Accountability”, *The Hindu* (Delhi), Feb 19, 2009.

Organs of the state have been created to serve the citizens of this country and citizens in turn, have right to check and control their service providers. Unless access to information will be provided, it will not be practicable to make effective exercise of freedom of speech and expression to check, criticize and control service providers.

*Disclosure of Assets by Members of Judiciary in the Possession of CJI's Office and Personal Confidential Information in Fiduciary Relationship*

Once, the arguments forwarded by the Supreme Court to seek exemption gained momentary after an order passed by the Central Information Commission (CIC) asking the Supreme Court Registry to provide information<sup>119</sup> in the possession of Chief Justice of India (CJI). Later on, in an appeal made by the Supreme Court Registry, the Delhi High Court stayed the order of the CIC.

The Delhi High Court has held that the office of the Chief Justice of India (CJI) is a “public authority” that comes within the ambit of the RTI Act and it is bound to provide information about the declaration of asset details by Supreme Court Judges.

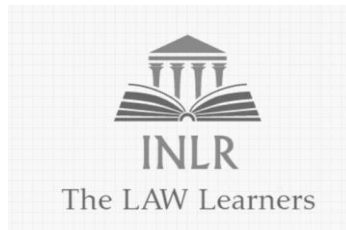
*CJI Comes Under the RTI Act*

The Central Information commission (CIC) has ruled that the Supreme Court is obliged to give information to an Appellant who wanted to know whether the judges of the Supreme Court are furnishing the details of their assets or not. Allowing the petition of one S.C Agarwal, three member bench of the Central Information Commission directed the Supreme Court's information officer to provide information asked by Mr. Agarwal in his RTI application whether the Judges have filed the details of their assets or not.

Central Information Commission ruled that the Supreme Court is an institution created by the Constitution and, therefore, is a public authority. CIC also held that the status and position of the CJI is unique under the Act, which says that all those including the President, Chief Justice of India, speakers of both Houses of Parliament, Chief Justices of High Courts and an administrator appointed under article 239 of Constitution all are covered under the Act.

---

<sup>119</sup> On declaration of assets by judges of the Apex Court and High Courts as per May 7, 1997 resolution adopted at an All India Judges Conference.



The office of the CJI is not exempt from public scrutiny. The decision of the full bench of Delhi High Court comprising Chief Justice A.P. Shah, Justice Vikramjith Sen, and Justice S. Muralidhar confirming that every citizen has the right to obtain information provided by the Supreme Court Judges and held by the Chief Justice of India is a welcome blow of transparency and accountability from the higher judiciary, This was the third in the series of legal challenges to such disclosure mounted by the Supreme Court.

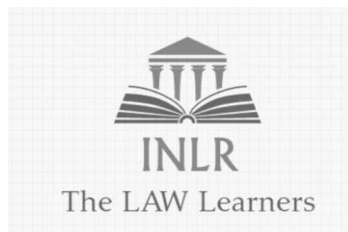
The case related to the information on the disclosure of assets of judges to the CJI as required under the 1997 resolution passed by all the judges of the Supreme Court. What the RTI applicant sought was not the contents of the declaration but merely if the judges had furnished the information required under the 1997 resolution.

Before the Delhi High Court bench, the Supreme Court raised the technical contention that the 1997 resolution had only moral force. It also argued that CJI held such information in a fiduciary capacity and in confidence and could not be compelled to disclose it.

The Delhi High Court rejected both these arguments, pointing out that the 1997 resolution passed unanimously by the judges themselves was considered binding. It also held that the CJI was not acting in a fiduciary capacity, but was holding the information by reason of his office. It is significant that Court also sought to place the right to information on higher constitutional right to freedom of expression under Article 19 (1) (a) and not just on the RTI Act.

The decision marks the close of one chapter that saw unusual spectacle of the Supreme Court canvassing its case before the High Court and losing – an outcome that should strengthen public perception of the independence of the High Court. Stranger would be the Supreme Court taking up its own case on appeal from the Delhi High Court decision. Bowing to the public opinion, the Supreme Court made public the disclosure of assets of all its judges on its website and the issue raised in the case has been addressed substantially. The gains from such transparency, would be squandered if the court were now to use its authority to insulate itself from public scrutiny.

Democracy can grow not only under the vigilant eye of its legislature, but also under the guidance of public opinion and the Right to Information Act, 2005. If democracy has to survive,



the best way is to have all our citizens informed as to how this judicial system functions and to accept true and fair criticism. It will be a mistake, therefore, to try to establish and maintain, through ignorance and fear public esteem for our courts.

### *Conclusion*

Conscience is the light of the soul that burns within the chambers of our psychological heart. It is as real as life is. It raises the voice in protest whenever anything is thought of or done contrary to righteousness. We should have the wisdom of using the clean conscience which enables one to enjoy freedom. Once conscience is clean there is no difficulty in making it an open book and making information available to all the stakeholders of the system.

The new legislation is a radical improvement on the relatively weak statute it seeks to replace, the Freedom of Information Act 2002. It unequivocally confers on all citizens the right to access to information and correspondingly, makes the dissemination of such information an obligation for all public authorities.

The Right to Information and open government are considered to be two of the most important and imperative attributes of liberal Democratic Countries. There has been an almost indomitable global trend in the recent years towards recognition of the right to information by countries, non-governmental organizations, civil societies and the common masses. In turn the Act facilitates speedy redressal of public grievances and thus improves feeling of good will towards the government. On the other hand, restrictions on the free flow of information results in the feeling of “powerlessness” and “alienation” among the citizens. Concealing information makes the government machinery less accountable and therefore more prone to misuse of power.

Right to Information Act 2005, is the Jewel in the crown of a successful constitutional reform. It is a supreme manifestation of ‘freedom of speech and expression’ guaranteed by our Constitution. It is rightly stated that, the right to information makes a unique opportunity for all of us to participate in nation building. By accessing and seeking information, citizens are in a better position to guide and direct meaningful implementation of policies and directives. Effective participation in such process is nothing but self – governance. The Act strengthens people’s voice against arbitrary functioning of public authorities, and to curb insensitivity on the part of public agencies and authorities towards people’s problems.

Although the Right to Information Act, 2005 is a welcome step but still it suffers from certain loopholes. For this Act to be a success, a right balance has to be struck between the competing interests of state and society<sup>120</sup>. For this purpose, the Act has to have certain qualities. They are

- (a) Maximum disclosure: RTI basically being a human right as well as fundamental right legislation on freedom of information, it must contain provisions, so as to provide maximum disclosure, with least exemptions as possible.
- (b) Obligation to publish: A successful Freedom of Information Act will contain provisions which makes it obligatory on the part of public authorities to publish either in printed format or by resorting to digitalization of records i.e., computerization of records as regards to all aspects encompassed by the Act.

The poor flow of information is compounded by two factors (1) low levels of literacy and (2) absence of effective communication tools and processes. In many regions, the standard of record keeping is extremely poor. Most government offices have stacks of dusty files everywhere, providing an easy excuse for refusing access to records on the specious excuse that they have been 'misplaced'. The rapid growth of information technology on the other hand, has meant that most states in the country are now trying to attract investment, and this is indirectly contributing to an improved flow of information.

We can see the success stories report from time to time regarding the use of the Act by common citizens in addressing their day-to-day problems. Citizens have successfully used the Act in matters such as issuance of ration card, securing admission in Government Schools, getting passport, electricity and water connections and other public services. These certainly are good beginning stories of the use of the Act by the more enlightened citizens in getting developmental schemes and projects sanctioned and executed in time.

The above mentioned success stories can be used more extensively to elicit vital information regarding livelihood and gender issues, developmental programmes, health, education and literary issues and so on. Its use should not get restricted only to individual concerns especially of those who have personal axes to grind with little implication for public interest.

---

<sup>120</sup> *Freedom of Information; Access to Information as a key to Democratic Governance*, by Padmaja Padman, [www.humanrightsinitiative.org/programs/rti/malaysia.pdf](http://www.humanrightsinitiative.org/programs/rti/malaysia.pdf); accessed on 28.8.2017.

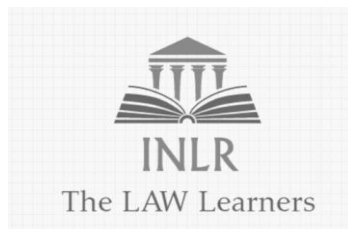
However the RTI India has certain weakness that hampers implementation. There have been questions on the lack of speedy appeal against non compliance to requests. The lack of a Central PIO makes it difficult to pin-point the correct PIO to approach for requests. The PIO being an officer of the Government institution may have a vested interest in disclosing and damaging information on activities of his/her institution. This therefore creates a conflict of interest. In the state of Maharashtra it was estimated that only 30% of the requests are actually realized under the Maharashtra Rights to Information Act. The law also bars disclosure of information that affects national security, defense and other matters that are deemed of national interest.

Our former Prime Minister Dr.Manmohan Singh described the Right to Information Act as “the consummation of a process initiated with the adoption of our Constitution” The RTI, along with the 73<sup>rd</sup> and 74<sup>th</sup> Amendments to the Constitution and the National Rural Employment Guarantee Act, took India closer to fulfilling Mahatma Gandhi’s idea of “real swaraj” he said. He commended the public authorities for taking on the task of implementing the RTI Act without additional staff.

