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Editor-in-Chief
Prof. (Dr.) Sri Krishna Deva Rao

Executive Editor
Prof. Jeet Singh Mann

**INTERNATIONAL JOURNAL OF TRANSPARENCY AND ACCOUNTABILITY IN
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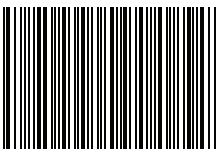
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INDEX

CONTENTS	Page No.
<i>From Editor's Bureau</i>	1
Part I: Transparency and Accountability in Governance	
1. Right to Information being Curtailed Illegally and Unconstitutionally: <i>Shailesh Gandhi</i>	7
2. Digital India: Transforming Capacity Building in Government with Future Skills: <i>Shilohu Rao NJP and Pooja Mishra</i>	21
3. From State to Smart State - Bridging the Digital Divide in Sikkim <i>Nidhi Saxena and Veer Mayank</i>	41
4. Delayed Justice in India: The Dehydrated Peach <i>Ashish Kumar Srivastava</i>	67
Part II: Corruption in Governance	
5. Civil Enforcement Action Against Corporate Corruption: A Legislative Lacunae in India <i>Ravidasan N.S and Vijay Kumar Singh</i>	83
Part III: Research on Good Governance	
6. The Success and Frustration of The RTI Act in Salvaging a Certified Land Plan: An Observational Analysis <i>B. Muthu Kumar</i>	113

FROM THE EDITOR'S BUREAU

Partly, the essence of a successfully functioning Democracy, not only lies in its power distribution system, but also on how accountability or responsibility is partaken in its various facets. As much as it is about the rights of the people involved in it, which ideally is the entire nation due to the seemingly participatory nature of it, a substantial sense of liability also exists on the hands of those who are in power.

This concept of accountability can be interpreted in many fashions, as has been explored in each of the entries present in this journal, contributed by some of the most eminent minds of this country. This Issue, of the, 'International Journal of Transparency and Accountability in Governance' has undergone a 3-part categorization which has been created for structural uniformity and coherence wherein the Governance issues are explored initially.

Part I - Transparency and Accountability in Governance talks about the aspect of law which coincides with policy making and analysis, by showing us as to how a policy covers the gap which existed since ages, in its various nuances, and the inverted version of it, wherein it is explored at depth so as to come upon a conclusion for a design of a policy which is needed in a particular state.

In the same, Shailesh Gandhi, the Former Central Information Commissioner explores the RTI Act in detail with respect to its recent trends which include the ill-researched precedents, power-curbing legislations etc. The article also provides a good reasoning regarding the inefficiency of the system. Another piece of thought is expressed by Shilohu Rao NJP, who is the General Manager and Legal Officer at National e-Governance Division of Ministry of Electronics and Pooja Mishra who is an Assistant Manager at the same Institution. They talk about various facets of Digital India, and go on to highlight in detail, the nuances of it pertaining to the initiatives taken, impact experienced, and the future of the same. It is also centered on the Learning Management System at which forms an integral part of the article.

Dr. Nidhi Saxena, and Dr. Veer Mayank, who are both assistant professors at the coveted Sikkim University talk about the application of the e-governance model in Sikkim, and how it has fared to be. Findings are presented along with subsequent elaboration upon methods to improve the current situation and ways to move towards the ideal, which is something that adds a sense of novelty in their piece.

Dr. Ashish Kumar Srivastava who is the Assistant Professor of Law at Faculty of Law, Lucknow University talks about the managerial aspect of the Legal system of the country, while he explores the areas of a burdened judiciary, delayed hearings, and the current inexistence of an alternate dispute resolution mechanism, along with analysis of other similar ideas.

Part II - Corruption in Governance talks about Constitutionality, or in some cases the lack of it and how in those cases, the desired level of deterrence is not being achieved. It talks about where do specific legislations lack, and how those lacunae could be filled, and to what extent is the government liable for the same, and more importantly, the extent of power it possesses to deal with the same. An article titled ‘Civil Enforcement Action Against Corporate Corruption: A Legislative Lacunae in India’ is written by Ravidasan N. S who is the DGM-Legal at L&T Hydrocarbon Engineering & Prof. (Dr.) Vijay Kumar Singh who serves as the Dean of the School of Law at University of Petroleum and Energy Studies, Dehradun. The said piece talks about the evil of corporate corruption, ways to tackle it and in what manner is the current system lacking. It also talks about the importance of having a civil legislation for the same instead of a purely criminal one.

Part-III - Research on Good Governance aspect deals with case studies, which work upon to show us a problem and solution in synchronization, with one another. For instance, Dr. B. Muthu Kumar who is the Assistant Professor of Law at Government Law College, Madurai talks about the personal journey of himself in retrieving a certified land plan of railway station from the Department of Southern Railway, Madurai Division. This will serve as a first person experience for the reader, and will help the reader to grasp the ground level working of the system of RTI, and its lackadaisical implementation.

This will help to show the reader, so as to what is the right method for problem solving and various gradations of it, which shall contribute in its way to initiate the change, i.e. – by visualizing and planning for it, which is the exact vision, the journal has. It envisages to provide a rich body of research and ideas which are creative, innovative and feasible in nature. With this basic idea in our minds, we present Volume VI of the CTAG Journal.

Finally, the Centre for Transparency and Accountability in Governance is very grateful to all the authors who have contributed to this journal. We are thankful to Prof SKD Rao Vice-Chancellor,

National Law University Delhi, for providing the support and valuable time for this journal. I would like to express my appreciation to Prof. Teng Hongqing, Professor of Law, and Assistant Dean, the South China University of Technology, for his constructive suggestions for this journal. I would also like to thank the advisory board of editors, Prof. Zhang Hong, , Beijing Normal University; Mr. Toby Mendel, President, Centre for Law and Democracy, Canada; Mr. Shailesh Gandhi, Former Central Information Commissioner, Mumbai, and Prof. Yun Zhao, Henry Cheng Professor in International Law, Head, Department of Law, the University of Hong Kong, Prof S Sachidanandam, Prof BT Kaul, and Shri Venkatesh Nayak, for providing their valuable inputs for the content of this journal. Finally, I acknowledge the efforts put in by the editorial committee for proofreading and editing for the journal's publication.

Prof Jeet Singh Mann

Executive Editor, IJTAG

Centre for Transparency and Accountability in Governance

PART I

**Transparency & Accountability in
Governance**

RIGHT TO INFORMATION BEING CURTAILED ILLEGALLY AND UNCONSTITUTIONALLY

Shailesh Gandhi¹

Abstract

Right to information has for a long time been a tool in the hands of the change makers of our nation, but not limited to those in the political realm. It has served as a symbol, of the power of democracy and dissent. Changing times and governments have had their share of influence on the implementation of RTI, as a function of democracy. The fact of the matter does remain to be that RTI as much as a right it should be, is more of a privilege now. Earlier as well, it had to fight against all sorts of opposition in order to establish itself, but as years passed, the institutional and systematic oppression against this right has increased. Whether its ill-reasoned judgments or biased legislations, the essence of RTI which existed during its inception has drastically reduced. This paper explores the same, in a lucid manner as it initiates its journey through a brief introduction and history of RTI, in order to set the context and tone of the paper in the right manner. Further, it deeply analyses the gradual circumscription of it, before which it analyzes the working mechanism and lack of transparency of this measure. This paper should serve as a precursor for people to realize that gradually their freedom to ask questions and express their opinion is being curtailed, and that too within the limits of the law because of its misuse. It should be a part of the strong base of thoughts ideas and expression backed with data, which not only initiate the said change, but also make sure that its impact goes till the end.

1. INTRODUCTION

When India got Independence in 1947, many people were confident that it would not sustain adult suffrage and democracy. Belying these doubts, India has managed reasonably well. The

¹ Former Central Information Commissioner, Govt of India

Constitution guaranteed the most inalienable human rights as fundamental rights. The judiciary acted as an effective check on the executive and generally ensured that the scope of the citizen's fundamental rights was not curbed by the executive. During this journey of over seven decades the judiciary discharged its duty as sentinel on the *qui vive* for citizen's rights and expanded their scope. The nation witnessed many changes in the political parties which came to power at the center and various States, and saw smooth changes of power amongst political parties and leaders. But despite all this actual power did not vest in the individual citizens, rather power was getting concentrated in the hands of some who held positions of power, their relatives and friends. The improvements and comforts flowed much more to the elite and very little to the poor and disadvantaged.

There were many attempts to give greater power to the under privileged and one such notable effort was the Mazdoor Kisan Shakti Sangathan in Devdungri village in rural Rajasthan. This was initiated by three unique individuals: Aruna Roy who gave up her IAS job, Nikhil Dey a young lawyer trained in USA and Shanker Singh a resident of the area with phenomenal artistic and communication skills. The trio stayed in a small hut and started working with the villagers from 1987. Through discussions and action, they tried to evolve ways to transform the elective-defective democracy into a participatory democracy further empowering citizens. While they struggled to empower the people to use their democratic rights they faced great corruption and arrogance from the officials.

2. PATH TO RECOGNITION OF THE RIGHT TO INFORMATION

One of the grievances of the villagers was that they felt that they were being cheated out of their fair wages in government works by manipulation in the muster rolls. This led to them demanding to see the records, resultant to the refusal of which, dharnas and subsequently negotiations took place. The villagers began to develop the wisdom that access to government records is essential for them to secure their right to life and to expose the arrogance and insolence of the officials who exploited them. This important understanding of the villagers led them to understand the importance of accessing information from the government and the legitimacy of their right to access it. In simple words they said: '*Hamara Paisa Hamara Hisab*' (The money is ours and hence

we must get its accounts). The fact that government belongs to the citizens and public servants are holders of public records on their behalf, unlocked the key to the meaning of democracy. This was reiterated in their slogan: ‘*Yeh Sarkar Hamare Aapki, Nahi kisike Baapki*’ (This government belongs to you and me and is not anyone’s father’s property). They began to realise that access to records was a necessary and useful tool to monitor their government, and curb corruption. There can be no better vigilance monitors who would get accountability from the government than the citizens themselves. The demand for a codified legislation for enabling the Right to Information spread across the nation and slowly became a National movement.

The Supreme Court had sounded the first clarion call for Right to Information in 1975. Justice Mathews in *State of Uttar Pradesh vs. Raj Narain*² said –

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security”.

After this in a series of notable judgments the Supreme Court repeatedly held that Right to Information was a fundamental right along with the right to publish, flowing from Article 19 (1)(a)³. In *S.P.Gupta vs. President of India*⁴ the court held: “The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands.” In *Reliance Petrochemicals vs. Proprietors*

² Justice Mathews in *State of Uttar Pradesh vs. Raj Narain*, 1975 4 SCC 428

³ Art. 19 (1)(a), the Constitution of India

⁴ *S.P.Gupta vs. President of India*, AIR 1982 SC 149

of Indian Express⁵ case, the court said that the “right to know is a basic right which citizens in a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our constitution”. Thus it was also linked to the right to life. The Supreme Court had accepted Right to Information as emanating from Article 19 (1)(a) and Article 21.

It was recognized that Right to Information was a fundamental right of citizens and thus on par with the right to free speech and the right to publish. It is worth contemplating on the fact that right to publish by media arises out of the citizen’s right to know and be informed. It is the medium to give information to the citizens. It should be obvious that the right to publish cannot be at a higher pedestal than the Right to Information of the citizens.

While the Right to Information was accepted as a fundamental right there was no mechanism to enforce it in practice. There was a need to codify it and provide a practical mechanism to implement it. Some States did enact such laws but finally the Parliament enacted the Right to Information Act in 2005 which harmonized the need to provide information to citizens about the working and reasons for government’s actions including public authorities. The national law became effective from 12 October 2005 which was Vijayadashami.

3. ENFORCEMENT MECHANISM OF THE RIGHT TO INFORMATION

The law in its preamble asserted that democracy requires transparency in functioning, and it was necessary to contain corruption and hold governments accountable. After recognizing that there may be some practical constraints in achieving this, it set out to harmonise the conflicting interests and gave India one of the best transparency laws in the world.

The law defined information as what existed in files, computers and even works. It gave access to information to all citizens, subject only to the exemptions outlined in the act in Section 8⁶. Apart from this, information may be denied if it would infringe someone’s copyright. In the RTI act the citizen has to ask for information from the office, where the information is likely to be found.

⁵ *Reliance Petrochemicals vs. Proprietors of Indian Express*, 1989 AIR SC 190

⁶ Section 8, Right to Information Act, 2005

All government bodies and all other institutions which are owned, controlled or substantially financed by government have to provide access of their information to citizens.

Each office of those mandated to provide information is required to have an officer designated as Public Information Officer (“PIO”). The PIO is responsible for providing the information. The law recognizes the citizen as ruler of the nation and hence specifies that she needs to give no reason to seek information. If the information is not with the department from whom she has sought the information the PIO must transfer the application to the appropriate department within five days. The PIO is mandated to provide the information within 30 days and if, - without reasonable cause, - information is delayed or denied, the PIO is liable to be penalized personally at the rate of RS.250 per day of delay, subject to a maximum penalty of Rs.25000.

The law expects that most information would be available to the citizens without having to apply for it, since it should be available *suo moto*. It also envisaged computer networks being in place which could make it simple to access and provide the information. If the PIO does not respond in 30 days or denies information, the citizen can file an appeal with a First Appellate Authority in the same department who should give a ruling within 30 days. If the outcome is not satisfactory the law created a new independent institution of Information Commissions. These are headed by Commissioners who are fairly senior and expected to ensure that the citizens’ right is honoured and the fundamental right of the citizens is implemented as per the law. The unique feature of this law are that for the first time a citizen can ask for a penalty to be levied on public servants for not honouring the right of the citizen. The law categorically stated that it superseded all existing laws so that various existing laws and rules could not be advanced to deny information. To ensure that the implementation of the law would not get stuck in the judicial quicksand it laid down that the final appeal will lie with the Information Commission and no court could hear any appeal against the order of the Commission. Citizens took to this right with great enthusiasm and spread it rapidly.

4. LACK OF TRANSPARENCY

However, the Law had one major weakness, like many other laws setting up high power, independent institutions which are expected to act as the checks and balances of democracy. It specified that the Central (and State) Information Commissioners would be selected by a committee comprising of the Prime Minister (State Chief Minister for State Commissions), Leader

of Opposition and one other Minister. It was ironical that the Information Commissioners upholding the transparency law were to be selected with no due process or transparency. This is one of the biggest flaws in India since our Higher judiciary, Commissioners of Human Rights, Women's rights, Children's rights and various other institutions like Lokayukta are not selected by any transparent process. The absence of transparency and accountability in the selection process is one of the major factors for a lack of real institutional independence and poor adherence to the rule of law.

Despite this drawback, citizens' enthusiasm was vibrant in enforcing the law. There were some very good Information Commissioners who gave decisions in favour of transparency. Some of these were challenged in the High Courts and despite the bar on hearing appeals imposed by parliament, courts heard many appeals by the government departments contending that the challenge was under writ jurisdiction. No explanation is given so as to how the challenge falls in writ jurisdiction. The rare exception was in a division bench judgment in WP 5237 of 2010⁷ which rightly held that "*In the case of Surya Dev Rai vs. Ram Chander Rai and ors*⁸, the Supreme Court made the following observations regarding the powers of certiorari under Article 226 of the Constitution:-

'Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.'
Having considered the challenge by the petitioners, in our opinion, the impugned order does not suffer from any infirmities on any of the grounds set in the above observations and therefore it does not call for interference in this petition.

⁷ *Vir Bhan Singh vs. FCI and Ors.*, 2011 (1) SCT 509 (P&H)

⁸ *Surya Dev Rai v. Ram Chander Rai*, 2003 6 SCC 675

Hence, this petition must fail at the threshold and the same is hereby rejected summarily.”

Despite the legal requirement that there can be no appeal against decisions of Information Commissioners, most courts entertain these challenges, without justifying how they fall in their writ jurisdiction. Logically when giving a stay on an Information Commissioner’s order in an RTI appeal, the court must first give a reasoned finding that the challenge falls under writ jurisdiction. Such facilitation with respect to the RTI Act has been rare. This has resulted in challenges to good decisions by Information Commissions, languishing in Courts. It is interesting to note that in Mexico challenges to the Commission’s orders are not entertained from government departments by the courts unless the issue involves national security.

5. BLOWS TO THE RTI ACT

Unfortunately, the courts have not followed the RTI Act displaying the same spirit which they have shown for right to free speech and right to publish. The first major hit to the RTI Act came in 2011 from the Supreme Court judgment in *CBSE Vs. Aditya Bandopadhyay*⁹ when it stated in August 2011, without any provocation or reason:

“Para 37. Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want

⁹ *CBSE Vs. Aditya Bandopadhyay*, 2011 8 SCC 497

a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties.”

These devastating unsubstantiated observations made by the Apex Court in Para 37 hereinabove had no basis and were wholly uncalled for. It does not befit the Supreme Court to voice disapproval in respect of a fundamental right of citizens in such manner. There is not a shred of evidence that RTI is ‘*obstructing the national development and integration, or destroying the peace, tranquillity and harmony amongst its citizens.*’ To label citizens exercising their fundamental right as oppressors and intimidators without a shred of evidence is unacceptable. These observations from the apex court have been gleefully picked up by public officials and quoted freely to curb the citizen’s fundamental right. RTI has been recognised by the Supreme Court as being integral to Article 19 (1) (a) which states that all citizens shall have the right to freedom of speech and expression subject only to the restrictions laid out in Article 19 (2) of the constitution. Section 8 (1) effectively covers these. These remarks cannot be explained by any facts and run contrary to all the earlier judgments on Right to Information.

If it is argued that right to information should be related to transparency and accountability and eradication of corruption, it could then be argued that the freedom of speech and expression and media should also be subjected to this test. With these statements the court dealt a serious blow to the fundamental right of citizens. This has warmed the hearts of many PIOs and Information Commissioners, and they are now often parroting these lines to deny the legitimate exercise of the citizen’s fundamental right.

As for the accusation of RTI taking up 75% of time, the following calculation has been made: By all accounts the total number of RTI applications in India is not in excess of 10 million annually. The total number of all government employees is over 20 million. Assuming a 6 hour working day for all employees for 250 working days it would be seen that there are 30000 million working hours. Even if an average of 3 hours is spent per RTI application 10 million applications would require 30 million hours, which is 0.1% of the total working hours. This means it would require 3.2% staff working for 3.2% of their time in furnishing information to citizens. This too could be

reduced drastically if computerised working and automatic updating of information was done as specified in Section 4 of the RTI Act¹⁰.

RTI requests have to be met only from the records. Records are kept in any office for reference. If Section 4 of the Act is properly implemented as envisaged in the law, collecting and giving information should not take much time. The Supreme Court did not comment on the lack of Section 4 compliance by all public authorities but decided to pass unwarranted and unsubstantiated strictures against citizens using their fundamental right. On reading the judgment there is no indication of why this particular condemnation of RTI was made.

Another judgment which has done great harm to the RTI Act is the judgment in *Girish Ramchandra Deshpande Vs. Central Information Commission & Ors.*¹¹ This judgment gives the license to refuse most information at will to the PIOs, FAAs and the Information Commissioners. It can even be used to deny information for which the RTI Act mandates suo moto disclosure under Section 4.

An RTI Applicant Girish Ramchandra Deshpande had sought copies of all memos, show cause notices and censure/punishment awarded to a public servant Mr. Lute. He had also sought other details such as his movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he had sought for the details of gifts stated to have accepted at the marriage of his son.

RTI only requires information which should be on record to be provided. The Court held that what was sought was ‘personal information’ and hence it is exempted under Section 8 (1)(j)¹² of the RTI Act. This section exempts “information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

¹⁰ Section 4, Right to Information Act, 2005

¹¹ *Girish Ramchandra Deshpande Vs. Central Information Commission & Ors.*, 2013 1 SCC 212

¹² Section 8 (1)(j), Right to Information Act, 2005

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

A simple reading of the words shows that under this clause information from public records can be denied if:

- a) The information requested is personal information and the nature of the information requested is such that it has apparently no relationship to any public activity or interest; or
- b) Where the information requested is personal information, and the disclosure of the said information, would cause unwarranted invasion of the privacy of the individual.

The Court did not rule on whether the information was an outcome of a public activity or if its disclosure would amount to an unwarranted invasion on the privacy of the individual. When denying information on the grounds of privacy it is necessary to consider the areas in which reasonable restrictions can be placed on the right to information.

These are listed in Article 19(2) which permits reasonable restrictions being placed in the interests of “*in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.*” There are only two words which can relate to privacy: ‘decency or morality’. If disclosure of information violates decency or morality it should not be given. Realizing that it may be difficult for PIOs and other appellate authorities to decide on what constitutes privacy, Parliament gave a simple test in the proviso that information which would not be denied to parliament or legislature would not be denied to any person.

This can only have one meaning: that anyone claiming that information would be denied to the citizen would make a subjective statement that he would deny the information to Parliament. The Supreme Court gave no reasoning but merely stated that the information sought was personal information and need not be given unless a larger public interest could be demonstrated. It did not conclude whether the information was with respect to a public activity, or whether it was invasion of privacy. Further it did not even quote the all-important proviso about denying the information

to parliament. It seemed as if the court did not read the complete clause.

It also missed taking the ratio of the apex Court in the *R.Rajagopal vs.State of Tamil Nadu*¹³ case in which the clear ratio decidendi had been established stating:

“28 We may now summarize the broad principles flowing from the above discussion:

1. ...A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical.

2. ...once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

3) In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their duty”

The Deshpande decision was given in an SLP without giving any reasons, or considering the law laid down by Parliament or the precedent of *R.Rajagopal*. Some people argue that a judgment given in an SLP does not become a precedent, but this has been treated as precedent in three subsequent apex court judgments. The Supreme Court itself has treated it as a precedent in the *Canara Bank*¹⁴ and the *RK Jain case*¹⁵. Thus a decision which did not give any reasoning, had no ratio and forgot to even mention the complete section is becoming the defining precedent for refusing information. It did not even consider the earlier decision on *R. Rajagopal* and is therefore *per incuriam*. Most governments have issued circulars mentioning this judgment and laying down

¹³ *R.Rajagopal vs.State of Tamil Nadu*, 1995 AIR SC 264

¹⁴ *Allahabad Bank vs. Canara Bank and Ors.*, AIR 2000 SC 1535

¹⁵ *R. K. Jain vs. Union of India and Ors.*, (2013) 14 SCC 794

that personal information should be denied unless a larger public interest is demonstrated. It is highly unlikely that a PIO or FAA will ever come to such a conclusion. Even at the level of Information Commissioners there will be less than 1% decisions which declare that an exemption applies and yet the information must be disclosed as there is a larger public interest in disclosure.

Across the country information about MLA funds and expenditure, officer's leave, caste certificates, file notings, educational degrees, beneficiaries of subsidies and much more are being denied. Many PIOs are denying information which may have the name of a person claiming it is personal information and hence exempted. It is also pointed out that whereas in the ADR PUCL judgment the apex court had ordered that citizens have a right to know about the assets of those who want to become public servants (stand for elections), the Girish Deshpande judgment ruled that citizens had no right to know about the assets of a public servant. Most information relates to some person, but that doesn't mean all of it breaches privacy. Infact, in section 4 of the RTI Act the government is mandated to provide information about the monthly remuneration received by each officer, details of beneficiaries, of subsidies, and particulars of recipients of concessions, permits and authorizations granted by it etc.

Many PIOs are refusing to provide even this information. This judgment is per incuriam but has now authorized denial of most information which can be termed even remotely personal, in terms of a deeply twisted interpretation.

There are other judgments of the Supreme Court which have not been too kind to the RTI Act. The Supreme Court has guarded and broadened the scope of Article 19 (1)(a) consistently until 2010. After that it appears that the court has steadily constrained the right to information beyond what the law made by parliament and the constitution envisage. The Chief Justice of India Justice S.A. Bobde observed in December 2019 that the extensive use of the RTI Act has created 'a sense of paralysis and fear' in the government, precluding those in the government from taking decisions. Underscoring the 'abuse' of the Act, the CJI said there is a need to lay down guidelines on its use, since the RTI was not an 'unrivalled' right¹⁶.

¹⁶ S. Dhingra, *How Supreme Court has not upheld the spirit of RTI Act over the years*, The Print (23/12/2019), available at <https://theprint.in/judiciary/how-supreme-court-has-not-upheld-the-spirit-of-rti-act-over-the-years/339204/>, last seen on 25/06/2021

Before that in November 2019 in Subhash Chandra Agarwal vs, Supreme Court¹⁷ the Supreme Court said in Paragraph 59:

“Reading of the aforesaid judicial precedents... would indicate that personal records, including name, address, physical, mental and psychological status... are all treated as personal information. Similarly, professional records, including... evaluation reports, disciplinary proceedings, etc. are all personal information. Medical records... information relating to assets, liabilities, income tax returns... are personal information.

Such personal information is entitled to protection from unwarranted invasion of privacy and conditional access is available when stipulation of larger public interest is satisfied. This list is indicative and not exhaustive.”

It reiterates the Girish Deshpande judgment and puts its stamp on it. Significantly, it did not mention Section 8 (1)(j) of the RTI Act which has been given a meaning which is not borne out by the law passed by parliament nor sanctified by Article 19 (2) of the Constitution. The Right to Information is being amended by the apex court in a manner that does not appear to be sanctified by the law or the constitution.

6. CONCLUSION

There is a need for citizens, members of the legal fraternity and the judiciary to discuss and debate these matters and in particular address these issues. The fundamental right to information must be interpreted as per the provisions of the law and the Section 8 (1)(j) must be properly understood. Citizens have rightly protested against an amendment in the RTI law by parliament which altered the positions and tenures of the Commissioners. The Supreme Court has enlarged the scope of denial in a very significant manner, but the citizens are not even discussing this. The Supreme Court’s rulings are slowly being spread across the nation. Governments have issued circulars highlighting these and slowly PIOs are realizing the excuse these give them to deny information whenever they do not wish to give information.

¹⁷ Subhash Chandra Agarwal vs, Supreme Court 2019 SCC OnLine SC 1459

It is true that right to information is empowering individual citizens and they are accessing records which expose arbitrariness and corruption. The nation must realise that the curbs on freedom of speech, right to publish and right to information are interlinked and must be treated with equal importance. Citizens must discuss and debate these judgments freely, and if they are not vigilant the RTI Act will be damaged and constrained very significantly.

DIGITAL INDIA: TRANSFORMING CAPACITY BUILDING IN GOVERNMENT WITH FUTURE SKILLS

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Pooja Mishra²

Abstract

With the evolving landscape and technological progression in government departments, government officials must continuously acquire novel skills and knowledge to contribute to the digital revolution in India. It is essential to use technology in such a way that information and thereby knowledge exchange can become a simple engagement without external intervention, to incorporate continual learning and build the capacity of the government officials. A web-based or mobile-based learning is easy to access irrespective of the time and place, with the emergence of social distance norms due to Covid-19. The use of software applications to create digital learning platforms has become a well-established, practice. The Digital India Learning Management System (“LMS”) is a software application developed by the National e-Governance Division (“NGD”) under the Digital India Program for government-related training purposes, to advance the focus of competency-based learning and provide the right knowledge and skills to the staff. The LMS program, implemented by the National e-Governance Division (“NGD”), serves as a medium for new learnings and training government officials involved in e-governance and administration in the citizen-centric services. This paper outlines the essential aspects of LMS, including the Digital India program, key features and framework, benefits, and implementation of LMS and the various pillars of Digital India, as well as the initiatives of the government to transform the country into a digitally empowered nation. The paper also traces for the fascinating journey of LMS implementation in various government agencies.

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Keywords

Digital India, Learning Management System (“LMS”), Change Management and Competency Framework, Capacity Building, e-learning.

1. INTRODUCTION

Technology is playing a significant role in ensuring transparency in the governance today. The use of technology takes place in different domains. As far as the governance is concerned, there has been a distinct focus on digitalizing governance for smooth administration and better public service. In this context, Digital India scheme of the Government of India plays a crucial role. The purpose of this paper is to understand the scope and relevance of Digital India in the capacity building of the government functionaries. The paper studies the nine pillars of Digital India with a special focus on the Learning Management System. It also underscores the characteristics of this scheme and in that light, its relevance in transparent governance. The paper also analyses the status of implementation of Digital India in and the issues that arise thereunder. The paper also provides the way forward for engaging technological tools for improving the governance in India.

2. ABOUT DIGITAL INDIA

Digital India is a programme launched by the Indian government in 2015 under the aegis of Ministry of Electronics and Information Technology (“MeitY”). The primary aim of the programme is to convert India into a digitally empowered technology. The initial step towards digital India is to connect rural with the aegis of digital governance, delivering the government services at the doorsteps of the citizens. As we are living in the 21st century which is a digital era, and it is time for India to meet aspirations of the people where the government services can easily reach door to door of the people which could have a long-lasting positive impact. Thus, Digital India is an incredibly significant project of Government of India. By connecting people with digital technologies, the government aims to provide people with all kinds of benefits of government services and to improvise their digital literacy. In this way, the digital empowerment of society can be brought into realisation.

As the country is moving towards the vision of new India with the increasing technology-driven work, the government of India recently launched new capacity building scheme for civil servants termed as ‘Mission Karmayogi’ which is aimed at creating the right attitude, knowledge, creative skills, professionalism, innovative ventures, and technology-enabled Indian civil servants. The Mission Karmayogi program is a significant shift in human capital management in government because the civil servants act as the agents of policymaking who deliver the government services to the doorsteps of the citizens. The mission intends to have a transition of the human capacity of civil servants from rule-based to role-based. Digital India Program intends to bring such mission mode projects and several other schemes together and restructure them rapidly to achieve Digital Transformation in Governance.