We need to balance the need for information with the limited time, material and human resources available with public authorities, he said. Encouraged by the response from stake holders, the Prime Minister was hopeful that a time would come when a citizen might not have to make an application for seeking information under the Act as authorities would place more and more information in the public domain on their own.

Right to know is the most fundamental of all those rights, which are critical for upholding human dignity. We live in age of information, in which the free flow of information and ideas determines the pace of development and well being of the people. The implementation of RTI Act is therefore, an important milestone in our quest for building an enlightened and at the same time, a prosperous society. Therefore, the exercise of the RTI cannot be the privileges of only a few.

Despite all these short comings, the legislation guaranteeing the right to information is a major step towards ensuring a participatory developmental process in the country. For the law to be truly effective it will need the active participation of the community at large, including non-government organizations and the press, who will need simplify and disseminate the possibilities under the new law to citizens. The new law could be the tentative beginnings of a more inclusive



development process – what Amartya Sen describes as “a momentous engagement with the possibilities of freedom”.

More than anything else, at a fundamental level, RTI Act ensures realization and meaningful implementation of a constitutional right without there being a need or necessity to approach any court of law. Towards this end, the Act provides a very simple process facilitating people to obtain the information from any public authorities.

Last but not least, the debate about whether CJI and Supreme Court Judges should come under purview of RTI or not. Both the Government and Judiciary’s response is not only similar but also on expected lines. They claim that constitutional Authorities fall outside the scope of RTI Act. In terms of the spirit and rationality of RTI, those who interpret and uphold Constitutional Principles and tenets should come forward to be covered under the ambit of RTI. This simple measure will have a larger and much deeper influence in the form of protection and promotion of Constitutional Values. If the individuals’ actions and decisions are transparent, seeking shelter under Constitution undermines the very integrity of that individual.

In recent years, there has been an almost unstoppable global trend towards recognition of the right to information by countries, inter governmental organizations, Civil Society and the people. The right to information has been recognized as fundamental human rights, which upholds the inherent dignity of all human beings. The right to information forms the crucial underpinning of participatory democracy – it is essential to ensure accountability and good governance.

We must encourage the use of the Act for achieving good governance and resist and attempt to use the Act to cripple the functioning of public administration. The RTI has already set in motion, a revolutionary process, which has the potential to root out corruption and to make public administration truly participatory, accountable and transparent.

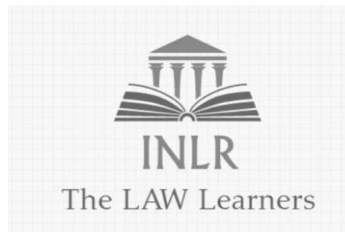
## **10. SUGGESTIONS**

The positive and purposeful outcome is very clear and explicit from the RTI Act enforcement. The unclear lying potential is much larger in perspective and deeper in influencing people’s participation in democratic governance.

The following suggestions which will undoubtedly succeed in influencing the purposeful implementation of RTI Act as to achieve much more concrete and desired impact. They are:

- a. Consistent dissemination about RTI among public;
- b. Essential principles pertaining to RTI must form part of school and college curricula;
- c. Strengthening NGO's and other organizations to get involved in practical enforcement of RTI Act;
- d. Adequate training to members of the Commission;
- e. Appropriate steps must be taken to see that the pendency of petitions does not acquire monumental presence;
- f. Creating awareness about RTI among public servants in different public authorities;
- g. Members involved in governance in different layers like panchayat etc. must be provided appropriate training about RTI;
- h. Erring officials must be subjected to statutorily envisaged fines;
- i. Authorities require to be informed and encouraged about the need for appointing PIOs;
- j. The authorities in different public departments must publish the required and warranted information as mandated by the RTI Act;
- k. Adequate number of commissions must be appointed;
- l. Schools and colleges must be encouraged to conduct RTI clinics;
- m. Ongoing community campaigns need to be facilitated;
- n. The application formalities and proceedings must be made simpler and people friendly;
- o. Specific steps need to be initiated to enlarge the scope of RTI like combined campaigns for right to information; and
- p. Delayed responses by officials concerned must attract fines.





VOLUME 2

ISSUE I

**THE LEGALITY OF FULLY AUTONOMOUS WEAPONS SYSTEM IN SITUATION OF  
SURVIVAL OF THE STATE: A CRITICAL PERSPECTIVE**

- Ashuthosh Vinod<sup>1</sup>

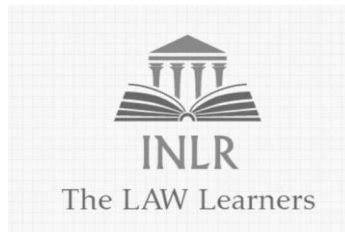
**ABSTRACT**

*Autonomous weapons are those weapons that can select and engage targets without human involvement either by its own intelligence or by prior instructions set by humans. This by far has been the most significant change in warfare that has been witnessed. The rise of autonomous weapons has sparked a robust international debate surrounded on one fundamental question: Whether the use of such weapons in a situation where the survival of the state is vital is legal? While the features of autonomous weapons may give rise to facts in which the application of the current law is difficult, the existing principles of international law are sufficient to regulate the use of such new technology weapons in a situation of an armed conflict. This article shall examine the current position of the controversial debate on whether the use of fully autonomous weapons shall be legal or not, discuss it in the light of relevant issues in international law, and analyse the characteristics of autonomous weapons when used in armed conflict. The article shall reach to the conclusion as to whether the use of a fully autonomous weapons system is legal or not in any circumstance but with particular emphasis on the situation of 'Survival of State'.*

**Keywords:** Autonomous Weapons, International Humanitarian Law, Armed Attacks and Self Defense.

---

<sup>1</sup> Law Student, Institute of Law, Nirma University, Ahmedabad



VOLUME 2

ISSUE I

## 1. INTRODUCTION:

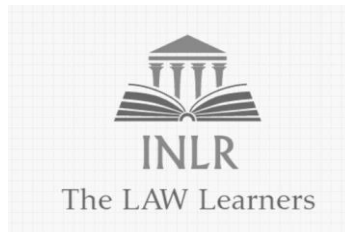
In the last one or two decades, there has been a massive increase in the development sector around the globe. Every state spends a huge amount of money and resources on the development of new artificial intelligence technology. States have increased their production of new weapons. Most of them have been banned by the Convention on Certain Conventional Weapons (CCW) laws. Such weapons range from anti-personnel mines, booby traps, and laser guns to weapons of mass destruction like nuclear, biological, and chemical weapons which not only pose harm to innocent civilians during an attack but also cause unnecessary harm to property, livelihood and the environment.<sup>2</sup>

The latest weapon to be developed and a certain type of it still in the developing stage is Fully Autonomous Weapons Systems (AWS). They are also called as killer robots. States would soon in a decade or more substitute their method of warfare from using ground troops to using such killer robots because they are cost-effective in terms of use of military power and their use in an armed conflict would lead to a reduction in the risk of casualties of ground troops. These killer robots are much more efficient than human troops for the sole reason that they do not have any emotional feelings that we humans face in any situation. They act the way they are programmed to as they work on algorithms based on certain input and desired output.

The debate with regards to the use of AWS in a situation of an armed conflict as a measure of self defense is a question that has not yet been solved and that shall be answered in this article. The article shall be divided into three parts, **firstly (I)** defining the nature and characteristics of an autonomous weapon, **secondly (II)** analysing the effects of such weapons on civilians, combatants and property and **thirdly (III)** regulate the use of such weapons, if possible, under the light of principles of international humanitarian law and use of force.

---

<sup>2</sup> Human Rights Watch, *Losing Humanity. The Case Against Killer Robots*, HRW (June 24, 2020, 1:10 AM), <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots>.



VOLUME 2

ISSUE I

## (I) NATURE AND CHARACTERISTICS OF AN AUTONOMOUS WEAPON:

There is no law, treaty, or convention governing the development or use of autonomous weapons. The definition that has been cited the most when it comes to defining AWS is the definition given by the US Department of Defence's (DOD). The DOD defines AWS as “a weapon system(s) that, once activated, can select and engage targets without further intervention by a human operator.” These weapons would be having the capability to select and engage their own targets on the basis of the prior command given to them.<sup>3</sup>

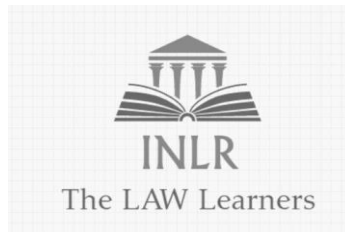
There are two types of system, one is autonomous and the other is an automated weapons system. An autonomous system works on the basis of an input specific but no pre-determined desired output. Such output or decision made by the weapon is determined on the basis of its sensors data that it receives from the input. Such weapons system works more like human intelligence where it makes a judgement or decision based on the sensors data that it receives from its surroundings at that point of time. On the other hand, an automated weapons system works on the pre-determined rules and output put in by the human developers. It acts like a rule following machine wherein the judgement or decision shall be the same for all situations and not based on the situation.<sup>4</sup>

The characteristics of AWS which countries are trying to develop and would successfully use it in their arsenal would be of autonomous nature. According to ICRC, an “autonomous system would have artificial intelligence that would have to be capable of implementing

---

<sup>3</sup> Md. Lutfur Rahman, *The Legality of Artificial Intelligence Weapons*, THE DAILY STAR (June 24, 2020, 1:01 AM), <https://www.thedailystar.net/law-our-rights/law-vision/news/the-legality-artificial-intelligence-weapons-1794499>.