There are three vision areas of Digital India:³

- a) Digital infrastructure as a utility to every citizen: It includes high-speed internet so that the services could be facilitated to the citizens easily; ensuring that every citizen has a digital identity; mobile service; safe and secure use of cyberspace.
- b) Governance and service on demand: It includes integrated service across departments or jurisdictions, availability of services from online and mobile platform.
- c) Digital empowerment of citizens: It includes accessibility of resources globally; digital literacy; all documents to be available on the cloud; to make available digital resources in Indian languages apart from English language.

The MeitY coordinates digital India programme with the help of ministries and departments in States and Central government partnering in their respective areas. Thus, it is an umbrella programme covering many departments. It could be said that this programme ensures– ‘minimum government, maximize governance’ and ease the living of the citizens.

³ *Vision Areas of Digital India*, Digital India Website, available at <https://digitalindia.gov.in/content/vision-and-vision-areas>, last seen on 20/02/2021.

3. ESSENTIAL COMPONENTS OF DIGITAL INDIA

There are nine pillars of Digital India, which are as follows⁴:



Figure 1 Pillars of Digital India

Source: Digital India Website

3.1 Broadband Highways

There are three subcomponents of Broadband Highway. It provides broadband for all rural, urban and the National Information Infrastructure (“NII”). Broadband connectivity will be provided to all 2.5 lakh Gram Panchayats. Also, NII would have nationwide coverage to provide on-demand network connectivity to government departments.

⁴ *Nine Pillars of Digital India*, Digital India Website, available at <https://digitalindia.gov.in/content/programme-pillars>, last seen on 20/02/2021.

3.2 Universal access to Mobile Connectivity

It mainly focuses on network penetration and filling the gap between connectivity.

3.3 Public internet access programme

It includes Common Service Centres (“CSC”) and Post Office as multi-service centres.

3.4 E-Governance

It includes simplification and field reduction; online applications and tracking; online repositories for certificates and educational degrees, identity documents etc.

3.5 E-Kranti

The goal of e-Kranti is to ensure that all government services are delivered electronically to the citizens ensuring efficiency, reliability and transparency of the services at an affordable cost. The implementation of e-Kranti is essential for digital India and for e-governance in the country. NeGD Learning Management System (“LMS”) is a project under e-Kranti, which is one of the main pillars of Digital India. The purpose of LMS is to prepare the Indian administrative machinery and ensure a digitally equipped society with proper skills and knowledge inculcated in every citizen. NeGD’s purpose, inter alia, is to strengthen capacities within the Government departments at both Central and State level by efficiently implementing capacity building in the domain of e-governance. The government officials face major challenge and setback to find skill filled human resources having competency in the relevant areas who can successfully deliver the services to the government. To correct this lacuna, every department has to develop its competency accordingly. These training program under the Capacity Building scheme identify the right kind of training course for the right person that enables structuring the pre-defined job roles.

3.6 Information for all

Open data platforms to be provided to the citizens, government to engage through social media proactively, online messaging to citizens on special occasions.

3.7 Electronic Manufacturing

This pillar focuses on promoting electronic manufacturing in the country with a target of net zero imports by 2020.

3.8 IT for jobs

This pillar focuses on providing employment opportunity to the youth in the IT sector.

3.9 Early harvest programme

It includes those programs which are implemented within a short period such as Wi-Fi in all universities, biometric attendance, secure email within government, public Wi-Fi hotspots, e-learning in schools, weather information and disaster alerts on phones via SMS, National portal for lost and found children etc.

4. DIGITAL INITIATIVES OF INDIA⁵

4.1 Digital Identity

The world's most extensive digital identity programme is Aadhar which provides biometric-based unique digital identity to the Indian citizens.

4.2 Digital Platforms

4.2.1 Unified Payment Interface ("UPI"):

It is a system where multiple bank accounts are powered under a single mobile application with the smooth functioning of transactions, merging of various other banking features into one channel. It is the best solution to avoid cash delivery hassle or ATM queue.

4.2.2 Goods and Service Tax Network ("GSTN"):

It is a one nation one tax platform. These platforms help the taxpayers to file the return, pay taxes and do all other necessary compliances.

⁵*Digital India Initiatives*, Digital India Website, available at <https://digitalindia.gov.in/di-initiatives>, last seen on 20/02/2021.

4.2.3 Government e-Marketplace (“GeM”):

It provides ease of doing business, and helps in maintenance of transparency. This is a faceless interface and at every step security and safety is maintained for the buyer as well as the seller. On each step of buying and selling of products, SMS or emails are sent to both to show the genuineness of the system.

4.2.4 Digilocker:

It is a system launched by the government where 1 GB space is provided to every person so that he can store documents, certificates in PDF, JPG or other forms. It shares them directly to the service providers. It is a secure system where the documents are accessed electronically. Digilocker aims to provide paperless service to the citizens.

4.2.5 Unified Mobile App for New Aged Governance (“UMANG”):

It is a single app to access multiple government services. It supports 12 Indian languages and English. It is a single platform to access PAN India service by the Indian citizens ranging from central to local government bodies. There are more than 875+ services available on UMANG. Some of the services include public grievance, housing schemes, certificates, finance, health, revenue, utility, transport, employment and skills, police, various types of Pradhan Mantri Yojanas, etc.

4.2.6 Digital India Learning Management System (“LMS”):

It is a single scalable web/ mobile-based platform for diverse learning needs allowing learners to access anytime and from anywhere, independent of browser or device.⁶

4.3 Digital Payments

Some of the initiatives under digital payment includes:

- a) Enabling payment by Fastag at national tolls.

⁶ *Flexible learning*, Learning Management System Website, available at <https://lms.gov.in/home.aspx>, last seen on 20/02/2021.

- b) Introduction of RuPay global card payment network in India that support both offline and online transactions.
- c) BHIM (Bharat Interference for Money)- a digital platform for money transfer.
- d) Bharat Bill Payment System (“BBPS”)- all kinds of payments like electricity, gas (LPG and PNG), post-paid telecom, DTH, water, insurance can be done.

4.4 Digital Infrastructure

4.4.1 Bharat Net:

This project aims to connect all Gram Panchayats with broadband. It provides affordable broadband services to institutions and citizens of rural and remote areas in the view of Digital India campaign.

4.4.2 National Knowledge Network:

This project aims to connect all knowledge and research institutions to a high bandwidth of internet service. ISRO institutions such as IIRS are also using NKN for their science mission.

4.5 Digital Inclusions

4.5.1 Common Service Centres (“CSC”)

CSC is spread all over the country in order to provide door to door service to the people, especially in remote locations creating a digitally empowered country.

4.5.2 Stree Swabhimani:

This is one of the bold and unique initiatives of the government to provide awareness among the women regarding various issues like menstrual health, childbearing and women empowerment schemes.

4.6 Digital Healthcare

4.6.1 Ayushman Bharat:

Ayushman Bharat scheme is a health care insurance scheme for the poor and lower strata of society. This scheme protects in case of medical emergencies.

4.6.2 e-Hospital:

It is a one-stop platform to connect patients, doctors, and hospitals digitally. Through this, patients can book an online appointment with the doctor without standing for hours in long queues.

4.6.3 e-Sushrut:

In order to streamline the treatment of the patient in the hospital e-Sushrut has been developed to provide hospital staff, doctors to their peak ability and efficiency.

4.7 Digital Agriculture

4.7.1 PM Kisan:

This yojana is for the small and marginal farmers. Under the direct benefit scheme every year 6000 rupees are transferred per year in 3 equal instalments of 2000 rupees every four months.

4.7.2 Soil Healthcard:

National Soil Health Card scheme was launched in the year 2015. Under this scheme, the soil information is provided to the farmers via a digital platform. Mobile app for soil cardholders is also made available to provide useful information.

4.8 Digital Literacy and Education

4.8.1 PM e-Vidhya:

This Program was announced by the finance minister Nirmala Sitharaman in August this year for students. The aim is to unify and compile all efforts concerning digital/online education. PM e-Vidhya is to contain in itself DIKSHA (one nation one digital platform) and also a TV channel is to be launched (one class one TV channel).

4.8.2 SWAYAM:

It is a free online course provided for the students by the government. SWAYAM stands for ‘Study Webs of Active Learning for Young Aspiring Minds’.

4.8.3 National Scholarship Portal:

National Scholarship Portal is provided by the Ministry of Technology. It provides scholarships to students belonging to SC/ST/OBC/ Minority. There are about 80 scholarship schemes.

4.8.4 E-Pathshala:

E-Pathshala is a multilingual app provided by the government to digitally help the students having significantly less storage space in the mobile phones. The app is a storehouse of multiple resources for the students like videos, audios, books etc. There are about 504 e-textbooks available on the app.

4.9 Digital Security

4.9.1 Cyber Surakshit Bharat:

This is a project which involves all the officers and the person working in cyber world and involves a series of workshops to make them aware about the cybercrimes that are being generated at different levels.

4.9.2 Botnet Cleaning and Malware Centres:

This is an initiative of Digital Bharat, which also includes Cyber Swachhata Kendra. ‘Kawach’ is a mobile application provided by the government to the people to protect them from the botnet. Cyber Swachhta Kendra has also been awarded as one of the 51 “Gems of Digital India” in the year 2018.⁷

4.10 Digital Democracy

MyGov is a world’s largest democracy platform provided for the citizens of India. MyGov is a move towards smart India, and this is one of the significant steps taken by the government in the era of digital democracy. All the central government ministries are available on the online platform of social media for the feedback, and grievance redressal. People can directly participate in policy formulation. The main aim to have this application was to reduce the perceptual gap between the electorate and the elected after the elections.

Mann ki Baat is, is also a program initiated by our Hon’ble Prime Minister Narendra Modi where he takes the suggestions, hears problems of the general public. People can also share their ideas directly with the Prime Minister of India.

⁷Ministry of Electronics & Information Technology, Government of India, *Annual Report 2018-19*, available at https://www.meity.gov.in/writereaddata/files/MeiTY_AR_2018-19.pdf, last seen on 20/02/2021.

4.11 Digital Employment and Start-Ups-Software Technology Parks of India (“STPI”)

It has been setup providing incubation facilities to the start-ups. Electropreneur parks are setup to provide cost-effective electronic hardware, IPR creations. Robotic labs have been setup, and till now, 20 patents have been filed. These are all efforts of the government’s Make in India program.

5. DIGITAL INDIA LEARNING MANAGEMENT SYSTEM (“LMS”)

National e-Governance Division (“NeGD”), MeitY has developed Learning Management System (LMS) under Capacity Building Scheme for Digital India, which caters to a broader spectrum of needs and requirements of learning and development. NeGD Learning Management System (LMS) designed to facilitate anytime, anywhere learning for government employees and e-governance practitioners to promote learning and improve required skills for digital governance.

LMS is a pioneer project under one of the nine pillars of Digital India E-Kranti initiated by the government in the year 2015. In line with this vision, it is widely recognized that there is a tremendous need to enhance the skill sets and to develop an adequate number of appropriately trained resources for handling a variety of tasks,⁸ including those who are expected to design and deliver government services to the citizens.

The primary reason to have competency-based capacity building approach is so that each job role is delivered by the official who has required KSB (Knowledge, Skill, and Behavior) to perform the functions. A web/mobile-based learning management system is being build-up to take this idea and approach forward and enable continual learning with proper skill and knowledge. LMS is a tool which allows efficient administration of training for various officials by bringing together learners/trainees and content in the digital form in an environment that enables for flexible learning and regular content update. It allows all these things to be done at a lesser cost as compared to the traditional form of training.

E-Kranti is a program of the government to bring a Kranti or a revolution in the government departments, to bring significant changes in the way services are delivered, or the way in which the citizen related work is being executed. With the view to implement the projects under e-

⁸NeGD LMS, National e-Governance Division Website, available at <http://negd.gov.in/learning-management-system>, last seen on 20/02/2021.

governance favorably, the need was felt to introduce a structured framework on which competency of the officials can be developed. It has led to the designing of e-Governance Competency Framework (“e-GCF”), which is a significant initiative helping in invigorating capacities and providing relevant training for targeted Government officials. This competency-based training approach is a platform by which e-Governance practitioners understand the optimum skills and the knowledge which is required for their job and determines their learning path.

Therefore, LMS under Digital India is designed to build capacities of the Government officials, by employing not only traditional but also innovative methods. LMS is a classic example that integrates four forms of learning, namely classrooms, e-learning, social and blended training.

6. CHARACTERISTICS AND FRAMEWORK OF DIGITAL INDIA LMS

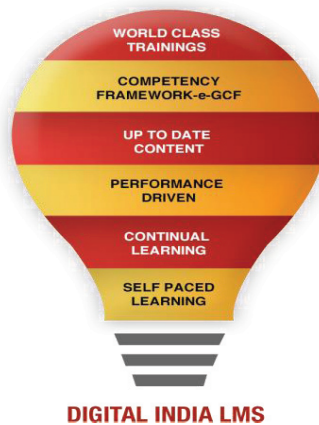


Figure 2 LMS Framework

Source: Digital India Website

Learning Management System (LMS) being a capacity-building tool facilitates e-learning of various government officials both at centre line ministries and state government level. LMS has several features and support tools, provisions for review and rating of assessments and various others in order to make it easy to be handled by the users. Besides this, LMS also aims to give access, provide stability to government officials taking into account methods of learning and diverse training requirements. The main features of LMS are as follows:

- a) **LMS portal for e-learning:** LMS provides the platform for various e-learning solutions and discussion groups to the government officials at the central and state level.

- b) **Content delivery mechanism:** LMS is a system through which the content for e-learning could be made available in a customized form. All types of deliverable contents, like PowerPoint presentations, document file, pdfs, e-books, multimedia content, visual recordings, as well as podcasts, could be easily accessed by all the participants. Thus, it is a medium to provide organized e-learning content at one location.
- c) **Training mechanism:** LMS provides a medium to government officials for training including various courses. All types of training modes are available in this platform like seminars, webinars, e-learning courses, etc.
- d) **Provision for assessments:** Another essential feature of LMS is the provision regarding virtual assessments. The software easily supports assessments in the form of multiple-choice, questions/ answers, true/false or any other form. There is also the provision for marking the particular assessment submitted by the participant.
- e) **Other features:** Includes the feature of registration of participants, the participants can also give ratings, post their comments regarding any e-learning material uploaded in the software. The software also provides the provision regarding the attendance register of the participants. On the successful completion of the course, the civil servants get in-built digital certificates.

7. EMERGING NEED OF DIGITAL TRANSFORMATION

The emergence of digital organizations is taking the world by storm. There is an urgent need for the government to transform into an innovative and modern outlook more particularly when it comes to the training and other certification courses of its civil servants. As the public sector consists of large number of employees, it is paramount for the government to implement such type of mechanisms which can streamline training and learning of its employees smoothly. Here comes the role of Learning Management System. Digital India LMS would act as the best mode to achieve digital transformation of human capital management in government. The pandemic has triggered the digital transformation in every organisation across the globe, the goal of the advancement of modern capacity building of civil servants would be possible with adaptation to learning experience portals. The government departments may face specific problems in the implementation of LMS as there exists a gap in the capabilities of the workforce, and hence gives rise to the need for upskilling of employees. Digital India LMS helps in streamlining the training process and provide relevant information to the employees, keeping them in tune with the changing

needs of the public sector. Digital India LMS is designed to provide adequate and suitable e-learning environment to the government officials. The new rules of learning will be of as follows.