<sup>4</sup> *Id.*



## VOLUME 2

## ISSUE I

IHL”<sup>5</sup>. Moreover, autonomous weapons operate with an interactive system of Human-in-the loop, Human-on-the loop, or Human-out-of-the loop.

The first system refers to such weapons which are directly influenced by a human operator and decide to attack on the command given by such human operator. They cannot act on their own without any direction given by the operator. Such weapons are ideally used in an armed conflict.

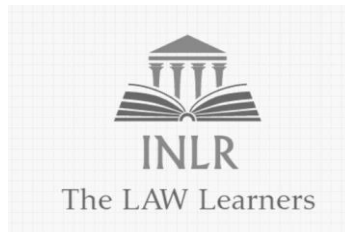
The second system refers to weapons that can select their targets and engage on their own individual capacity as there is a human operator who has the power to override such action taken by the system. So, in this interaction system, although the selection of targets and the launching of an attack is in the control of the weapons system, the final order shall be with the human operator and such operator shall always have the option of overriding such attack and stopping such system from engaging in an illegal attack. Human operators have a supervision role where they supervise the functioning of such a weapons system.

The third system refers to weapons that can select targets and simultaneously engage in an attack without the control of any human operator. They work independently without any overriding or supervision from such human operators. This system of interaction has faced the most criticism for the controversy it has created on the basis that artificial intelligence shall now substitute human intelligence during an armed conflict where the survival of the state is vital and at stake.

Lethal Autonomous Weapons System or **LAWS** are being voted to be banned on a pre-emptive basis by many international NGOs and UN bodies for the controversy that lethal attacks shall be discharged without any human operator making the final decision or order to kill in a situation of an armed conflict as a measure of self defense.

---

<sup>5</sup> ICRC, Statement to the Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapon Systems, (15 November 2017) <https://www.icrc.org/en/document/expert-meeting-lethalautonomous-weapons-systems>.



## VOLUME 2

## ISSUE I

The nature of such an attack shall be unique for the reason that the weapons system shall select the target and engage in an attack based on the sensors data it receives. The attack can be indiscriminate as such a system lacks any skill of human judgement which is based on rationale and emotion. Artificial intelligence and judgement shall be based on the orders or instructions that were pre-designed and they shall also be after the analysis of the sensors data that the weapons system receives.

The use of other AWS like Unmanned Aerial Vehicle (UAV) or Remotely Piloted Aircraft (RPA) in combats was for the specific purpose of intelligence gathering or data gathering for future or potential strikes. This strategy was used in the 1980 to 1990 period after which drones were developed which could be distantly operated and such drones could undertake an attack in the target area.

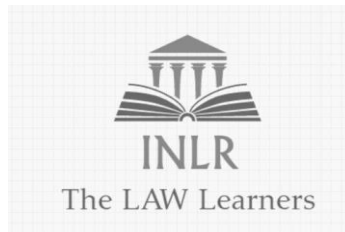
In a more complex situation where non-international actors or international actors pose a threat to the survival of the state, the state may deploy such weapons system which would be of such nature that it would detect or identify incoming targets from the enemy and then defend the military base by neutralizing the same or by using force as a measure of self-defense on the target. Here, the AWS shall act as an Anti-Rocket or Mortar weapon, the primary purpose of which is to protect the state's interests. Hence, their functioning is to create deterrence<sup>6</sup> and not use the same to first attack the target.

## **(II) EFFECT OF AWS ON CIVILIANS, COMBATANTS AND PROPERTY:**

### **a.) Civilians:**

---

<sup>6</sup> THOMAS C. SCHELLING, *ARMS AND INFLUENCE* (Yale University Press 2008).



## VOLUME 2

## ISSUE I

Attacks engaged by the weapons system if made under the mistake of selecting the wrong target may pose a severe threat to harm civilians who shall be the likely target.

Civilians unless they take a direct part in armed hostilities are presumed to be innocent and are thus, exempted from receiving any damage as a result of an armed conflict. Civilians are protected under the provisions of the IV Geneva Convention 1949 as they are innocent people who do not wish to be a part of such armed hostilities.

Now even at the time of situation of survival of the state, no state can attack civilians or civilian object unless such damage shall be collateral<sup>7</sup> There shall be no indiscriminate attacks on civilians due to the inability of such AWS to target the attack properly as such an attack would lead to the death of innocent civilians and many of them shall be severely injured. There would be unnecessary damage to the property of civilians which shall hamper their livelihood. Moreover, there would be increased damage to civilians in terms of death and severe injury due to the effects of the debris of the damaged property and the incidental damage it might have caused. The food and water supply to them might be affected along with incidental damage to the environment surrounding the area.

### **b.) Combatants:**

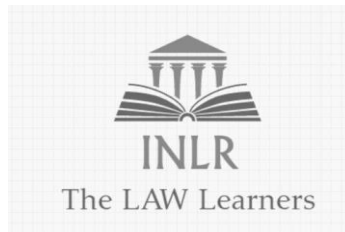
Although a state shall have the authorization to attack a combatant in a situation where the survival of the state is vital, no state can attack a combatant more than what is necessary to serve the military objective determined<sup>8</sup>. The laws of war protect combatants from suffering unnecessary damages due to attacks that are indiscriminate in nature.

There is a high probability that AWS shall engage in attacks of proportionality that is more than what is required because there is no human control or operator to govern the conduct of such weapons system and to override the functioning of such weapons system.

---

<sup>7</sup> JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF AUGUST 1949 (Yves Sandoz et al. eds., 3<sup>rd</sup> ed., Martinus Nijhoff Publishers 1987).

<sup>8</sup> *Id.*



## VOLUME 2

## ISSUE I

An effect on such indiscriminate attacks in combatants shall be that they shall suffer unnecessary damage and no matter how much actively they shall take part in hostile activities against the state, such combatants are also human beings in the end and must be treated with the same respect and dignity that every human should be treated with, thus attacking them no more than what is required. It may be required so because sometimes such combatants may not be taking part in such hostilities or may be captured as prisoners.

The reason for the incapability of determining the necessity of the attack by an AWS is for the sole reason that there is no human control involved and such weapons system works on artificial intelligence rather than human intelligence when it comes to making judgements and taking decisions.

### **c.) Property:**

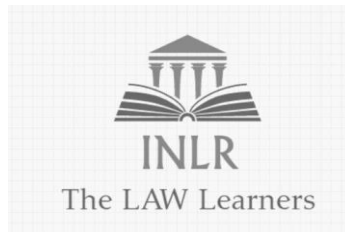
Property or objects refer to civilian objects and not military objectives. Civilian objects are simply defined as all those objects which are not military objectives<sup>9</sup>. Military objectives on the other hand refer to the result that the military of one state desires to achieve, the purpose for which it shall launch an attack, and such desire shall positively yield some direct military advantage that the state shall enjoy. In basic sense, the military objective can be the elimination of an enemy base or training centre. The advantage shall be that there is no more threat the state shall have to face from such an enemy. Usually, attacks as a measure of self defense are undertaken to achieve some military objective.

Thus, any object that does not fall under the definition of a military objective shall be termed as a civil object. For example, a school, or a hospital, or a place of worship, etc.

The attacks undertaken by AWS without any human control may be incapable of distinguishing civilian objects from military objectives and a direct result of that shall be damage to civilian property which would further lead to indirect death of people and badly

---

<sup>9</sup> JEAN MARIE HENCKAERTS, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, RULE 1 pg. 3 (2<sup>nd</sup> ed., Cambridge University Press 2005).



injure several other people. The effects of damage to civilian property ha been mentioned above.

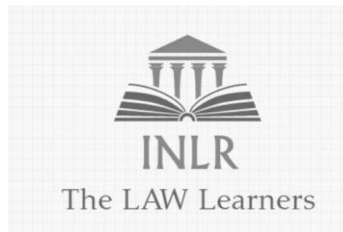
### **(III) LAWS AND ITS COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW:**

In the current spectrum of international law, there is no law or treat that has been specifically created to regulate the use of AWS or ban the use of AWS. A longstanding and robust debate is being engaged by the representatives of Member States at the CCW-LAWS meeting which calls for a pre-emptive ban by all States to develop further such autonomous weapons.

Although they are highly certain to cause indiscriminate attack, these weapons unlike weapons of mass destruction like nuclear and chemical weapons are not always incapable of distinguishing between civilians and combatants. Such weapons can be developed and their use can be legal only if they comply with the principles of international humanitarian law which shall act as the governing law. In particular to its use in an armed conflict even if engaged in as a measure of self defense, such AWS shall comply with the rules of targeting that are the principle of distinction, the principle of proportionality, and the principle of precautionary attack. Along with the rules of target, such weapons must also comply with the essentials of the principle of Marten's clause. Developers should also ensure that they get a legal review undertaken to ensure that the AWS is in compliance with the existing laws governing its conduct.

Moreover, there should be a discussion on the appropriate human control that shall be applied as the debate is not just on legality but on ethical issues as a machine could not be delegated the decision to kill without human interference or without any human giving the final command. The reason being that if there goes an error on the part of surveillance data or the machine and that leads to an indiscriminate attack then the responsibility of carrying out such





## VOLUME 2

## ISSUE I

attack cannot be put on a machine as no entity can be made responsible for killing innocent civilians or cause damage to their lives or property.