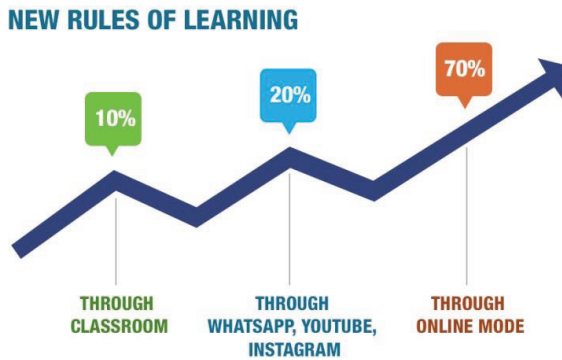


Figure 3 New Rules of Learning

Source: NeGD Website

8. OUTCOMES OF DIGITAL INDIA LMS PROJECT

8.1 E-Learning environment

E-learning and classroom teaching are combined by government LMS to create a smooth blending learning experience for the civil servants as a change from the traditional classroom method which is no longer practicable to be employed.

8.2 Time Saving

LMS acts as a time saving tool for the government departments. Much time that is spent on setting up of training for the employees could be saved when there is a single e-learning mode available which could be accessed easily.

8.3 Cost Saving

As it is time saving, LMS also acts as a cost-saving tool. The training cost incurred for setting up training camps, infrastructure cost, travel expenses, study material and classroom cost etc. could easily be saved.

8.4 Higher interaction

LMS encourages interdepartmental and interpersonal communication and interaction of the employees through knowledge management. By this maximum benefit could be gained to encourage better relationship within the organization.

8.5 Ease to access

LMS is an 'anywhere anytime' accessible tool. It could easily be accessed by mobile, and the feature of offline learning makes it easy for the government officials to access the training courses as per their convenient time and also from any location. In this way, the officials may learn with their own speed and pace so that they gain maximum learning from the course.

8.6 Security of Data

Government departments have certain sensitive information and important data which have to be secured. Keeping this in mind, LMS is designed with all necessary security compliances needed for the superlative data security. Also, considering the nature of work of the government officials, LMS is secured from the risk of cyber-attacks and threats so that the data of the government remains secure.

8.7 Consolidated form of data

LMS is a network where the training data is available in consolidated form at one single location. Thus, it eliminates the time spent in searching for data from various platforms.

9. IMPLEMENTATION STATUS OF DIGITAL INDIA LMS

9.1 Learning & Development and E-Learning Under Capacity Building II

The Digital India Learning Management System (LMS)⁹ launched in March 2017, is an application for administration, documentation, tracking and reporting of training programs, classroom, online events, e-learning programs and training content along with blended capacity building feature. It provides e-Learning as a Service, enabling capacity building through e-learning and virtual training.

NeGD LMS has been requested by about 10 Ministries and departments to make more comfortable their e-learning needs and to be updated about the technology regularly. There are more than 72 government departments/ministries/training academics, making the use of NeGD Learning Management System all over India. As on 1st Dec 2020, we have reached over 69,000 registered users in Digital India LMS, including all Ministries/Departments.

About 100 hours of e-content is available on NeGD LMS on various topics such as e-Governance, Digital India, United Nations Development Programme's sustainable development goals which could be accessed easily either through a mobile application or by the web browser.

So far total webinars conducted by the team of LMS are more than 450 for government officials of ministries/departments on some essential topics like Goods and Service Tax Network ("GSTN"), Ministry of Culture, Department of Telecommunications ("DoT"); MeitY Start-up; Indian Railways; Department of Defence Production, Institute of Secretarial Training and Management, Ministry of Defence; National Academy of Customs Indirect Taxes and Narcotics, Department of Revenue etc. Recently, NeGD/MeitY launched the Program on Cyber Law, Cybercrime Investigation and Digital Forensics with more than 540 participants from judiciary, police and the Law Enforcement Agencies.

In collaboration with MyGov, a series of webinars called "MyGov Samvaad" are conducted by the Digital India LMS team. These webinars help government departments to connect directly with the citizens, and take their feedback, suggestions, answer the questions relating to various government initiatives. Since December 2019, NeGD, in collaboration with MyGov, has

⁹ Home, Learning Management System Website, available at <https://lms.gov.in/>, last seen on 20/02/2021.

conducted ten MyGov Samvaad webinars. Over 200 webinars have been conducted with 26 lakh viewership for GST ecosystem in association with GSTIN in various languages. On 5th April, 2019, NeGD was awarded in recognition of the valuable contribution and support in the development of the Goods and Services Tax (“GST”) ecosystem.

A Post Graduate Program in Digital Governance and Management (“PGP-DGM”) leading to the award of Master of Business Administration (“MBA”) degree is launched by the Indian Institute of Management, Visakhapatnam (“IIMV”), under the aegis of the National e-Governance Division (“NeGD”), MeitY. The first batch of the Program (2019-21) has started from January 2020 with the inauguration of Secretary, MeitY. The First Semester of the Diploma is completed in June 2020¹⁰. All the training conducted which are open for the public are available on the Digital India Learning YouTube Channel.¹¹ As on 1st December 2020, the Digital India Learning YouTube Channel has approximately 42,500 subscribers with 275 videos.

9.2 DIGITAL INDIA LMS ACTIVITIES DURING THE LOCKDOWN AND COVID CRISIS (March-December 2020):

In the month of April 2020, the Ministry of Tourism in India launched the ‘Dekho Apna Desh’ webinar series to offer tourism virtually. It is intended to provide in-depth knowledge of several destinations in India along with information on the rich heritage of India. As part of the ‘Dekho Apna Desh’ initiative approx. Fifty webinars have already been conducted by the Ministry of Tourism in collaboration with National e-Governance Division, Digital India, Ministry of Electronics & IT. It has become very famous among the viewers of NeGD’s YouTube Channel, and numerous articles are published on this by PIB and other media.

NeGD LMS Team also conducted ten webinars with Cyber Security and IT experts for doing knowledge enhancement sessions for its stakeholders during the lockdown period. From 24th April 2020, onwards, NeGD has also started facilitating the Ministry of Culture for their webinars under various departments. Between 24th Apr 2020, and 30th Jun 2020, NeGD has promoted the Ministry of Culture for around 63 webinars.

¹⁰ *About PGP DGM (Blended Learning Program – On Campus / Off Campus)*, IIM Visakhapatnam Website, available at <https://www.iimv.ac.in/pgpdgm>, last seen on 20/02/2021.

¹¹ *Youtube Video*, NeGD’s Youtube Channel, available at https://www.youtube.com/channel/UCbzIbBmMvtvH7d6Zo_ZEHDA, last seen 27/04/2021.

NeGD provided exceptional support to central ministries, departments and state governments to conduct online meetings to facilitate their urgent official work in this Covid-19 crisis. Since 23rd March 2020, NeGD has facilitated approx. 62 Department/Organisations under 31 Ministries/State Governments for conducting over 750 hours of meetings/webinars.

Online Capacity Building Program on Cyber Law, Cyber Crime Investigation and Digital Forensics¹²- NeGD has launched an online post-graduate diploma in Cyber law, Cybercrime Investigation and Digital forensics for the government officials of various ministries and departments. The Program was launched on 9th Nov 2020. It has more than 550 nominations from judges, police officers, public prosecutors, and officers of Law Enforcement Agencies (“LEAs”) from all over India. The LEAs deals with cybercrime cases and uses digital forensics to generate the required digital evidence for effective prosecution. The post-Covid situation mandated online transactions, which in turn, resulted in the rise of cybercrimes. To build the investigation capabilities in cybercrime domain, the Ministry of Electronics and IT pioneered the efforts of the online capacity building program in association with National Law Institute University (“NLIU”), Bhopal. Some of the features of this Program are:

- a) Comprehensive e-learning system
- b) Classroom management
- c) Assessment management
- d) Authoring tool
- e) Virtual classroom
- f) Skill gap and competency mapping

Some of the advantages of this course include easy accessibility, self-based learning, seamlessly blended training, learning while working, and flexible timing. A post-graduate diploma will be awarded to all at the end of the course. The participants will also have virtual access to a state-of-the-art cyber forensics lab to garner the investigation skills in the event of a cybercrime.

¹² *Online Capacity Building Programme on Cyber Law Cybercrime Investigation & Digital Forensics*, Learning Management System Website, available at <https://cytrainsetu.lms.gov.in/Cytrainindex.html>, last seen on 20/02/2021.

10. CONCLUSION

The concept of Digital India is a new revolutionary step towards making new digitalised India, where the citizens are empowered digitally and economically. In the current pandemic where the people are advised to stay at home, digital technologies have made the life easy wherein digital transactions, online classes; telecommunication and telemedicine have helped each section of the society.

The post-Covid era will have a new norm called Digital Learning, where the new technologies are adopted across the world. Digital Learning through the LMS in government departments can act as a paradigm shift in training and capacity building through which civil servants can gain new digital skills required for themselves to deliver the government services. The Digital India LMS, a project under e-Kranti (the pillar of Digital India Programme) is envisaged to promote learning driven by knowledge and skills. Through Digital India LMS, learners and various competencies could be brought up in the same environment where regular learning with up-to-date e-Content on prevailing topics on emerging technologies are present, in order to make a future-ready workforce. The Digital India LMS will help the government officials in numerous ways by self-paced, learning while working, and minimal displacement from the workplace. This centralised approach of imparting knowledge and training among the learners is an efficient way to improve their skills, creating a broader scope for learning opportunities.

Eventually, Digital India LMS is expected to achieve the vision of a Digital India program and attain great number of objectives once it is implemented effectively. Digital India LMS will surely be helpful to achieve the capacity building goals, of all the learners, including the civil servants.

FROM STATE TO SMART STATE - BRIDGING THE DIGITAL DIVIDE IN SIKKIM

Dr. Nidhi Saxena¹ and Dr. Veer Mayank²

Abstract³

In a democratic setup, people are the axis around which a government revolves. One of the essential tasks of the governance architecture of a society is to identify and provide the needs of that society within the jurisdiction of the government of that society. Federal structure of government divides this responsibility between the centre and state. State governments in India thus are equally responsible for providing for the needs of the society. One of the needs of the society which also is elemental to the establishment and successful running of participatory democracy is ensuring the participation of the people in the governance of that particular society which later on translates into participation in the governance of the country. Participation in governance leads to the establishment of an 'accountable government' in the state for as much it participates in the building of a strong nation thereby providing a backbone to the nation by becoming a very important pillar of the government. A government that provides such a platform to its people where they can participate in the governance of the society is more successful than any other and this is the basic element of participatory democracy. The Digital India Plan brought in by the union government in the year 2015 brought many governmental schemes for the people, both at the central and state levels. The different states also came up with their state specific e-Governance initiatives. Sikkim too launched several digital initiatives; amongst them some initiatives have been discontinued while others are still in place. This research paper examines the electronic governance initiatives of the Sikkim Government, the challenges and hurdles in the implementation of those policy initiatives. With the proposition that electronic governance is a very important tool in the hands of government to secure good governance, the paper argues that

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if government initiatives are citizen-centric, they will increase public participation and lead to strengthening of the governance architecture in the state. The paper assesses the conceptual landscape for e-Governance, with a focus placed on how Sikkim can foster digital environments with citizen-centric modes.

Keywords

E-Governance, E-Government, Digital India, Citizen-centric, Information and Communication Technology.

1. INTRODUCTION

Public governance is an important attribute of a state. Public governance applies the mechanisms through which decisions are taken and implemented while maintaining the constitutional values of the state through the changing circumstances. Good (public) governance requires the attributes of accountability, transparency, efficiency, effectiveness, responsiveness and rule of law⁴. To what extent a government secures and preserves these attributes reveals the status of governance of a state.

Information and communication technology is emerging as an important tool to achieve the goals of good governance. The advent of information and communication technology has transformed not only the way people communicate with each other but has also modified the system of governance in the country. The system of electronic governance is based on the use of information technology in governance while satisfying the needs of the society. Electronic governance comprises the use of information and communication technology for providing services to the public, establishing public-private relationships, managing relations between states and the Centre, maintaining interconnections between government departments and ultimately establishing democratic setup. The use of information technology in offering democratic services has potential to build a strong democratic edifice of the country.⁵ Nevertheless, use of Information and

⁴ *Public Governance, 2011*, OECD Website, available at <http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/41890394.pdf>, last seen on 11/04/2021.

⁵ N. Saxena & V. Mayank, *E-Government and E-Democracy: The Role of Technology Vis-A Vis Indian Socio-Legal Framework*, *Cyber Crimes in 21st Century* 358,361 (2017).

Communication Technology in the governance architecture of the country is very challenging⁶. The existing and evolving system of governance in many countries exhibits how information and communication technology is revolutionizing the concept of public administration “through control, surveillance, communication and its knowledge to manage its potential”⁷. The importance of information and communication technology in governance can be seen in the shift towards e-Governance in countries throughout the globe where many countries including Organisation for Economic Cooperation and Development members have formulated policies for the better functioning of governance architecture⁸ in their respective nations.⁹ India too initiated the electronic system of governance and came up with the “Digital India Plan” on 1 July 2015¹⁰.

The ‘Digital India Plan’ was launched by the ‘Central Government’ to increase people’s participation in the governance of the country. The plan came up with many governmental initiatives both at the Centre and state level to facilitate the provisioning of services and connecting the government directly to the people. Various schemes such as online filing of the form, pension schemes of old age people; DigiLocker; e-Granthalaya; e-District etc. were launched. The digitalisation of services inspired the functionaries too and many state governments¹¹ are continuously working to adopt, introduce and implement electronic governance policies, either as per the directives of the central government or through their own initiative.

Sikkim too worked to introduce many such plans. The ‘State’ has launched many digital initiatives; amongst them some are discontinued while others are still in place. In spite of several challenges in implementation including hilly terrain and geographical limitations the state has launched several e-Governance projects. Implementation of any policy in the state is challenging as it needs

⁶ *Ibid.*

⁷ I. Snellen, *Electronic Governance: Implications for Citizens, Politicians and Public Servants*, 68, International Review of Administrative Sciences, 183, 183 (2002).

⁸ C. V. Haldenwang, *Electronic Government (e-government) and Development*, 16 The European Journal of Development Research, 417, 418 (2004).

⁹ S. M. Mutula, *Bridging the Digital Divide through e-Governance*, 23, The Electronic Library, 591, 591(2005). Also, C. Auty, Cunningham, A., & Phillips, M., *Accountability and Accessibility: Ensuring the Evidence of e-Governance in Australia*, 57, Aslib Proceedings Emerald Group Publishing Limited, 301,317 (2005).

¹⁰ *About Digital India*, Digital India Website, Ministry of Electronics & Information Technology, available at <https://csc.gov.in/digitalIndia>, last seen on 11/04/2021.

¹¹ S. Paul, *A Case Study of E-governance Initiatives in India*, 39 The International Information & Library Review, 176, 177 (2007). See Also S. Madon, *Evaluating the Developmental Impact of e-Governance Initiatives: An Exploratory Framework* 20 The Electronic Journal of Information Systems in Developing Countries, 1, 2 (2004).

great efforts in not only identifying the needs of the people but also how to fulfill them. Since, if these policies are successful, they have the potential to bring the government closer to its people and thereby not only resuscitate but invigorate the government - people relationship in any system.