### **a.) Principle of Distinction:**

The principle of distinction encompasses the core legal obligation that the commander who engages and attack on the target to ensure that a distinction has been made between civilians and combatants, between civilian objects and military objectives and between active combatants and *hors de combat*<sup>10</sup> The principle is a part of the Additional Protocol I of 1977 to the Four Geneva Convention or AP I under the article 48 which discusses certain basic rules and then in article 51 and 52 which protects civilian population<sup>11</sup> and civilian objects<sup>12</sup> respectively. Moreover, such rule has been adopted in Customary International Humanitarian Law (CIHL) as well thus attaining the nature of customary international law. Hence, parties not bound by the treaty shall be bound by the same principle under Customary International Law (CIL).

The problem with AWS is that it might be efficient in less complex situations but, when it comes to certain complex situations where it is difficult to distinguish between a civilian and a combatant, the AWS would attack as per its sensory data which would lead to unnecessary suffering and indiscriminate attack.

### **b.) Principle of Proportionality:**

The rule of proportionality has gained customary value like the principle of distinction and it is also a written law expressed under article 51(5)(b) of AP I as follows:

---

<sup>10</sup> Francois Bugnion, *Birth of an idea: The founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement*, Vol. 94, No. 888, INT'L REV. OF THE RED CROSS, pp. 1299–1338 (2012) <https://www.icrc.org/eng/resources/documents/article/review-2012/irrc-888-bugnion.htm>.

<sup>11</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, 8 June 1977, 1125 U.N.T.S. 3.

<sup>12</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52, 8 June 1977, 1125 U.N.T.S. 3.

*“Launching an attack, which may be expected to cause incidental civilian casualties and damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited”*

It is also covered under 57(2)(a)(iii) of AP I where the provision requests States to refrain from carrying on any attack<sup>13</sup> that shall cause any incidental harm or loss to innocent civilians and such harm or loss shall be of greater value than the military advantage that the State shall gain from the military objectives of such attack. This applies especially to an attack made as a measure of self defense. The threat or risk which is the military advantage should be of greater value and AWS should comply with this provision for it to be legal when used in an armed conflict even if the measure is taken as self defense.

The problem is that fully autonomous weapons find it difficult to assess the military advantage along with the collateral damage and refrain from attacking once it has established that the collateral damage would exceed the specific military advantage that is desired to be gained from such attack. Hence, while developing such AWS the developers must make sure that the weapons system would be able to assess the situation using artificial intelligence at par with the same assessment by using human intelligence.

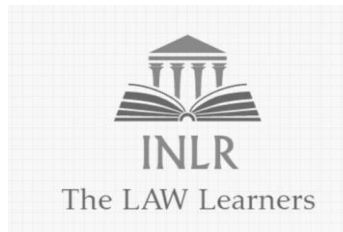
### **c.) Principle of Precaution:**

This principle has also established itself as CIHL under rule 16 which states all "feasible"<sup>14</sup> precautions must be taken to prevent unintended damage to civilians while choosing targets and in the choice of means and methods of attack and in the actual conduct of military operations.

---

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 57(2)(a)(iii), 8 June 1977, 1125 U.N.T.S. 3.

<sup>14</sup> JEAN MARIE, HENCKAERTS, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, RULE 16, pg. 55 (2<sup>nd</sup> ed., Cambridge University Press 2005).



## VOLUME 2

## ISSUE I

States must ensure that they undertake every measure possible so that least damage or risk is to be faced by civilians and that such damage should not exceed the direct military advantage that is expected to be gained from such attack. The AWS must be designed and developed in such a manner that it is capable of ensuring that every measure possible has been taken to make sure that minimal damage shall be caused by such an attack.

The three principles when complied with together give rise to an attack that can be lawfully accepted as an exception to the prohibition of the use of force under Article 2(4) of the UN Charter<sup>15</sup>. Self defense can be a reason to use force as explained under article 51 of the Charter<sup>16</sup> but such an attack can be made only if it complies with the above principles of IHL.

### **d.) Marten's Clause:**

Marten's clause is another principle that AWS must comply with as there is no treaty or law specific in nature to govern the conduct of such weapons. This principle was used by ICJ in deciding the "Advisory Opinion on Legality of the Threat or Use of Nuclear weapons" as there was no specific law governing the use and development of nuclear weapons.

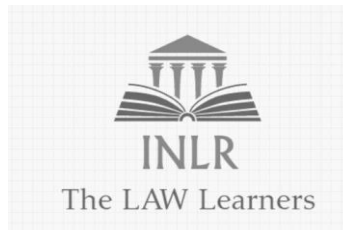
Marten's Clause was first introduced in the preamble of the 1899 Hague Convention and was later subsequently added as a part of the Four Geneva Conventions of 1949 and its Two Additional Protocols referring to the principles of humanity and dictates of public conscience<sup>17</sup>. Marten's Clause is defined under Article 1(2) of AP I as follows:

---

<sup>15</sup> BRUNO SIMMA ET. AL., THE CHARTER OF UNITED NATIONS: A COMMENTARY (3<sup>rd</sup> ed., Oxford University Press 2012); Charter of the United Nations, art. 2(4), Oct. 24, 1945, 1 U.N.T.S. XVI.

<sup>16</sup> *Id.*; Charter of the United Nations, art. 51, Oct. 24, 1945, 1 U.N.T.S. XVI.

<sup>17</sup> The "principles of humanity and the dictates of public conscience" are mentioned notably in article 1(2) of Additional Protocol I and in the preamble of Additional Protocol II to the Geneva Conventions, referred to as the Martens Clause



## VOLUME 2

## ISSUE I

*“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>18</sup>*

Marten’s clause is based on the principle of humanity and the dictates of public conscience. The Martens Clause prevents the assumption that anything that is not explicitly prohibited by relevant treaties is therefore permitted: it is a safety net for humanity. The provision is recognized as being particularly relevant to assessing new technologies and new means and methods of warfare<sup>19</sup>.

Although there lies a debate over the authority of Marten’s Clause as a legal text which is binding on parties, still it is the link between law and ethics. The principle has driven the evolution of international law with respect to new weapons which have led certain specific treaties to limit the use of certain weapons<sup>20</sup>.

For many unconventional weapons, ICRC has approached the civil society to advocate for the prohibition of certain weapons which cause superfluous injuries to civilians and unnecessary damage to combatants. For example, they called for a ban on chemical weapons in 1918, nuclear weapons and anti-personnel mines in 1977 and blinding laser weapons in 1995.

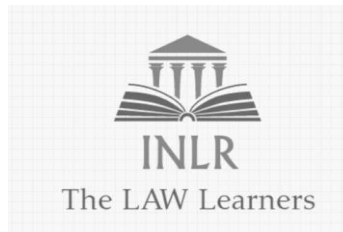
The above examples show how civil society plays a role in the development of the law and this truly represents the second principle of Marten’s Clause which is dictates of public conscience. The first one being the principles of humanitarian law.

---

<sup>18</sup> *Id.*

<sup>19</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶78 (July 8).

<sup>20</sup> R GEISS, A ZIMMERMANN AND S HAUMER (EDS.), HUMANIZING THE LAWS OF WAR: THE RED CROSS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 141-184 (Cambridge University Press 2017).

**e.) Legal Review of AWS:**

There lies an obligation on the State to undertake a legal review of a new weapon or new method of warfare at the stage of development to ensure that such a new weapon is capable of conducting hostilities in compliance with the existing provisions of international law.

Such legal review is to be conducted by legal experts either through the formation of a committee or by the order from the respective State. This particular obligation is mentioned under Article 36 of AP I.<sup>21</sup>

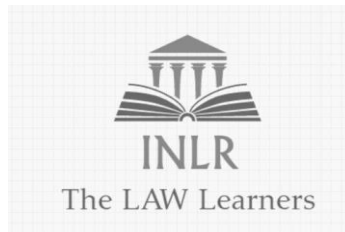
The particular purpose of this provision is to assess the nature of AWS and whether they are capable of undertaking attacks in compliance with the above principles to ensure that the measure taken as self defense directly results in the elimination of threat or risk from the enemy which is a military advantage. Thus, to ensure that AWS can be used in a situation of self defense, it has to be legally reviewed to prove that its functioning is in accordance with the above principles of international law.

**f.) Human Control:**

Human control is essential in the development and activation stage in order to ensure that the AWS shall comply with the law. But then the machine later acts on its own at the time of selecting targets and engages in attacks without any human control. The controversy lies in the incapability of AWS to comply with principles of international law unless there is no human operator to override the decision made by the AWS as and when the attack shall be indiscriminate.

---

<sup>21</sup> Kathleen Lawand, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC (Geneva, January 2006) <https://e-brief.icrc.org/wp-content/uploads/2016/09/12-A-Guide-to-the-Legal-Review-of-New-Weapons.pdf>.



## VOLUME 2

## ISSUE I

Human control shall ensure that the AWS is predictable and reliable as there is a human who uses his rational intelligence to make a decision based on the surrounding facts. Otherwise, it is difficult in establishing predictability<sup>22</sup> and reliability<sup>23</sup> on a fully autonomous system that shall engage in an attack on its own by using artificial intelligence on the basis of sensory data it receives automatically.