When the government introduces any website or app etc., it provides an online channel to reach to its citizenry. There is an observation that “an e-government web-site is actually a proxy for the government providing public services to citizens through traditional offline channels.”¹² In addition to providing an online channel for providing the services, it builds trust¹³ for the government since it promotes transparency and participation.¹⁴ It is a well-accepted fact that information and communication technology has today “permeated nearly every aspect of government, business, and daily life.”¹⁵ Undoubtedly, technology has proven that it has the potential “to establish interactions among technology development, social trends, policy responses, and public management adaptations.”¹⁶ An electronically equipped state with good policies to implement e-initiatives could be designated as a smart state and may be “viewed as a template of how e-Governance can allow local systems to effectively harness these global forces and deploy the results in a positive generation of new opportunities, socially, politically and economically”.¹⁷ The paper presents the various initiatives that the government of Sikkim has launched and evaluates its effectiveness.

2. DATA COLLECTION METHODOLOGY AND SCOPE OF STUDY

During the progress of research various field surveys and interviews were conducted with the draft questionnaire, to identify the e-services offered by the state and Centre; their success rate in the state; challenges and impediments in implementation of these-services and e-Governance in

¹² T. S. Teo, Jiang, et.al., *Trust and Electronic Government Success: An Empirical Study*, 25 Journal of Management Information Systems, 99, 104 (2008), available at https://web2-bschool.nus.edu.sg/wp-content/uploads/media_rp/publications/mc9Qw1370226095.pdf, last seen on 16/1/2021.

¹³ P. Y. Chu, et.al., *A Longitudinal Research of Public Value and Electronic Governance Development in Taiwan*, Proceedings of the 10th International Conference on Theory and Practice of Electronic Governance, 459, 460 (2017).

¹⁴ A. Tavares, et al., *Electronic Governance for Context-Specific Public Service Delivery: A Survey of the Literature*, Proceedings of the 9th International Conference on Theory and Practice of Electronic Governance, 135, 136 (2016).

¹⁵ Sharon S. Dawes, *The Evolution and Continuing Challenges of E-Governance*, 68 Public Administration Review, 586, 586 (2008).

¹⁶ *Ibid.*

¹⁷ K. A. Paskaleva, *Enabling the Smart city: The Progress of City e-governance in Europe*, 1 International Journal of Innovation and Regional Development, 405, 418 (2009).

Sikkim. Two different sets of the questionnaires were prepared for conducting surveys one for the service providers, in particular the departments offering e-Services and second for the consumers of the services. The second questionnaires were answered by the students studying in colleges between the age group of 18- 30 years and people of age group between 31-40 years of age. The objective of conducting this survey was to find the tech-friendly attitude of the people in Sikkim; to study their awareness about various schemes launched by the government of Sikkim or Central government; user's confidence level in using app for availing services offered; the technical or other difficulties in using apps; security issue(s) if any in using app; adequacy of the services launched in electronic mode.

The research method adopted in the research project included both doctrinal and non-doctrinal methods. With other primary and secondary materials various websites documents, Facebook pages, applications introduced by governments are examined.

The data was collected through snowball sampling. For this, we started with random sampling within the targeted group of the people concerned to identify appropriate individuals. The sampling method consisted of both the random sampling and thereafter the snowball sampling approach.

The research includes data collected from the questionnaires and interviews. This was done in two stages. At the first stage of the study, the questionnaires were used to collect data from School and College going students. The questionnaires were also filled by people above 25 years of age. The survey was to understand how people are using tech-gadgets; whether they are aware of various schemes launched by the State of Sikkim or Central government; how much confident they are in using application-based services? What difficulties are (technical or otherwise) they are facing in using apps? Whether the government could adequately introduce the services in electronic mode?

At the second stage research data was collected from the interview with the officer-in-charge of various departments (Information Technology Department of State of Sikkim, Energy and Power Department Sikkim, Forest & Environment Department, Cooperation Department etc.) The questions in interviews were associated with the existing legal framework, various schemes/services launched by the departments; the problem they are facing in bringing and implementing new schemes/services. Data collection was also done through filing of Right to Information applications (Social Justice & Welfare Department etc.).

What transpires from this study encompassing e-Governance experiences is that e-Governance is inevitable. We tried to examine the policies of the Sikkim government in implementing the electronic governance system with a citizen-centric approach.

3. e-GOVERNANCE MODEL IN THE SIKKIM

Sikkim is situated in the North-Eastern part of India and located in the southern mountain ranges of Eastern Himalayas. The geographical area of the state is 7096 square kilometer¹⁸ measuring approximately 112 km from North to South and 64 km from East to West.¹⁹ The terrain of Sikkim is mountainous with an altitude varying between 300 meters above sea level to over 7000 meters at Khangchendzonga peak of the Himalayan Mountain with the almost entire state having a mountain terrain.²⁰ With these unique geographical limitations, Sikkim is trying to implement e-Governance program and is facing unique problems that are not present in the plains of India. The e-Governance initiatives in Sikkim are taken care of by the 'Department of Information Technology'. The department not only provides electronic services to the citizens but also guides various government departments on IT projects in technical matters. The department of information technology in Sikkim acts as a nodal agency in determining the availability of electronic services and maintains the Sikkim 'State Portal' and 'State Service Delivery Gateway Portal' which allows diverse e-Service applications of various departments of state in a single portal.

The details of electronic services in the Sikkim include:

¹⁸ *Sikkim Information Commission*, Government of Sikkim Website, available at <https://sikkim.gov.in/departments/sikkim-information-commission>, last seen on 11/03/2020.

¹⁹ *Directorate of Census Operations Sikkim*, Census of India 2011 Sikkim, District Census Handbook North, West, South and East Districts: Village and Town Wise Primary Census Abstract (PCA) Series 12 PART XII-B, available at https://censusindia.gov.in/2011census/dchb/1100_PART_B_DCHB_SIKKIM.pdf, last seen on 16/1/2021.

²⁰ *Ibid.*

3.1 e-District²¹

A district in India is a major centre for government as most of the government to consumer (“G2C”) or government to citizen (“G2C”) interactions takes place there itself.²² E-District as a scheme is a one of the 44 Mission Mode Project (“MMP”) of the National e-Governance Plan (“NEP”) was conceptualized by the central government for the state.²³ The project was introduced to equip various departments of government at the district level with efficiency in their service delivery to the citizens.²⁴ The project was launched with the objective of providing “efficient and improved delivery of services; capacity building of field functionaries; access to efficient, reliable, transparent and accountable services; reducing service time & costs for the government and citizens and enhancing perception & image of the government.”²⁵

The ‘e-District Mission Mode Project’ in Sikkim was launched with a single window setup on 9th July 2016 in the east district of Sikkim. The government of Sikkim has identified the services for e-enablement in all the districts of the state. It emphasizes upon the various citizen-centric services²⁶ such as online application of ‘schedule caste certificates,²⁷ schedule tribe certificates,’²⁸

²¹ *About us*, e-District, Government of Sikkim Website, available at <https://eservices.sikkim.gov.in/>, last seen on 16/3/2021.

²² *e-District*, Ministry of Electronics & Information Technology Website, available at <https://www.meity.gov.in/content/edistrict#:~:text=e%2DDistricte%2DDistrict,or%20G2C%20interaction%20takes%20place.&text=Front%2Dends%20under%20the%20scheme,Sub%2Ddivision%20and%20Block%20levels>, last seen on 16/3/2021.

²³ *Information Technology Department*, Information Technology Department, Government of Sikkim, available at <https://sikkim.gov.in/departments/information-technology-department/e-district>, last seen on 16/03/2021.

²⁴ *E-Districts*, Ministry of Electronics and Information Technology (MeitY), available at <https://vikaspedia.in/e-governance/national-e-governance-plan/mission-mode-projects/e-district-mission-mode-project>, last seen on 06/03/2021.

²⁵ *Ibid.*

²⁶ In Sikkim there are seven services under e-District projects.

²⁷ For the issuance of online SC/ST certificates the users are required to fill up an online application form and also have to upload their scanned images of their photographs and signature.

²⁸ *Apply for ST Certificate*, National Government Service Portal, Sikkim, available at <https://services.india.gov.in/service/detail/sikkim-apply-for-st-certificate>, last seen on 16/03/2021.

OBC certificates,²⁹ senior citizen certificate,³⁰ unmarried certificates,³¹ income certificate³² and property certificate³³ bearing digital signature of the competent authority. These services, citizen can avail online or on common delivery outlets at various District Administrative Centers (“DAC”)³⁴; Sub-Divisional Magistrate (“SDM”) office ‘Block Administrative’ centers & various government departments. The citizens can avail services by applying online or by processing it to a kiosk or applying in person. The service³⁵ provided under e-District project can be accessed on the website regulated by the Government of Sikkim³⁶. Under the ‘apply for services tab the users can view services based on their respective state.’³⁷

²⁹For application of OBC and the SC/ST certificates a similar procedure has to be followed but due to the economic factors involved in determining the status of OBC specific reference is needed. The applicant is required to provide their family details with regard to no. of member in their family, name of the members of their family, age, sex and relationship with the applicant as well.

³⁰The applicant must follow a similar procedure as opted in the application for the issue of SC/ST certificate.

³¹*Ibid.*

³²The applicant must follow the similar procedure of SC/ST Certificate along with that they also have to provide the provisions of family members details as similar to the OBC Certificate.

³³For the application of property certificate, the applicant has to choose between the option of landed property certificate and no landed property certificate and the revenue circle to which the property belongs based on the district and subdivision of the applicant. The applicant has to provide his personal details along with photograph and signature in the required size. After submission of application a bank payment is to be made of an amount of Rs. 50. After a successful payment, the bank receipt is to be downloaded and with the acknowledgement slip so generated which candidate should produce before the concerned authority for further processing and physical verification of documents.

³⁴ N. Saxena, *E-Governance: An Evaluation of Citizen Centric Services in the State of Sikkim*, 12 *Shriji Socio Legal Journal* 67, 76 (2017).

³⁵ For availing online services, the citizens are required to register themselves on the site. After the successful completion of registration process, the user can view their profile on the ‘service plus service delivery framework’ and apply for various available services.

³⁶*State Online Services*, Department of Information Technology, Government of Sikkim Website, available at <https://sso.sikkim.gov.in/account/login>, last seen on 10/04/2020.

³⁷ The term Service Plus is used as a generic application to refer to all electronic services provided by the Government to its citizens. This includes all the services whether Government to Citizen (G2C) or Government to Business (G2B), provided at centre, state or local level by the centre, state and local government. Based on demand or mandates the services can be categorized as: (a) Regulatory Services like trade licence, permit for construction of a building etc. (These services can be denied by the Government). (b) Statutory Services like Issuance of Birth/Death certificate (Government cannot refuse it). (c) Developmental Services are services or schemes provided by the Government for the benefit of citizens like NREGA, IAY, Old age Pension etc.” *Service Plus*, Bihar Government’s Service Definer Guide, available at <https://serviceonline.bihar.gov.in/resources/homePage/10/Document/ServicePlus-SDG.pdf>, last seen on 10/04/2021.

3.2 Community Information Centers³⁸/ Common Service Centers

The ‘Community Information Centers’ (“CIC”) project was launched with the objective of socio-economic development of people of India staying in urban and undeveloped areas without proper internet connectivity or no connectivity by connecting the blocks of the District through information and communication technology (“ICT”).³⁹ Based on ‘community access methodology’ Community Information Centers (CIC) was launched to alleviate the digital divide amongst the people staying unconnected due to unavailability and unaffordability of the internet.⁴⁰ Initially in Sikkim in the year 2001 total forty (40) Community Information Centers were set up⁴¹ which became 45 in the year 2005 by inclusion of 5 additional CICs.⁴² The project was launched in the state with the following objectives- to provide ICT infrastructure at block level; web access and internet services such as e-mail; market access and e-Commerce; access to socio-economic databases; e-Learning (computer aided learning processes) and e-Education; e-Medicine, e-Consulting; e-Governance applications, government to citizen services; weather information; IT awareness among local people; computer training programs; tender notification; e-Employment notification.

The Common Service Centers or CSC were introduced in May 2006 under the aegis of National e-Governance Plan of India as “a strategic cornerstone of the ‘National e-Governance Plan’

³⁸ In February 2000, the then Prime Minister Shri Atal Bihari Vajpayee announced a plan for the establishment of Information Technology facilities at Block level in the North-Eastern region of the country. Accordingly, the Ministry of Communications and Information Technology launched a pilot project to establish CICs in 30 Blocks in North-Eastern States in April 2000. The CICs have been set up in all the 487 Blocks of the eight North-Eastern states viz. Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim and Tripura. Ministry of Communications and Information Technology Department of Information Technology, Government of India, Annual Report 2005-06, available at <https://www.meity.gov.in/writereaddata/files/annualreport2005-06.pdf>, last seen on 17/03/2021.

³⁹ Ministry of Communications and Information Technology Department of Information Technology, Government of India, *Report by India to the UNESCO General Conference on the Implementation of the Recommendation Concerning the Promotion and Use of Multilingualism & Universal Access to Cyberspace*, available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/1st_report_india.pdf, last seen on 17/03/2021.

⁴⁰ *Ibid.*

⁴¹ Sikkim also faces the problem of underdevelopment due to its geographical remoteness and hilly terrain which during the rainy season makes it cut off from the mainland India.

⁴² *Community Information Centers (CICs)/ Common Service Centers (CSCs)*, Information Technology Department, Government of Sikkim, available at <https://sikkim.gov.in/departments/information-technology-department/community-information-centers-cics-common-service-centers-cscs>, last seen on 10/11/2020.

(NeGP), approved by the Government”.⁴³ This CSC as the ‘National Common Minimum Program’ brought to introduce e-Governance on a massive scale to provide “e-Governance, education, health, telemedicine, entertainment as well as other private services”.⁴⁴ The main objective of its launch was “to provide physical delivery access points for government”⁴⁵ with a further goal “to provide internet access and IT enabled services to the community at large.”⁴⁶ The launch was mainly in rural areas across the country in ‘Public Private Partnerships’ (“PPPs”)

In the year 2006, the ‘Government of India’ made a change in the functioning of CIC which was operational within the parts of North-East India at that time. These CICs were converted to CSCs. The evolution of CIC to CSC transferred the authority of supervision and functioning of such CSC to the hands of the department of information technology Sikkim. The CSCs were to provide assistance to the state departments by channelizing the services to those departments. “With the approval of the State government the project was handed over to M/s Comat Technologies in the year 2008 that was later handed over to M/s IL&FS (“ETS”) in the year 2009. The State Government had issued a notification (no. 692/406/DIT) on 12 July 2010 for leveraging the CSC’s for delivery of services as well as for sustenance of such CSC’s by making the state departments avail services from such CSC’s within a prescribed rate for various technical tasks⁴⁷.