Moreover, by applying human control it becomes easy to establish accountability in front of the Court for an indiscriminate attack on innocent civilians. Under no circumstance can a machine be held accountable or responsible for an indiscriminate attack as it is not possible to hold an entity liable for an error on its own part. The problem of accountability further intensifies the debate and creates a strong reason to create a law banning such weapons and its use under any circumstance including the situation of self defense or a treaty which shall limit the use of such weapons in an armed attack.

## CONCLUSION:

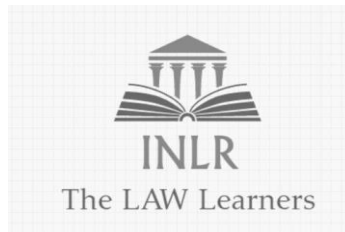
AWS must not be banned on a pre-emptive basis as suggested by ICRC or International NGO Human Rights Watch (HRW) because they are not inherently dangerous or a weapon of mass disaster as other weapons like nuclear weapons, chemical weapons, blinding laser weapons. They do not inherently violate the principles of international law. But then due to their nature of functioning independently and making decisions based on artificial intelligence along with the relevant sensory data, there has been a question with regards to its compliance and therefore legality in any circumstance where the use of force is established from such AWS.

Use of force is prohibited under Article 2(4) of the UN Charter with an exception under article 51 of the Charter. Such exception deals with the situation of survival of the state where

---

<sup>22</sup> JOHN SIMPSON, OXFORD ENGLISH DICTIONARY (Michael Proffitt ed., 3<sup>rd</sup> ed., Oxford University Press 2010).

<sup>23</sup> JOHN SIMPSON, OXFORD ENGLISH DICTIONARY (Michael Proffitt ed., 3<sup>rd</sup> ed., Oxford University Press 2010).



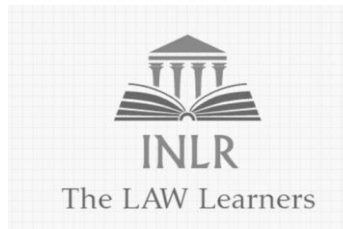
## VOLUME 2

## ISSUE I

an attack is undertaken as a measure of self defense. But then to invoke Article 51, every State must ensure that their attack complies with the governing international principles.

Therefore, for AWS to be legally valid, there must either be a law that specifically deals with the regulation of use of such weapons which is in compliance with the relevant principles or the State must ensure that the weapon doesn't have any specific treaty governing its use, and at the time of selecting the target and engaging in such attacks undergone as a measure of self defense are not violating any of the above principles.

Unless the nature and characteristics of AWS are such that it is incapable of complying with the relevant laws, the use of AWS as a measure of self defense is legally valid in cases where the situation is the survival of the State is vital.



VOLUME 2

ISSUE I

**MODERNISING POLICE SYSTEM: NEED OF THE HOUR**

- Dr. N. Krishna Kumar<sup>1</sup>

- Dr. Sanju.V.K<sup>2</sup>

**ABSTRACT**

*The police normally refuse to grant bail in many cases mainly because the police officer does not want to take the risk. Due to the laziness or irresponsibility of the police officers many accused who are having permanent residence etc. are refused bail in the police stations and unnecessarily they spend twenty four or more hours in the police custody and they get bail only in the court. Uttering indecent words in public is an offence.<sup>3</sup> But when it comes from the police personnel in uniform, it no more tends to remain as an offence. Though wide powers are given to the police under the Code of Criminal Procedure; they should be made aware that they should exercise their powers with utmost restraint within a democratic setup. Police is a social service organization, committed to community welfare orientation. Helpful advice and immediately responding attitude of police to the needs of one in trouble will win regard and respect of the community.*

**Key Words:** Bail, Criminalization, Custodial violence, Forefeit, Social service, Suspect

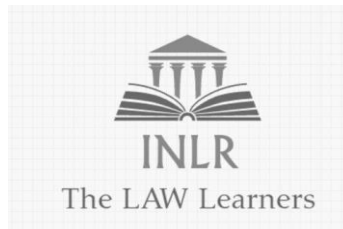
---

<sup>1</sup> Asst. Professor, Govt. law College, Thrissur

<sup>2</sup> Asst. Professor, Government Law College, Kozhikode.

<sup>3</sup> Under section 290 of Indian Penal Code..





VOLUME 2

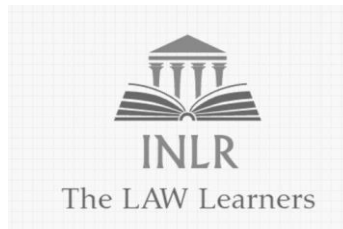
ISSUE I

## 1. INTRODUCTION

The police are the official agency to deal with crime and criminals. They have to register crimes, investigate them, detect criminals and file reports for prosecuting the cases. The prime task is to control crimes and thus reduce the number of crimes in society. Recently, it has been noted that there are more criminals in police than in society and the number of criminals in police is on the increase and criminality is seen in every functioning of the police.

Criminalization in police is another area widely discussed in the state. And thus the allegation against the police department is indeed very serious. It is shocking to anyone to see that a department created and maintained by the people to control crimes and criminals becomes criminal or crime prone by committing crimes or understanding criminalization process.

The society today becomes increasingly concerned with police and enforcement crimes. When they become threat to society and its security, then they become social problems. India is in a transition stage from colonial rule to a mature democracy. From 1860, the police in India have travelled a long way and after India's independence in 1947, the police have travelled further and now are in the third millennium. Ours is a developing democracy and in such a democracy, the police can commit many crimes or can withdraw themselves from committing crimes. But the policemen who are bound to book bootleggers and sellers of poisonous liquors encourage crime by consuming them commit crimes including sex crimes and prostitution. The crimes which the police commit can never be tolerated.



## VOLUME 2

## ISSUE I

If the arrested person is not influential or is not aware of his rights or is otherwise incapable of getting his rights established, he has to remain in police custody for a period decided by the police. Majority of the persons who are taken into custody are detained bail in station. Such detained persons are also not having any grievance as they relieved without taking any case against them.

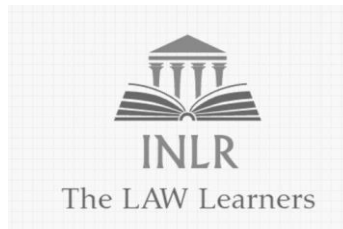
There is now a great deal of consensus that pre-trial detention should be avoided and some other substitutes for confinement should be devised. There are several compelling reasons why pre-trial detention should be avoided. Imprisonment before conviction has a punitive content and even those who are guilty should not be punished before they have been convicted.

Economic crisis in the family of the detainee, who usually are from economically backward situations, is another argument in favour of the release of the detainee on bail by the police. Detention, even for a short span of time is bound to cause disruptions in his private life. If an arrested person is released by the police on bail he will have a better morale just because he has the support of his family and friends.

Section 50(2) of the Code of Criminal Procedure guarantees this right to an arrested person. Section 50(2) provides that:

“Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. “ There are also provisions for the release of persons arrested under warrant. Chapter XXXIII of the Code of Criminal Procedure contains provisions relating to bail and bonds.

First proviso to sub-section (1) of Section 436 gives discretionary power to the officer in whose custody a person is or the court to discharge the accused on bond without sureties for his appearance. Accordingly a person shall be released on bail if:



## VOLUME 2

## ISSUE I

- i. he has been arrested or detained without warrant by an officer-in-charge of a police station, or
- ii. he appears or is brought before a court, and

he must be prepared at any time while in the custody of such officer or any stage of the proceeding before court to give bail.

Unless a crime is non-bailable<sup>4</sup>, the police can release the arrested person on bail and so it is his right to be released on bail. Instead of bail, he can even be released on a personal bond if the police officer considers it to be enough. In the case of bailable *offences* to which Section 436 applies, a police officer has no discretion at all to refuse to release the accused on bail, so long as the accused is prepared to furnish surety.<sup>5</sup>

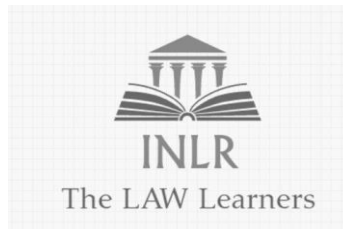
Where an offence is non-bailable, as per section 436 (1) of the Code of Criminal Procedure, the granting of bail shall depend upon the discretion of the officer-in-charge of the police station or the Court. But the power of discretion given to the police officer is very often not exercised by him judicially.

Code of Criminal Procedure also contains provisions regarding release of a suspect on recognizance even in non-bailable cases. In many countries recognizance is used to avoid pre-trial detention in case of petty offences. Recognizance is a kind of bail in which the accused is not required to give surety for his release. In this form of bail suspects are required to give a bond for appearance before a court when his case comes to trial.

Section 437 gives the court or a police officer power to release an accused person on bail even in non-bailable offences. But such person shall not be released on bail if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or

<sup>4</sup> Bailable - e.g. defamation, hurt, causing death by a negligent act, adultery, rioting & public nuisance.

<sup>5</sup> *Dharmu Naik v. Rabindranath Acharya*, 1978 Cri. L.J. 865 (Ori.).



## VOLUME 2

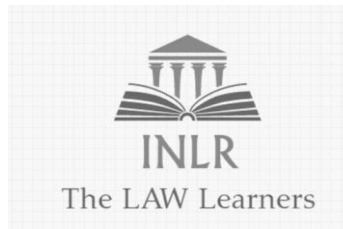
## ISSUE I

imprisonment for life. Such person shall also not be released on bail if the offence is cognisable and the accused had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

However in view of first proviso to sub-section (1) a person (i) under the age of sixteen years, or (ii) a woman or (iii) a sick or (iv) infirm person may be released on bail even if the offence charged is punishable with death or imprisonment for life or the accused is a previous convict of the category stated above.

When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station and if it appears to such officer at any stage of the investigation that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his alleged guilt, then, according to Section 437(2), the accused shall, subject to the provision of Section 446A and pending such inquiry, be released on bail, on the discretion of such officer or court on the execution by him of a bond without sureties for his appearance.

Code of Criminal Procedure, Section 437(2) reads: “ If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall subject to the Provisions of Section 446-A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.”



## VOLUME 2

## ISSUE I

Code of Criminal Procedure, Section 446 A reads: “ Without prejudice to the provisions of section 446, where a bond under this code is for appearance of a person in a case and it is forfeited for breach of a condition-

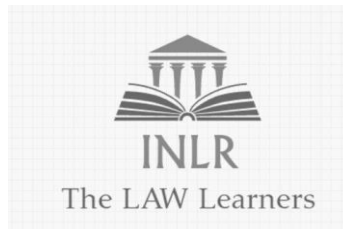
- a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled: and
- b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.

However the police is reluctant to release the suspected persons even though they are confident that such a release will not adversely affect the interest of criminal justice system.

The police normally refuse to grant bail in many cases mainly because the police officer does not want to take the risk. Due to the laziness or irresponsibility of the police officers many accused who are having permanent residence etc. are refused bail in the police stations and unnecessarily they spend twenty four or more hours in the police custody and they get bail only in the court.

Thus the system of granting bail in the police station has to be made liberal especially in the cases of persons accused of less serious offences. At the same time there is also chance for corruption and bribery, because of the discretionary powers of the police to grant bail. Just because an accused pays some bribe to the police, he will be released on bail in the police station itself. Therefore, it is recommended that judicial supervision is essential over this issue.



## VOLUME 2

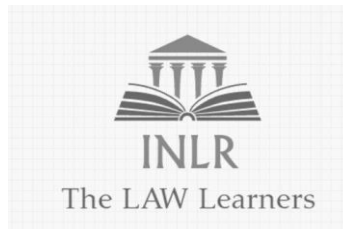
## ISSUE I

Code of Conduct for the police lays down that ‘a police officer shall be deemed to have committed abuse of authority if he is uncivil to any member of the public’. But there is a lack of appreciation of this principle among the policemen. Resolution of Kerala State Human Rights Commission dated 4<sup>th</sup> July 2002 also suggests that the persons in custody shall not be abused or mocked at. While discussing practices of extortion, oppression and unnecessary severity seen in the police force, the Indian Police Commission of 1902-3 wrote: ‘What wonder is it that the people are said to dread the police?’ Though more than hundred years have now elapsed after they have said so, the study proves that the situation continues to be the same even today.

Vulgar language, epithets and filthy expressions are regularly uttered by police personnel while effecting arrest. If people belonging to uncivilized area speak filthy language there is justification. But police personnel most of whom are hailing from civilized family back ground is also using this language to those even from civilized family set up. Generally people will immediately obey them only if they use vulgar abuses in loud voice.

Police personnel of lower rank are enthusiastically using epithets and indecent expressions on people in their custody. New entrants into the service who are having academic qualifications are also not exception to this.

Field study reveals that most of the police personnel who are regularly using filthy language while on duty are not using the same while they are in the relatives’ or friends’ circle. Psychologists opined that as every human being police personal is also having a multiple personality. Police personnel in uniform especially when they are having a feeling in their mind that there is a force behind them get a distinct personality which drives them to speak indecently to the people.



## VOLUME 2

## ISSUE I

The humiliating indecent expressions used by the police are mostly related to sex-organs and sex-aberrations of the mother of the persons. Using filthy words has become a common trend among the police but hearing such expressions creates a bad feeling among the public. The pain so caused lasts long and is unforgettable. Even though the suspect may turn out to be innocent after interrogation, the pain caused to him by the use of filthy words by the police cannot be wiped off.

Every language is good, but the tongue is not. There are two locks for every tongue and they are the teeth and lips. There is a third and stronger lock too and that is the 'determination' not to use the tongue to speak vulgar things and utter filthy expressions.

Reports have shown that police all over the world use filthy language. In some countries such use depends upon selectiveness and discrimination of police. In those countries such language is not used everywhere – especially in public. Similarly they do not use them against everybody as they respect human dignity. But in India use of filthy language has become a sort of privilege to police and they use it indiscriminately everywhere<sup>6</sup>

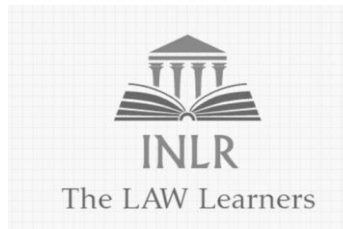
The police due to several reasons use filthy language. The origin and development of a filthy police sub-culture from the British past is considered to be one of the main reasons for the continuation of the same sub-culture even today. The British rulers induced the Indian police personnel to look at the Indian people as enemies. They encouraged the police personnel to be as nasty as they could when they interacted with the people. Defective training system plays a major role in making the police to use filthy language.<sup>7</sup>

It is highly interesting to note that in the Police Academy usually the trainees are addressed by their instructors with epithets. This practice is followed not in class rooms but in

---

<sup>6</sup> *Ibid.*

<sup>7</sup> See cases like *Kishan Singh* {(1981) Cr. L.J. 17}; *Niranjan Singh* {(1980) Cr. L.J. 426}; *Nandini Satpathy* {(1978) Cr.L.J.968}



## VOLUME 2

## ISSUE I

parade grounds. In the grounds the instructors are giving relief to the cadets by saying obscene stories. On hearing such foul words, the trainees used to suppress their feelings against the instructors. On completion of training and it has been noticed that the suppressed trainees spoke filthy language to the people whenever they face some frustrations during their interaction with them. The imperfect understanding and appreciation of the scientific methods of investigation have paved the way to make them to think that discourtesy pays well in police work.

Uttering indecent words in public is an offence.<sup>8</sup> But when it comes from the police personnel in uniform, it no more tends to remain as an offence. But very few people move the higher authorities or courts with legal proceedings against the use of filthy language by the police because they apprehend that the court may be either prejudiced or may neglect it as a trifle. More over such proceedings may invite further problems and unnecessary expenditure.

People are afraid of complaining against the misbehaviour of police personnel. They think that they have no way other than tolerating the indecent behaviour of a man with muscle and authority because if they question the authority of police the filthy words may be followed by fists.

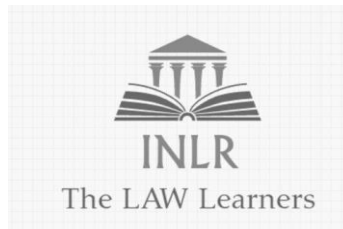
This helpless attitude of the public is a license to the police to employ filthy language. The tolerating and encouraging attitude of the higher authorities also favours the development of this sub-culture.

Many police officers and even many educated people who have a perverted ego concept says that that a police man who does not use some force or threat of force against even innocent people in his jurisdiction or who does not use some abusive words to people does not get the approval of the public as a good law enforcement officer. Many of them even expressed the view that such people who are unable to use filthy words and indecent expressions should not

---

<sup>8</sup> Under section 290 of Indian Penal Code..





## VOLUME 2

## ISSUE I

come to the field of police. Many police officers hold the view that vulgar expressions regularly used by the police along with threat give instant results in many occasions.

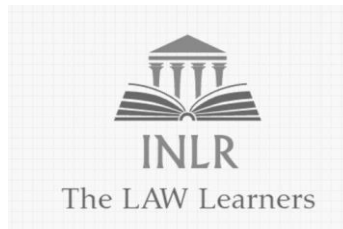
The defective personality and behaviour patterns find expression in the use of filthy expressions. There is a misconceived notion among the police personnel that the police should show undesirable personality traits and indecent expressions in their verbal transactions in order to become 'police'.

They should realize that to keep up a good relationship with the public their talk should be decent. Human rights oriented training, giving priority to socialization of police personnel and effective supervision by superior officers having better values and behavioural convictions are the possible means to check this menace.

Very often, police tries to encroach the functions of the judiciary to prove the innocence or guilt of the suspect. In order to exert a judicial power, which they do not actually possess, they exercise a pseudo authority by permitting press photographers to take photos of the arrested persons and publish them.

Though some police personnel try to justify their acts by saying that such types of publication can have deterrent effects and that general public can take precaution against such persons, human rights activists cannot agree with this view. For this purpose the offenders can be classified into two kinds; hardened criminals who are habitual offenders and those who are forced by circumstances to commit an offence but are not at all dangerous to the society. If interest of the society is the criteria for such publication then the second category of arrested persons are victimised by the police hands.