3.3 The State Portal and State Service Delivery Gateway & State Service Portal

The ‘State Portal’ (“SP”) and ‘State Service Delivery Gateway’ (“SSDG”) project was started in 2013. Formulated under the ‘National e-Governance Plan’ (NeGP) the ‘State Service Delivery Gateway’ (“SSDG”) steadily evolved from computerization of the departments to service orientation of people’s centric services. The SSDG was developed by the Department of Information Technology of Sikkim to provide various services. For availing such services citizen

⁴³ *Common Services Centers*, Ministry of Electronics & Information Technology Government of India, available at <https://www.meity.gov.in/content/common-services-centers-0>, last seen on 12/11/2020.

⁴⁴ *Ibid.*

⁴⁵ *Supra* 51.

⁴⁶ *Ibid* at 20.

⁴⁷ The applicable rates are: For data entry works, Rs. 100 per hour, lump sum usage of CSCs for all its operational services, Rs 2500 per month per panchayat and for services provided by CSCs at block level, Rs 500 per month for per block for providing different services and forms to the citizens.

can register⁴⁸ themselves by logging onto the website⁴⁹ of SSDG. The online ‘State Portal’ provides information related to the functions and services provided by the Government of Sikkim and its constituent departments to the ‘citizens’, ‘businesses’ and other ‘interested users’ (e.g. tourists and investors). The following e-services are available through the state portal - “State Quota Allotment; Scholarship; e-Certificates; Utility Bills; e-Recruitment; IT Vendor Empanelment”.⁵⁰

The SSDG and the State portal of the Sikkim Government provide 41 services, relating to 9 departments of the state government. These are - Agriculture,⁵¹ Animal Husbandry,⁵² DC Office,⁵³ Labour Department,⁵⁴ Rural Management and Development Department,⁵⁵ UD & HD

⁴⁸ The user has to click on to the new user register tab, highlighted in blue color below the login window or at the left-hand side top corner of the portal. After clicking on the new user registration tab, the user registration window will open where user should provide personal mandatory details such as the name, email address, date of birth, category (SC, ST, OBC, BC), father’s name, mother’s name, guardian’s mobile number, mobile number of the user, address, *Aadhaar* number, bank account details and a profile photo for their account. The user then is provided with a unique login id and a password to login themselves to the portal.

⁴⁹ *Single Window to Access Online Government Services*, Department of Information Technology, Government of Sikkim Website, available at <https://sso.sikkim.gov.in/account/login>, last seen on 12/04/2021.

⁵⁰ *About Us*, Government of Sikkim Website, available at <https://www.sikkim.gov.in/aboutus/faq>, last seen on 12/04/2021.

⁵¹ For availing the services offered by the agriculture department anyone can submit an online application for asking assistance or can download the required form for a manual application. The available services are assistance and training for agriculture, horticulture and cash crop development.

⁵² The Department provides an online platform where interested citizens can apply for certificates for the establishment for AI centers in state AH, LF and VS. The applicant can also apply for the training for such purposes. It also provides e-application form for allotment of breeding bulls under AH, LF, and VS.

⁵³ The DC office provides e- services - for registration of firm, for issuance of NOC for passport from the ministry of internal affairs on tatkal basis, for Employment Card, for issuance of Schedule Caste/Tribe certificates, for issuance of duplicate map/*parcha* of the land by the holder, for issuance of dwelling house no., for birth certificates verification, for marriage registration under Hindu Marriage Act, for Income Certificates, for Certificate of Identification, for issue of Mutation/*parcha* (Record of Right) after registration of land, for issuance of No landed property certificate and for Unmarried Certificate. Supra at 34.

⁵⁴ The e-service includes labour clearance certificate of the contractor's, registration of workers by the principal employer/employer/contractor/owner of the establishment and issuance of labour clearance certificate of the departmental workers.

⁵⁵ Online grievance redressal forum where a person can electronically apply for grievance redressal.

Department,⁵⁶ National Scholarship Portal,⁵⁷ e-Payment of Electricity Bills⁵⁸ and Application for Scholarship. Few are discussed as:

3.1.1 e-Payment of Electricity Bills:

The Energy and Power department of Sikkim has introduced the process of electronic payment for the electricity Bill.⁵⁹ For availing this service⁶⁰ of online payment the site could be accessed where a new consumer can register⁶¹ and utilize⁶² the electronic payment service.

3.1.2 Application for Scholarship:

The State government has introduced the scheme of electronic application⁶³ of scholarships⁶⁴ both at the pre-matric and post matric levels. Scholarships are provided to economically weak students of Scheduled Tribe (ST), Scheduled Caste (SC), Other Backward Class (OBC Central & State

⁵⁶ The department provides an electronic mode of application for the occupancy report, for the allotment of site, trade licence, constructions, and hawkers' licence.

⁵⁷ The website of the department of social justice empowerment and welfare provides a list of documents required to be submitted for physical verification.

⁵⁸ *Sikkim: Guide on Making online Payment of Electricity Bill*, Services India Website, National Informatics Centre (NIC), Ministry of Electronics & Information Technology, available at <https://services.india.gov.in/service/detail/sikkim-guide-on-making-online-payment-of-electricity-bill>, last seen on 12/04/2021.

⁵⁹ *How to Make Electricity Payments through RTGS/NEFT for Consumers Being Billed from Gangtok, Singtam, Rangpo and Jorethang Billing Centres*, The Energy and Power Department of Sikkim, available at <https://sikkimpower.co.in/neftRtgs.php>, last seen on 12/04/2021.

⁶⁰ The consumer for the online bill payment should first log on to the website of the power department. In the upper right corner under the heading of 'electricity bill' the option of quick payment, RTGS and NEFT are available where users can choose any of the options. Under the terms and condition the consumer gets the information about the payment gateway, net banking disclaimer, and transaction process with the refund policy. The policy states that for the completion of a transaction, a transaction reference number has to be generated and if no such transaction number is generated the consumer should have to start a fresh transaction.

⁶¹ The registration can be done by clicking on the "New User Register Here button. This will direct the user to the 'Consumer Registration Form Page' where the consumer must enter his details such as contract account number & installation number or type.

⁶² The consumer can avail service for new connections under the tab of consumer corner. He can get the information for new connections of electricity under the new service connection option. This provides the list of documents required for availing such a new connection. The consumer can also download form for such a new connection by clicking on the download new connection form button.

⁶³ *National Scholarship Portal*, Ministry of Electronics and Information Technology Government of India, available at <https://scholarships.gov.in/>, last seen on 12/04/2021.

⁶⁴ *How do I apply for Scholarship*, Social Justice, Empowerment & Welfare Department, available at <http://sikkimsocialwelfare.gov.in/#1462947577195-65ec4f3e-5585>, last seen on 12/04/2021.

List) & Minority communities. For availing this service, the students are required to register on the e-Scholarships portal of the central government where they can choose the scholarships, they are eligible for.

4. PROBLEMS FACED IN IMPLEMENTATION OF E-GOVERNANCE PROJECT IN SIKKIM

Sikkim has introduced various electronic services with a people centric approach. The state is trying to implement e-Governance in a mountainous terrain that has its inherent geographical limitations and because of which the implementation process is facing huge problems.

The research identified these many challenges and kept them under the following heads -

4.1 Challenges of Natural Calamities and Connectivity

Sikkim's hilly terrain, prone to landslides; heavy rainfall and other natural calamities, during the monsoon, disturbs the roadways of Sikkim and makes the state 'cut off' or separated from the rest of the country. In such circumstances, e-Governance could be the perfect option to meet the requirements of implementing citizen-centric services for handling the issues of the locale/region. Hence connectivity is the main component for making e-Governance a successful initiative and effective project in Sikkim. The success of e-Governance is directly proportional to the better internet connectivity in the areas where such projects are initiated. The communication between the government and the public necessarily needs strong internet connectivity which leads to greater and increased participation in governance through availing government schemes introduced in electronic mode. Sikkim being a part of the northeastern states of India faces the problem of connectivity as a persistent hurdle which makes the implementation of an e-Governance system a distant dream for the state.

4.1.1 Associated Issues of Connectivity

There are several associated issues of natural calamities and connectivity that affects connectivity. These include problems related to use of fiber optic network cable for transferring data and high internet connectivity issues that include unstable internet connections.

a) Fiber Optics Network Cables

The telecommunication services in the state of Sikkim are provided through the 'Fiber Optics Network Cables', brought from West Bengal. The climatic conditions of Sikkim like landslides etc. sometimes cause damage to the optics fiber cable or breaking of the line of such cable. This often leads to total shutdown of electronic services eventually causing a heavy blow towards the goal of e-Governance in Sikkim. Further, the hilly terrain of the state delays the quick repair and maintenance of such lines which leads to a total shutdown of internet connectivity for days, thus making the whole interconnectivity of departments collapse.

b) Challenges of High-Speed Internet Connectivity and Unstable Internet Connection

In Sikkim the four districts have their district headquarters as Gangtok for the east district; Mangan for North District; Namchi for South District and Geyzing for West District. Large volumes of metadata need to be transferred from the districts to the state headquarters of the departments for efficient e-Governance and it requires high-speed internet connectivity. The connectivity to some extent is fair in the district headquarters but the problem arises as soon as we move towards the rural areas of Sikkim. Rural Sikkim faces the problem of connectivity as the telecommunication networks fail to reach the far ends of rural Sikkim. The poor connectivity affects the proper transfer of data from district to the state headquarters. Hence if any person wishes to avail such services he needs to visit the suburban areas where internet connectivity is stable. This actually defeats the purpose of providing such services electronically. The lack of a stable internet connection disheartens the public and they involuntarily use the default offline services.

4.2 Challenges of 'Service Providers'

For availing benefits of e-Governance initiatives internet plays a very important role, as both the services rendered and made available to citizens are in electronic form/mode. This consequently makes internet access indispensable if one has to enjoy the benefits of services rendered. Therefore, the internet is a mandatory requirement for both the service provider as well as the user. The telecommunication service used by everyone including various departments of Sikkim governments for connectivity (internet also) is of the Bharat Sanchar Nigam Limited of West

Bengal circle.⁶⁵ From the interviews with various functionaries conducted during research, it appeared that having administrative control over the telecom circle in the form of having a separate circle for Sikkim would enhance efficiency in managing the telecommunications related problems that Sikkim faces today.

4.3 Technical Challenges

An impediment in the successful implementation of e-Governance projects is deficient IT infrastructures and poor technical support, especially in the rural areas of Sikkim. The establishment of IT infrastructures is a costly and time-consuming process. Introduction of community information centers by the central government which later evolved into common service centers to some extent could implement electronic Governance in the State. As these centers not only provided IT support to the departments of Sikkim but also acted as an IT infrastructure to the mass and passively advertised such schemes and services provided by the government where local people could gather knowledge about such schemes and services. But absence of trained manpower, trained technical staff, and dearth of proper equipment to repair any defect is affecting implementation adversely. Sometimes equipment to repair the connection doesn't arrive on time. These all factors together are enhancing the issues of connectivity in the state and posing huge challenges in implementing e-Governance initiatives.

4.4 The Citizens/User Perspective

A major obstacle in the implementation of e-Governance projects is lack of awareness among the people with regard to the use of those services. Although Sikkim has a literacy rate of 82.6 percent, the same rate does not reflect in e-Governance implementation. Our survey indicated that people do not have knowledge of e-Governance initiatives. The people are mostly unaware about what various services are available; how these services are working; who can avail these services; what are the basic requirement for availing these services; how secure these services are; If they use these services how much security to their credentials is available; who can assist them in accessing and availing these services; if some failure happens where to approach, whom to approach and

⁶⁵ From the Himalayas to the Bay of Bengal and from the diversified demographics of Manbhum to the dense forest of Sundarbans BSNL offer Telecom services to the entire Sikkim and West Bengal (except Kolkata Metropolitan Area). *West Bengal Telecom Circle, West Bengal and Sikkim*, BSNL West Bengal Telecom Circle, available at <http://www.wb.bsnl.co.in/aboutUs/aboutus.html>, last seen on 12/04/2021.

how to approach. Even though the literacy rate of Sikkim is high as compared to the other states of India the success of e-Governance project depends upon the ‘Digital Literacy’ of the public which is less in Sikkim.

5. PROBABLE MEASURE TO IMPROVE THE SITUATION

The democratic status of a country is directly proportional to the participation of its people.⁶⁶ However, providing services doesn't amount to participation in the polity of the country. Participation in the polity of the country requires providing an opinion on the contour of the policies of the country. Participation in the polity of the country can be fortified by encouraging public participation in the e-Governance and making them utilize the services provided through the e-Governance channels. Making people participate in the e-Governance process is totally dependent on how and what services are provided to them; whether these e-services address their actual problem; whether they are asked before the service/s was/were introduced for their requirements; whether they are allowed to evaluate these services provided afterwards; whether and how they can complain about inadequacy of these services; how government response to their complaints and how the government ensure people's participation. It establishes only when people rate and evaluate usefulness of service/s introduced democratically. Thus citizen-centric services should be the main agenda of any government in democracy and this would eventually lead to better participation of people in policy making.

A country where population is around 1360 Million,⁶⁷ participation of everyone through physical channels is not feasible; therefore e-Governance can provide a very apposite and profuse model of delivery of services. E-Governance is apt for the participatory governance framework. For successful implementation of electronic governance in India the government should take into consideration “Inclusive Digital Literacy Framework” as without digital literacy, the transition from India into a digital India will remain more a dream. Implanting a “Digital Education

⁶⁶ The more people participate in a democracy, the more democratic the nation becomes. R. J Dalton, *Is Citizen Participation Actually Good for Democracy?* British Politics and Policy Blog, available at <http://blogs.lse.ac.uk/politicsandpolicy/is-citizen-participation-actually-good-for-democracy/>, last seen on 12/04/2021.

⁶⁷ *India Population (LIVE)*, Wordometer, available at <https://www.worldometers.info/world-population/india-population/>, last seen on 12/04/2021.

Framework” in the country needs to first evaluate many factors responsible for the successful implementation of e-Services. These factors are low literacy, comprehensive exploitation of technology etc. E-Governance suggests a path for empowerment and appropriate “use of technology will help in bridging the digital divide.”⁶⁸

For making e-Governance a success in Sikkim the following suggestions are made-

5.1 Internet Connectivity

The State should focus on the improvement of internet connectivity as it is a basic requirement for the successful implementation of such services and internet users are the explicitly probable and potential customers of e-Government projects. The State should make greater investment in providing internet services to the populace. It could tie up with the private sector to provide more stable internet services. The areas already have a major chunk of internet users who are availing such services through private internet connections and have the technical knowledge to avail such services. An establishment of stable internet connectivity in the areas would boost the usage of such services to a greater extent for the time being and will also act as a basic foundation to provide stable internet connectivity to rural areas of Sikkim.