Policemen take the arrested person to court by public transport vehicles, by auto-rikshas, by parallel transport services or privately operated transport services. To long distances,



## VOLUME 2

## ISSUE I

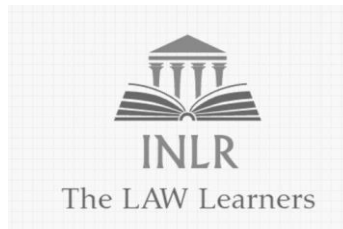
they are taken by rail and in all such situations, the passengers do not like to travel with persons who are handcuffed. Sometimes, the escorting police men may carry 303 rifles with them.

The suspect is taken in police jeeps back of which is open. Usually the suspect is allowed to sit only on the floor of the jeep in between the seats. The back portion of the jeep is always open which causes insult to him. When asked about this, many police personnel justified that there is chance of the suspect attacking the driver of the jeep if he is allowed to sit in the seat of the jeep. Police personnel stated that there are many instances to show that the police party is attacked when suspects are taken to police stations. In foreign countries arrested persons are taken to court and police stations in special vehicles. Those vehicles have automatic locking system to guarantee protection of the persons in police custody.

## 2. IMPLICATING IN FALSE CASES

The simplest way for the police to destroy the social prestige of anybody is to implicate him in a false case. The police are again blamed for registering false cases and sometimes they do so as desired by unjust forces or unscrupulous people. Instances are not rare that even officers of the Indian Police Service are blamed for registering false cases against people with whom they have unpleasant relations. This is nothing but misuse of authority and surely miscarriage of justice.

A simple hurt can be interpreted as an act of voluntarily causing hurt or even an attempt to murder. Punishments to the crime vary depending upon the interpretation that is given to the act. 'Beauty lies in the beholder's eye' - this principle applied in the interpretation of crimes takes away the objectivity in identifying and analyzing crimes. They can drop the case at the end of investigation, by stating that the charge is against fact. But the suspected must have suffered enough by the time the proceedings for dropping the investigation is initiated.



## VOLUME 2

## ISSUE I

Since the criminal justice system permits this sort of miscarriage of justice to be committed by police without having any accountability for the injustice the police commit, people suffer the damages as their fate. Victimological researches now advocate for sanctioning compensation to victims of police action in all cases in which the proceedings get dropped by some reason or another.

The Chairman of the National Police Commission has once opined:

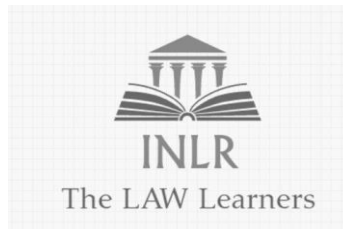
When we went round throughout India we found that they (Police) were certainly not the servants of the people. In the police stations complaints were recorded not according to what a complainant reports but what the leaders or bigwigs desire. Even the suspect's names were changed and in a number of cases there was no registration because if the complaint was registered some people might be involved which did not suit the local bigwigs. So the whole idea of the National Police Commission was to produce a force that was an ideal one, that was motivated and was freed from interference by political bodies, political heavy weights. Extraneous forces had to be eliminated before the police could do its duty.<sup>9</sup>

Instances are there judgments are not pronounced in cases which have been dragging for decades and the accused are exposed to many hardships. When finally the accused are acquitted of the charges, honourably, the position goes from bad to worst.

An acquittal for the accused means either that he is unnecessarily put into trouble by the police and prosecutor or he is charge-sheeted with the support of insufficient evidence to prove his guilt. So in the cases in which the accused is acquitted with benefit of doubt, miscarriage of

---

<sup>9</sup> Nehru Centre and Hindustan Andolan, *National Police Commission: Its Relevance Today* (1997), p. 9.



## VOLUME 2

## ISSUE I

justice takes place as he is made the victim of legal action which is deemed to be unjustifiable in all respects.<sup>10</sup>

The investigating official is quite often, the first person to reach the scene of occurrence and to make a factual record of situation. He may get the best and perhaps the last opportunity to recover certain important information or pieces of evidence which lead to detection of the criminal. He may also get the opportunity to see the immediate reactions of the victims, witnesses or suspects. Hence the reports and statements are to be prepared by the police with utmost care.

14<sup>th</sup> Report of Law Commission suggested that the discretion allowed to a police officer to record or not to record the statement of a witness orally examined by him is in such unrestricted terms that the whole purpose of section 173 (which requires copies of such recorded statements to be given to the accused) could be defeated by a negligent or a dishonest police officer. It, therefore, recommended that the police officer should be obliged by law to reduce to writing the statement of every witness whom the prosecution purpose to examine at the trial.<sup>11</sup>

This view was accepted in the thirty seventh Report of Law Commission and as such it suggested further that the statement of every witness questioned by the police under section 161 must be recorded.<sup>12</sup> But the 41<sup>st</sup> Report of Law Commission, however, declined to accept the above mentioned recommendations on the ground of practical difficulties faced by the investigators owing to the increase of burden on them.<sup>13</sup>

Sub-section (2) of section 161 requires every person examined by the police officer to answer every question put to him. The sub-section, however, avoids saying that the person

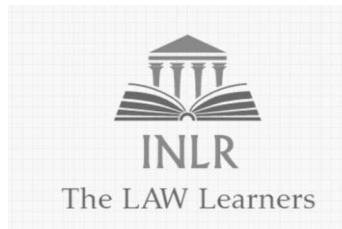
---

<sup>10</sup> N. K. Jain, "Custodial Crimes- An Affront to Human Dignity." *Human Rights Year Book* (2000), p. 61.

<sup>11</sup> Law Commission of India, *Fourteenth Report*, Vol.2, pp. 754-755.

<sup>12</sup> Law Commission of India, *Fortyfirst Report*, para 437(a), p. 118.

<sup>13</sup> Law Commission of India., *Thirty Seventh Report*, para 14.9, pp. 69-70.



## VOLUME 2

## ISSUE I

examined must answer those questions "truly". (There was no legal obligation to speak the truth under the old Criminal Procedure Code.)

This becomes, for the future, the basic document which will help in investigation, interrogation, inference etc. The report writer must be ever mindful of presenting the facts accurately, clearly without any flaw or negligence.<sup>14</sup> But there are instances where the police were accused of having wrongly recorded statements of witnesses, manipulating reports, fabricating evidence etc.

They resort to these unfair practices for the purpose of making the case strong or weak according to their interest in the case. 60 % respondents stated that the police freely added imaginary things to fill up the lacunae in evidence. Altering or suppressing or substituting real or imaginary things in police records are the usual ways of manipulation of records by the police. Even in cases of custodial deaths in police stations, the police do such manipulations and they do such things to escape from being caught.

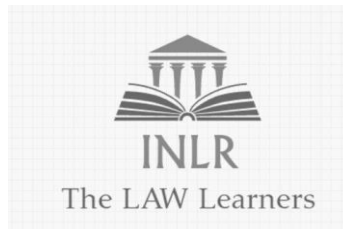
Majority of the respondents in the interview finds that manipulation of records is proportionate to the intensity of influence exerted on police. Most of the respondents who were accused in criminal cases opine that every step during the investigation involves money.

When imaginary things are mixed with real facts, it paves way for flaws in the chain of evidence. Manipulations are done by the police secretly and the accused comes to know of this only later which creates many difficulties to him in proving his innocence.

Though wide powers are given to the police under the Code of Criminal Procedure; they should be made aware that they should exercise their powers with utmost restraint within a democratic setup. Under our laws decency of behaviour has been assured even by arming the

---

<sup>14</sup> P. Lakshminarayanan, "Communication – An Effective Source for Improving the Image of Police", *The Indian Police Journal*, Sant Bahadura (Ed.), Vol. XLI No.1 (January – June 1994), p. 50.



accused with a number of basic human rights. But they can never be preserved, unless we have a police which can act fairly, honestly, humanely without exceeding the limits of law.<sup>15</sup>

### 3. SOCIETAL PARTICIPATION

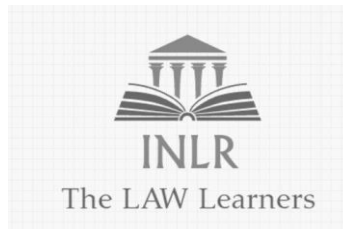
Jawaharlal Nehru in his address to the Andhra Pradesh Police Officers remarked: “The basic test of a police officer should be whether he can gain the co-operation of the people. If the official who is in charge cannot do that, it does not matter how clever or able he is; he is just not suitable for the task.”<sup>16</sup>

Police is a social service organization, committed to community welfare orientation. Helpful advice and immediately responding attitude of police to the needs of one in trouble will win regard and respect of the community. The programmes that are introduced by police in this path to interact with the public have a long way to go. The police should be taught that the root causes of political violence are political in nature and the cures should also be political. The police should confine themselves in fighting against the criminality involved in the actions of the ‘rebels’ and through better tactical and professional skills and methods attempt should be made to neutralize them. To fight against the ‘rebels,’ one needs information and cooperation from the public. Custodial violence takes the people away from the police and weakens their efforts to get information.

Instead of blaming the police, they should be supported by the people with all kinds of help for the enforcement of law and the protection of life and property of the people. Now the people are even afraid to be witnesses of cases in the court. This attitude of the public is to be

<sup>15</sup> R. Deb, “Notes to Eschew Malpractices in Law Enforcement”, (1992) 34 *J.L.I.* 416 p. 417.

<sup>16</sup> Talk to the Andhra Police officers at Kurnool in December, 1955 quoted in B.N. Mullik, *Nehru On Police* (1970), pp. 17, 20.



## VOLUME 2

## ISSUE I

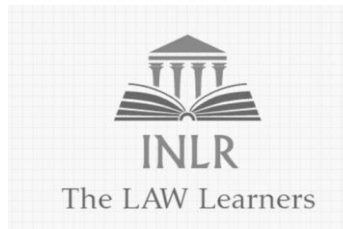
changed and they should be made aware that it is a duty of every citizen for the purpose of safeguarding the values of human rights.

Without public participation, no police howsoever equipped and trained can fight against crime in any society. As such, police has to take the initiative to build bridges with all sections of society and solicit their co-operation. It is possible for the Inspector General to appoint Honorary Police Officers from amongst respectable members of the public in different areas who can supplement police efforts in crime prevention and detection.

The public should come forward to assist the police in detection of crimes by giving useful information, and the police within the existing limitations should try to perform their duties honestly and sincerely. The senior police officers should envisage novel programmes like 'Police-Community Relations' and thereby establish constant contact and a healthy relationship with the general public. The senior officers and the retired hands from the police department who are having sufficient foresight and determination should provide proper guidance to such programmes. If these measures can be achieved, the police can keep away from depending third-degree methods and thereby put some constraints against custodial violence.

Custodial violence should be abjured at all levels by creating a consensus among the public against all forms of custodial violence. Complaints against police actions should be treated seriously because only through the complaint, the pulse of the public can be ascertained. Public Opinion and Public will to eradicate custodial torture and custodial violence is urgently required to be built up. This will be the biggest and the surest penance.

The subordinate investigating police officers should be given ample time and opportunity by the higher police officers to find out the real culprit without imposing unnecessary pressure.



## VOLUME 2

## ISSUE I

### *Better Lock-ups and other Facilities*

Police station is designed and equipped for putting the arrested persons for a short period. This does not necessarily mean that it is only used for such purposes. So there should be a thorough modification as far as the lock-ups are concerned. The existing pattern of putting the arrested persons in dark cells without sufficient air circulation is absolutely a violation of the human rights of the arrestees who are also human beings.

In this context it is suggested that all lock-ups should be constructed with sufficient ventilation and adequate space<sup>17</sup> with sufficient furniture.<sup>18</sup> The maximum number of inmates in a lock-up should not exceed five. Each person should be provided with clean mattress and blankets. Persons in custody should be allowed to comply with the needs of nature with adequate washing facilities.

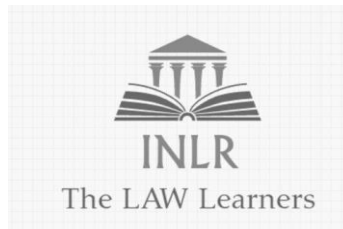
Women custody officers should be appointed in all the stations and they should be given absolute control over the women in police custody. It is suggested in this context that even the remote possibility of interference by the superior police officers upon the female custody officer should be avoided. Pregnant women should be given ample medical care with facility for periodical check up and nutritious food.

---

<sup>17</sup> In early 1992 the CPT suggested that the size of the lock-up should be of the 'order of 7 square metres, 2 metres or more between walls, 2.5 metres between floor and ceiling'. This standard has proved difficult to apply in conditions of long-term penal custody. So the Committee has subsequently accepted that cells substantially smaller than these are acceptable. In the past, the CPT's threshold of acceptability has appeared to lie between 4 and 4.5 square metres for overnight stays with Cells with smaller than 4 square metres area was acceptable only for detainees waiting for a 'few' hours. However, it has recently said that cells of 4.5 square metres area are not acceptable for overnight stays. Waiting cells of 2 square metres or less have been judged totally unacceptable for even the shortest of periods Rod Morgan, "Protecting Prisoners Against Ill-Treatment in Police Custody: the CPT's Standards", *12 Interights Bulletin* (1998/9), pp. 223-224.

<sup>18</sup> If there is any apprehension on the part of the police about violent attacks between the arrested persons using movable furniture, it can be substituted by fixed ones.





## VOLUME 2

## ISSUE I

Juvenile justice is the need of the day. Welfare of the children should also be considered by the police personnel. While dealing with the children the police should always keep in mind that they are the citizens of tomorrow. They should not be treated like grown ups. The trivial errors committed by the children can be ignored and if possible such matters should be settled in the presence of their parents at home.

The single comprehensive custody record system was introduced in England and Wales.<sup>19</sup> From CPT reports it appears that although almost all countries record the principal aspects of custody, such as the time of arrest, time of arrival at the police station, starting time and finishing time of formal interviews, these accounts are generally recorded in different documents.<sup>20</sup> This makes them relatively difficult to collate and many potentially important aspects, such as the provision for clothing, food, medical care etc. generally go unrecorded.

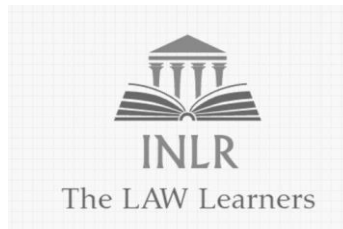
It is suggested that the fundamental safeguards guaranteed to persons in custody should be ensured and there should be a single and comprehensive custody record for each detained person. Such custody record should contain the details of his arrest, the subsequent action taken, legal consultation, his physical health, mental condition, the details of those who visited him in custody, the kind of food offered to him, details of personnel who interrogated him, duration of interrogation etc. The custody record should contain all the whereabouts of the interrogation such as the duration, beginning and end, the presence of others at that time the request, if any, made by a detainee during the interrogation etc.<sup>21</sup> This record is to be kept systematically in the police custody. The police should get the record signed by the detainee and thereby defend themselves against unwarranted allegations.

---

<sup>19</sup> Where this is required by the Police and Criminal Evidence Act 1984.

<sup>20</sup> Rod Morgan, *op.cit.*, (1998/9), p. 223.

<sup>21</sup> *Id.*, p. 222.



## VOLUME 2

## ISSUE I

As police stations are established for maintaining law and order, the public should be given free access there. The present system of placing an armed police constable in front of police station will definitely cause fear in the mind of the public in approaching the police station. Contrary to the existing system, all police stations should be provided with reception-cum-waiting rooms with adequate seating facilities.

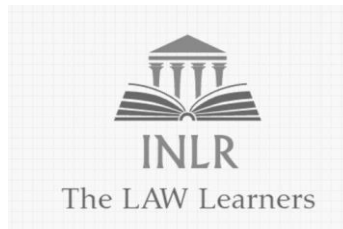
Today it is the usual practice of the police personnel to make discrimination among the suspects. In many of the police stations, they are very much reluctant to offer a chair to the interrogated and at the same time they do offer this to the prominent persons like politicians and bureaucrats. Application of this double standard in their approach to people should be thoroughly eliminated. Method of treatment should be almost uniform to all suspects, irrespective of the fact that whether he is an influential politician or an illiterate layman. Another suggestion in this context is that there should be ample facilities for free communication between the interrogated and the interrogator.

A Reception Centre headed by a senior police officer consisting of a physician and a psychiatrist should be constituted in all sub-divisions. This would help to conduct medical examination of the arrested persons. It is suggested that arrested persons should be assisted by the psychiatrist at the reception centre even before interrogation so that they will be mentally prepared to face any sort of questions put to them<sup>22</sup>. The Reception Centres should be attached with an interrogation room equipped with essential scientific arrangements for the purpose of interrogation. In setting up such interrogation rooms, the suggestions and recommendations of the psychiatrist in the centre or other psychiatrists may also be considered.

Regarding the dress of the arrested persons it is suggested that the present pattern is to be changed. As far as possible he should be allowed to wear his own cloth, if not possible, he

---

<sup>22</sup> The survey results reveal that 8% of the arrested persons have lost their mental balance.



## VOLUME 2

## ISSUE I

should be provided with better decent and hygiene dress. They should not be forced to wear humiliating dress.

The welfare of the people can be ensured by the sincere efforts and judicious action by police with a professional orientation. The root cause of the problem of custodial violence can be eliminated by resorting to professionalism in police and ensuring greater independence of their functioning with accountability and transparency.

Of course every profession has the primary responsibility to impose discipline upon its members and maintain a code of ethical behaviour by internal mechanisms and supervision by the seniors in the organization. But as far as police is concerned already there is an effective system of superior command and control over the subordinates. This power of control is to be put to good use by making the superior police officers more transparent in their dealing with the subordinates. Transparency brings efficiency and popular support. Reformation of the organization should start from above and clear signals of good behaviour should be sent down to all ranks.

The interpersonal relationship and the management in the police system should be re-shaped in a democratic manner based on human rights concept. The style of leadership has a very important role in shaping the qualities of subordinates in the service and their attitude towards human rights.<sup>23</sup> The concept of leadership qualities of police officers, especially the SHOs should be modified according to the modern human rights concepts and the need of time.

---

<sup>23</sup> This leader is to be characterized by the interest for the protection of human rights of persons, a strong drive for responsibility venture in problem solving, drive to exercise initiative in social situations, self-confidence, and a sense of personal identity, willingness to accept consequences of decision and action, readiness to absorb inter-personal stress, willingness to tolerate frustration and delay, ability to influence other person's behaviour, and capacity to structure social interaction systems to the purpose at hand. M.Ponnaian, "Human Rights and Police