5.2 Community Information Centers (CIC)/ Common Service Centers (CSC)

Community Information Centers (CIC)/ Common Service Centers (CSC) had proved to be an asset for providing people’s centric services to the people of Sikkim. It can be seen that the introduction of Mission Mode Project (“MMP”) of CIC which was started in the year 2002 had created huge awareness among the citizens who did not have prior knowledge of such services being provided. The CIC’s / CSC’s were a crucial element for capacity building for the public in bridging the gap between wired elite and non-elite masses. The rural masses of Sikkim had benefited with the introduction of such centers and came to par with the urban masses in terms of use of ICT for accessing such people centric services. Now with the closure of such centers the rural population has a deficiency in accessing such services which is further fueled by the lack of stable internet connectivity. The revival of ‘Common Service Centers’ with well-equipped technical

⁶⁸ P. P. Nedungadi, et al., *Towards an Inclusive Digital Literacy Framework for Digital India*, 60, Education Training, 1, 3 (2018).

infrastructure would ensure a one-stop access point for such services. Further, CIC/CSC's can be leveraged to use as a basic center for providing such technical knowledge to the masses of rural Sikkim as these centers become a hub point for single window access to internet connectivity.

5.3 Digital Literacy

The rural area of Sikkim still faces the problem of digital literacy which has become a major limitation in implementing e-Governance schemes in the State. Sikkim though having a literacy rate higher as compared to some of the states of India lacks digital literacy as people are not much tech savvy due to lack of technological knowledge, age of the citizens etc. Poor connectivity in particular acts as a hindrance in creating a desire of having tech gadgets which they can use for availing e-Governance services. Therefore, some schemes for digital literacy should be introduced. It is suggested that, to improve e-Governance in Sikkim, it is necessary that people should be trained in using the platforms. Looking at the needs of the society there should be two training platforms one for basic learners and other for those who have basic knowledge or are comfortable with digital gadgets. In all four districts of Sikkim an outreach program should be started where volunteers could receive initial training/information on how to use the applications. They then could be provided with a unique code which they can use to assist individuals for downloading and installing the application and helping them to file documents. The people/volunteers involved here should be provided reward from the government. They can partly be paid through the fees collected from the applicants. This may provide employment to the volunteers working in the area and thus is a source of earning. This will give solutions to many problems at one place like digital illiteracy, implementation of e-Governance program, educating the people on the use of such applications and providing some employment to the youngsters etc. However, the State IT department would have to ensure proper integration of the services with the respective departments and provide service support to such trained volunteers which too could be easily generated in house or for a short period of time outsourced to service providers.

5.4 Awareness

For successful implementation of any project/scheme or service, awareness plays a vital role. If people are not fully informed about the scheme, they would be precluded from taking advantage of the scheme. Therefore, detailed information of the scheme is much needed. An emphasis must

be made by the state for creating awareness for the use of various ICT devices/modes among the public equipping them with the technical knowledge required for use of various e-Governance schemes.

5.5 Youth Participation and Awareness

Technology is something that attracts the youth the most. Hence, inevitably youth plays a very important role in the success of e-Governance schemes. Therefore, we find youth participation in implementing e-Government projects in the State a vital element. An informed youth will not only prefer to use these e-channels but also will help to promote the use of such schemes to various other age group people. Thus a greater emphasis must also be made to create understanding and familiarity among the youth in various schools and colleges by conducting awareness programs, symposium and tech fest's where the students/youth can learn about various innovative technologies available and can harness such knowledge to avail such e-Governance schemes. With the growing competitive market, one has to be advanced with the changing economy and must quickly adapt to the changing innovative technological environment.

5.6 Reduce Paper Documentation

It has seen in the governance system of Sikkim that although the state has implemented e-Governance schemes the back office works of such services are being carried out in the old file system of paper documentation. For example, in case of an application of ST certificate through the e-District portal, the applicant has to provide a hard copy of the supporting documents to the concerned authority and has to make an offline presence to the office during the time of verification. This process of offline submission of documents and verification is an additional work which creates doubt in the minds of citizens about the use of e-Services provided by the departments and has become a hurdle in achieving the goal of moving from 'a paper-based governance model to a paperless governance model'. The state should focus on reducing the paper documentation which is required for some services. An efficient delivery of electronic services in case of issuance of certificates can be ensured by using 'Digital Signatures' and further making them available on the DigiLocker portal where the applicant should be allowed to download them through *Aadhaar* verification. The state should make it focus and transform file-based paper service into online service by introduction of a reformatory transfer of file within an office through

the use of local area networks. This would benefit in many ways such as ensuring speedy transfer of file from one authority to another authority and a shift from the phase of paper bound to paperless transactions.

5.7 Introduction of Aadhar Verification Method

It has been observed that in order to avail some services online in Sikkim the applicant has to follow a two-step procedure which starts with the online application of such service followed by the verification of documents physically. This verification procedure starts with the verification by the panchayat followed by block offices and then District Collector or Sub Divisional offices which provide the services. This verification process is usually time-consuming as the applicant has to pass through various verifications stages which might frustrate the process of online application as in the end the applicant has to make a physical presence. With the advancement in technology and to thrust the implementation of e-Governance by the government for providing efficient delivery of services to the public, the government must make the use of available e-Governance schemes of center such as *aadhaar* by linking it to all the services in order to ease the verification process. An example of such can be made by the introduction of *aadhaar* based biometric verification which will reduce the time for prolonged verification process as the person cannot obtain multiple *aadhaar* numbers and will ensure to check various bogus claims. Such measures can also be obtained by providing income certificates to individuals employed under the 'National Rural Employment Guarantee Schemes' ("NREGA"). The *aadhaar* can be linked with the banks to monitor the fund details provided by the government. This will also be the income proof of such individuals. The linking of *Aadhaar* to all the services provided by the government will reduce the time consumption in delivery of services; increase the efficiency of the government; help in curbing corruption and automatically lead to the reduction of various fraudulent benefit holders.

5.8 Integration with Central Schemes.

From the research, it has been seen that in Sikkim a vast majority of the population comprises of rural population which are basically unaware of such schemes provided by the government. The people, however, have some knowledge of various schemes of 'Digital India' plan but are not utilizing such services due to lack of internet connectivity, hesitancy and unwillingness as no

services of Sikkim government are being provided under such schemes. The government can take proactive measures to link the services provided in Sikkim to the central schemes such as *UMANG* which covers a great deal of services provided by the central as well as various state governments. These schemes have a greater number of users as the schemes are provided in various platforms which diversifies from a feature phone to access on the web. The popularity of such schemes and diversified user interface will create a large user base for the people of Sikkim. Therefore, linking of electronic services provided in Sikkim to such centrally sponsored schemes is useful in establishing an e-Governance system in the State. The government can also harness the popularity of such schemes in order to create awareness among the public with regard to various schemes of e-Services available in Sikkim.

6. CHIEF RECOMMENDATIONS

Villages in Sikkim are facing problems of disconnection from the mainland. The problem aggravates during rainy seasons due to landslides or road destructions. However, some problems like bills payments, purchases can be managed but issues of medical needs; medical emergencies need consideration. It would be useful if medical emergencies can be attended through the introduction of an e-Governance application which can be utilized by people for calling ambulance services or taxi services or consulting with doctors/trained medical attendants based on their location. Help from trained individuals could save precious time and so would the presence of taxis and ambulances. Pregnancy and other issues need continuous queries to be resolved for which it is not always needed to visit the hospitals or doctor. Also travelling long distances is not comfortable some time and not advisable in other times. Hence an application for the people of Sikkim could be introduced to make them to be in touch with the doctor, Nurse etc.

Sikkim is badly fighting with the problems of a high number of suicide cases⁶⁹. People need counseling and advice on psychiatric treatment. Hilly terrain does not have a dense population and getting immediate psychological counselling is not possible most of the time, if the patient belongs from a rural/village area. An application to provide immediate advice/counselling can also be introduced to make people relaxed and less suicidal. Such an application could also be of assistance

⁶⁹W. F. Gurung, *Sikkim: The Suicide Capital of India*, Statecraft (30/12/2019), available at <https://www.statecraft.co.in/article/sikkim-the-suicide-capital-of-india>, last seen on 12/04/2021.

to people who are in contact with individuals who are prone to depression. In addition, counselling and advice can be provided without the person disclosing his identity. The initiative can be a boon to the patient and may reduce the suicide rate in the Sikkim. Aarogya Setu during the time of corona is emerging as a user-oriented solution for the public. A similar initiative in suicide cases is much needed in the state.

Rural villages of Sikkim lack some basic facilities such as poor frequency of bus services etc. The people are required to visit the district headquarters for availing many of the services. Therefore, it is suggested that the government should offer at least one bus in a day with an online/app based seat booking facility, where citizens should be provided facilities for the advance or even same day booking of the seats. The online/app booking service may help them to plan their journeys comfortably. There may be issues of understanding the app facilities; accordingly, the conductor should be trained in doing it. He may be required to instruct the people how to use the app and transfer money. He may be given the authority to collect money and show to the people how to use a wallet. And the government may ask the bus drivers to do at least 25% online/app bookings. This would encourage the people to understand the digitalised system or the system of e-Governance. CCTV cameras can be installed on such buses to prevent mismanagement and the conductor should have to book 6 tickets compulsorily by installation of six apps every day. For this Government of Sikkim could enter into a tie-up with private service providers to provide such services.

Digital India plan is about providing and availing e-Services or services in electronic mode. To fulfill this objective, one needs tech-gadgets. Since, the poor citizenry of the country cannot afford costly gadgets, a scheme to make available either low budget devices or a single with the tutorial as to how to use them may emerge as a solution.⁷⁰

⁷⁰ With the objective to bridge the digital divide Sikkim Government distributed laptops to the students studying in Government Schools and colleges (XI and XII and College). *Distribution of Free Laptops to Students*, Government of Sikkim, available at <https://sikkim.gov.in/departments/human-resource-development-department/distribution-of-free-laptops-to-students#:~:text=The%20State%20Government%20procured%2018%2C500,all%20Government%20Colleges%20of%20Sikkim>, last seen on 12/04/2021.

At present a large number of public utility services are provided by the government therefore it is necessary that the government should take an initiative for rolling out such services in Sikkim.

7. CONCLUSION

In a democratic country, the citizens have the right to elect their government. Participatory democracy is where people not only elect their government but participate in the system of governance. Nonetheless, in a country like India where the population is huge, participating in governance is not beyond imagination but difficult to achieve. A participatory democracy longing for participating citizens in the system of governance is more than just democracy. In any participatory democracy, the role of citizens is of significant importance as they may decide or build the future of the country by participating in the system of governance. Recent advancement in technology has brought a paradigm shift in the approach of government as well as the citizenry led by increased use of information and communication technology in government departments as well as private work. The system of e-Governance is emerging as a felicitous means of achieving participatory democracy.

There is a need to understand the two basic aspects of e-Governance - first providing the basic services electronically to the citizens and second ensuring their participation in day to day governance. The services offered by the government departments are basically the part of their duty and obligation thus if delivered electronically may not only be convenient to avail but also enhance the trust in the government. A properly planned service based on public opinion, considering their needs, upgraded and improved on feedback are actually a platform to the people to participate in governance. Thus the newly introduced system of e-Governance is having potential to establish participatory democracy. The use of technology in governance led to transparency, reduced corruption and sustainability with a higher investment in e-Governance.

For achieving the objective of good governance, e-Governance is the best vehicle. Nonetheless, if the policy directives of the government are designed with citizen centric services for increasing the people participation, the ideals of participatory democracy could be achieved. Where proper planning met with a people's centric approach along with the aspiration may give desired results. Thus there is a dire need to build the confidence of its citizens by providing the suitable and most needed services. Once the confidence is built up people will adopt electronic means of governance.

Ergo, the next obstacle in achieving it is designing the policies to implement e-Services successfully. Undeniably, the designing and implementing mechanism of the people centric services may induce satisfaction in people towards the services provided by the government and thereby increases the usage of online services. The basic requirement of e-Governance to provide tech devices could be achieved by making availability of the cheap mobile phones with handy messaging services. Facebook's role in all this is so central that, in rural regions, handsets with internet access are dubbed 'WhatsApp phones.'⁷¹ These efforts may definitely accelerate the use of digital devices.

The Department of Electronics and Information Technology ("DeitY") has placed a multi-pronged strategy under 'Digital India Plan' to make it an ICT based system. The Digital India program is centered on infrastructure, services and empowerment which came up with several policy initiatives. Some of these initiatives were implemented by the government of Sikkim. The department right now furnishes the project of e-District, maintains Sikkim State Portal and State Service Delivery Gateway Portal to provide diverse e-Services of various departments of state in a single portal. However, lack of services in some emergency situations makes the life of people more difficult in hilly terrain. The state government needs to come up with more people friendly/citizen centric services to make e-Governance a more successful mode of governance. Further, in order to make implementation of people centric services a success in the State, it is very evident that internet connectivity will play a chief role. This limitation of internet connectivity is a major obstacle not only for the public which is availing the services provided but also for the departments to provide and develop citizen-centric services for the public. Poor internet connectivity adversely affects communication between state departments. It is well evident that the electronic services also require interconnectivity with various other departments in order to achieve efficiency with a horizontal flow of communication between the concerned departments in some cases as well as connectivity for communication from state offices up to the GPU level.

⁷¹ S. Rai, *How Reliance Jio and WhatsApp are working together to attract millions*, Mint (04/12/2018), available at <https://www.livemint.com/Companies/EYEHmbrCLaqw0Eb3uipAEM/How-Reliance-Jio-and-WhatsApp-are-working-together-to-attra.html>, last seen on 12/04/2021.

The state has been putting its efforts; nonetheless, the implementation process is facing huge problems. The perfect designing and proper implementing mechanism of the people's centric services may improve the satisfaction of people towards the services provided by the government and thereby increase the usage of online services.

DELAYED JUSTICE IN INDIA: THE DEHYDRATED PEACH

Dr. Ashish Kumar Srivastava¹

Abstract

Justice in social, economic and political realm is a constitutional goal. Remedying the wrong or providing to one, his due is the core of justice dispensation process. Substantive and Processual Justice in India due to being a grafted outcome of British Imperialism resulted in a dilatory and expensive justice dispensation process and it mostly turned the remedy into the malady. Legalism and authority of court is a collateral of federal model of constitutional governance which is sine quo non. This legalism, authority and majesty of court has often proved to be self-harming for the Indian judiciary. Dilatory trials and enlarged review jurisdiction of appellate courts proved to be like 'pimple on ulcer.' Litigation policy and litigation management boosted with IoT, AI, Robotics, 4.0 and jurimetrics is being seen as a panacea. Alternative dispute resolution especially mediation is arresting our attention and back-to-back amendments to Arbitration Act is an evidence of it. Indifference to local self-governance and indigenous model of justice dispensation bodies like Gram Nyayalay & Nyaya Panchayat and law schools have proved very fatal to the system. Judiciary wants to act as 'messiah' for 'we the people' and in the process do not let us solve our own problems. Equally it does not let us believe that we can also solve our problems. Unnecessary enlargement of jurisdiction and liberalizing the locus standi resulted in docket explosion. Disposal and execution in India are simply not linked and mostly justice dispensation is associated with disposal only which again makes justice in India a dehydrated peach, the juiceless fruit. In this paper the author attempts to analyze the problems of Indian justice dispensation process and suggest solutions.

Keywords: dilatory justice, delay, litigation, management, court management.

“Justice delayed is justice denied.”

William E. Gladstone

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1. INTRODUCTION

“We the people of India’ constituted India as a sovereign, socialist, secular, democratic, republic and having done that we have resolved that it will provide Justice- social, economic and political. The Constitution establishes the three organs of state, legislature, executive and judiciary. Indian Constitution is federal. ‘Federalism lastly means legalism- the predominance of judiciary in the constitution-the prevalence of a spirit of legality among the people.’² The Indian judiciary is an integrated judicial setup which was required in federal model to adjudicate the disputes between the states and union. This needs authority of courts which comes being a court of record and having inherent power to punish the contemnor³. The need of judicial organ as an adjudicator is justified for existence of State. Over the years, Indian judicial system and justice dispensation process proved to be dilatory and expensive. Docket explosion and pendency of litigations became the face and fate of Indian judiciary. This created a deterrence effect in dispute resolution process as genuine disputes could not see the adjudication process of the country and trivial matters arrested the attention of the judiciary. The Indian judicial setup is an amalgamation of Constitutional Courts i.e. Supreme Court, High Courts and at many lower level courts are established to resolve the disputes. O. Chinappa Reddy J. writes that, “Independence of judiciary is not a luxury, it is a constitutional necessity. It is necessary not merely to adjudicate upon the disputes between the parties and settle their disputes, but it is a constitutional imperative to sustain and stabilize democracy by keeping the Parliament and the executive within the bounds of their constitutional authority and preventing Parliament from degenerating into an autocracy and the executive into a dictatorship.”⁴

1.1 Dispensation of Justice: Indian Judicial System

The judiciary with its full vigour and effort tirelessly worked for resolving disputes of human beings but due to many challenges in the process got overburdened with dockets. Dispute resolution can be divided basically in two categories, trial which is a fact-finding adjudication and review which is a law finding revision. The trial and review process are gift of common law system

² A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, Universal Law Publishing Co., New Delhi 175 (2012).

³ Art. 129, the Constitution of India.

⁴ O. Chinappa Reddy, *The Court and The Constitution of India: Summit and Shallows*, Oxford University Press, New Delhi 301 (2012)

to India. India is plural and diverse and grafting an imperial system in India has not done any good. The trial techniques and ignorance of pre-trial process has proved very fatal in India. It resulted in dilatory and expensive trials which is mostly challenged in higher courts. The instinct for justice and liberty establishes an egalitarian order. Justice, which is ascertainable and enforceable makes the true basis of society.⁵ Rankin Committee in 1925 extensively researched about causes of delay in justice delivery⁶. It traced many reasons of delay and provided solutions therein for which are still relevant and utile.

1.2 Enlargement of Jurisdiction

The review system by appellate and Constitutional courts was in the line of spirit of democracy and rule of law. Judicial review is basic feature of Indian Constitution hence in the name of “miscarriage of justice” and “to do complete justice”⁷ and by PIL, liberalization of *locus standi*, curative petitions, judicial legislations, use of writs for ordinary matter, in the name of judicial activism Indian Judiciary enlarged its review jurisdiction so even an ordinary issue can now travel from the lowest court to apex court, that is, Supreme Court and that too multiple times. For example, in Ratlam Municipality case⁸ section 133 of Code of Criminal Procedure was used by Supreme Court of India normally exercised by Executive Magistrates. Recently in Nirbhaya Gang Rape case and Ajmal Kasab case multiple mercy petitions were filed and rejected. S.P Gupta v U.O.I.⁹, Hussain Ara Khatoon v. State of Bihar¹⁰, Sheela Barse v. State of Maharashtra¹¹, Sunil Batra v. Delhi Administration¹², Municipal council Ratlam v. Vardhichand,¹³ PUDR v U. O. I¹⁴., Nilbati Behra v. State of Orissa¹⁵, D. K. Basu v. State of west Bengal¹⁶, Vishaka v. State of

⁵ Sir Alfred Denning, *The Changing Law*, 3 Universal Publishing Co., New Delhi (2012).

⁶ 77th Law Commission of India Report, *Delay and Arrears in Trial Courts* 5 (1978). See also 14th, 77th, 78th, 79th, 114th, 128th, 221st, 222nd, 230th, 237th, 238th, 245th, 246th, 253rd, 266th and 277th Report of Law Commission of India.

⁷ Art. 142, the Constitution of India, which has been recently used to adjudicate the Ayodhya Dispute. Popularly known as curative petition; See M. Siddiq (D) Thr. LRs. v. Mahant Suresh Das & Others LNINDORD 2019 SC 1633

⁸ Municipal Council, Ratlam v. Shri Vardhichand & Others, AIR 1980 SC 1622

⁹ S.P Gupta v U.O.I., (1981) Supp. SCC 87.

¹⁰ Hussain Ara Khatoon v. State of Bihar, (1980) 1 SCC 81

¹¹ Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96.

¹² Sunil Batra v. Delhi Administration, (1978) 4 SCC 494.

¹³ Municipal council Ratlam v. Vardhichand, AIR 1980 SC 1 622

¹⁴ PUDR v U. O. I, (1989) 4 SCC 730.

¹⁵ Nilbati Behra v. State of Orissa, (1983) 4 SCC 141.

¹⁶ D. K. Basu v. State of west Bengal, (1997) 1 SCC 416

Rajasthan¹⁷, M.H. Hoskot v. State Of Maharashtra¹⁸, Rudal Shah v. State of Bihar¹⁹, M. C. Mehta v. U.O.I.²⁰, Murli S. Deora v. U.O.I.²¹, Guruvayoor Devasam Managing Committee v. C. K. Ranjan²², Re Yamuna Pollution case and Re Noise Pollution²³ etc.

The Supreme Court on PIL, observed that, “Public Interest Litigation which was initially created as a useful judicial tool to help the poor and weaker section of society who could not afford to come to courts, has, in course of time, largely developed into an uncontrollable Frankenstein and a nuisance which is threatening to choke the dockets of the superior courts obstructing the hearing of the genuine and regular cases which have been waiting to be taken up for years together.”²⁴

2. ALTERNATIVE DISPUTE RESOLUTION: THE DILEMMA

The alternative system created by arbitration, mediation and conciliation by Arbitration Act, 1940 and Arbitration and Conciliation Act, 1996 could not gain momentum as the alternative dispute resolution process has often been abused and proved ineffective as the disputants first go for arbitration and then they go for adjudication in regular courts. The Frank Committee in 1957 recommended for ‘establishment of tribunals’²⁵ and there has been a flood gate opened for tribunals and commission as a viable medium for dispute resolution. Debt Recovery Tribunals, Securities Appellate Tribunal, Income Tax Appellate Tribunals are some of the examples wherein for specialized matter tribunals were thought to be more appropriate over regular courts²⁶. The tribunals were conceived as an alternative of regular courts to lessen the burden of pending cases in regular courts. However, the working of tribunals was impaired by Judicial Review. Law Commission of Indian in its 272nd Report recommended that “Tribunals are supplemental not

¹⁷ Vishaka v. State of Rajasthan, AIR 1997 SC 3011

¹⁸ M.H. Hoskot v. State Of Maharashtra, (1978) 3 SCC 544.

¹⁹ Rudal Shah v. State of Bihar, (1983) 4 SCC 141.

²⁰ M. C. Mehta v. U.O.I., AIR 1988 SC 471.

²¹ Murli S. Deora v. U.O.I., AIR 2002 SC 40.

²² uruvayoor Devasam Managing Committee v. C. K. Ranjan, (2002) 2 SCC 333.

²³ Re Yamuna Pollution case and Re Noise Pollution, AIR 2005 SC 3136.

²⁴ Common Cause (A Regd. Society) vs Union Of India And Others, AIR 2008 SC 2116.

²⁵ Article 323A and 323B were inserted in Constitution. Subjects are custom frontiers, foreign exchange, industrial and labour disputes, land reforms, ceiling of land, election, production-supply-distribution of food stuffs, rent etc. for which tribunals are to be established.

²⁶ 272nd Report, Law Commission of India, available at <http://lawcommissionofindia.nic.in/reports/Report272.pdf> last seen on 28/04/2021.

substitute to the High Courts.”²⁷ However Constitutional Courts by practicing ‘Judicial Restraint’ could use the potential of tribunals to lessen the burden of constitutional courts.

In business the timelines are very important and delay in business matters is linked to delay in justice. However due to lack of trained officials and appropriation of staff from regular courts in tribunals and commission proved very wrong in terms of a possible solution. It has often been seen that ADR has been costly and dilatory so in 2015 the Arbitration and Conciliation Act, 1996 was amended to provide for ‘Fast Track Arbitration.’ Fast Track Arbitration must be used in appropriate cases to save time and energy of stakeholders.²⁸ In 2019 it has been amended again to institutionalize institutional arbitration and establish Arbitration Council of India.²⁹

India ranks at 68th Rank in World Justice Project Rule of Law Index 2019.³⁰ Rule of Law, separation of power, division of power, democracy and justice social, economic and political are interlinked. No business and investment shall be made to a country having no rule of law and dilatory dispute resolution process. Economy, GDP and dispute resolution are interlinked. Poor & dilatory dispute resolution means less investment and business. Providing commercial courts in 2015³¹ was a welcome step however trying the same by regular judicial officers in regular courts with ADR mind is like missing the soul by targeting the body.

3. LITIGATION & COURT MANAGEMENT

Recently National Judicial Data Grid³² has been established and courts have been modernized and equipped with information technology. Legal Information Management & Briefing System

²⁷ *Ibid*, at 95.

²⁸ Richard Chernick & Zela Claiborne, *Reimagining Arbitration, Litigation*, 37(4) *Revision*, 32-38 at 34 (2011); See also A.K. Ganguli, *The Proposed Amendments to the Arbitration and Conciliation Act, 1996 – A Critical Analysis* January-March 2003, Vol. 45, No. 1, *Journal of the Indian Law Institute*, pp. 3-24 at 20 (2003). Also, see 77th Report of Law Commission of India, *Delay and Arrears in Trial Courts* (1978) p. 5. Also see, 14th, 77th, 78th, 79th, 114th, 128th, 221st, 222nd, 230th, 237th, 238th, 245th, 246th, 253rd, 266th and 277th Reports of Law Commission of India.

²⁹ The Arbitration and Conciliation Amendment Act, 2019.

³⁰ *Rule of Law Index 2019*, The World Justice Project, available at <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf> last seen on 28/04/2021.

³¹ The Commercial Courts Act, 2015.

³² As per National Judicial Data Grid, out of 31542784, 23230339(73.65%) are more than one-year-old, data available at <https://njdg.ecourts.gov.in/> last seen on 28/04/2021.

(“LIMBS”) has been launched by Ministry of Law and Justice³³. The upcoming technology like blockchain technology, 4.0 (wherein analogue and digital medium shall be infused), IoT, Artificial Intelligence and Robotics remind me of Jerome Frank of US Realist Movement who propounded the ‘Doctrine of Jurimetrics’³⁴ wherein computers may be used for resolving disputes. These techniques are becoming dominant in urban area but for petty matters like traffic disputes and financial issues. However, in the modern worlds the layers of complexities make a simple dispute very technical and there using these technologies is still questionable. Like after the passage of Motor Vehicle Amendment Act 2019, E-challan and disposal of cases and deposit of challan was made electronic through UPI system. But once an e-challan was generated the other works like transfer, sale and tax deposit relating to vehicles were hampered in the process. Now after generation of E-challan and other works shall not be hampered and documents in ‘Digilocker’ may be impounded for violation of Motor Vehicle Act. This will gradually settle down. Electronic dispute resolution will take time to ingrain in the system³⁵. Technologies are always changing at a very fast pace. Blockchain technology is being perceived as panacea for many problems and Government is to run a pilot project in the Vaccination, Chemical Fertilizer Subsidies and land record keeping. However, we can see that Government is very skeptical about cryptocurrency which is based on blockchain, was declared unconstitutional by Supreme Court³⁶. The humble submission of the author is that people friendly technologies are rare and complexities of newer technologies is a serious issue.

Ignorance of indigenous dispute resolution model i.e. Gram Nyayalayas, Nyay Panchayats, Local Self Governance, indigenous dispute resolution system and use of Law Schools for dispute resolution of small and petty issues proved very fatal. Though some law schools like National Law School Bengaluru and Jindal Global Law School are running some clinical programmes successfully³⁷. Law Schools like V.M. Salgaocar Law College and National Law School Bengaluru are doing tremendous works relating to ‘Access to Justice.’ National Law School itself

³³ Home Page, Legal Information and management Briefing System, available at <https://limbs.gov.in/> last seen on 28/04/2021.

³⁴ Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of Law*, 125, Harvard University Press, Cambridge (2018).

³⁵ *Dainik Jagran* (07/10/2020), Lucknow Edition ‘Jagran City’ page IV.

³⁶ Internet and Mobile Association of India v. Reserve Bank of India, (2020) SCC OnLine SC 275.

³⁷ *Clinical Programs*, Jindal Global Law School Website, available at <https://jgu.edu.in/jgls/research/clinical-programmes/> last seen on 28/04/2021.

has right from 2005 done a variety of work like public interest litigation, pro bono lawyering, legal awareness etc.³⁸ The unnecessary enlargement of jurisdiction of courts in petty matters like cattle trespass, drainage disputes, land disputes, boundary disputes in village farms have proved fatal. The judiciary did not let the Indian people believe that they are competent to resolve their disputes. It did not let them own their problems rather it acted as a ‘Messiah’ for their disputes and in the process started limping due to loads of *lis*.

Several reasons are pointed out for the dilatory justice, but the author sees one reason as the lack of ‘right sense of justice.’ What by right sense of justice is meant that justice has always been remedy oriented. Grievances are redressed and dues are provided by justice. When a “cause of action” arises, disputants do not know that where the shoe pinches and when he should approach the various stakeholders involved in dispute resolution and hence, his sense of justice is manipulated. A petty matter gathers a mammoth size of *lis*. Grievances, remedies, and forums are varying but client counselling being in a very poor shape in India does not help the disputants. This results in multifariousness, litigiousness and multiplicity of litigations on the same cause of action. This results in Himalayan heap of litigations breaking the spine of Indian judiciary.

4. CHALLENGES

Docket Explosions and arears of pending cases are reality in India. Docket explosion results from the various reasons like adjournments, rigour of adversarial trial systems, judicial review, poor witness protection system, tussle of bar and bench, strike by bar, bench hunting, uncle practice etc. The reasons are uncountable, and the really countable fruit ‘Justice’ gets dehydrated or juiceless in process. ‘The delays inherent in judicial proceedings are often unacceptable to those involved in modern commercial transactions, and a simpler, faster method of dispute resolution is required.’³⁹

³⁸ Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 Penn St. Int’l L. Rev.421(2004); A. S. Anand, *Legal Education in India – Past, Present and Future*, 3 SCC (Jour) 1(1998); N. L. Mitra, *Legal Education in India, Conference of International Legal Educators*, Florence, Italy (2000) available at <http://www.aals.org/2000international/english/India.htm>; N.R Madhava Menon., *Professions for the Professionals or for the People?*, Law and Justice, 273-274 (1994).

³⁹ Arijit Pasayat, *Alternative Dispute Resolution: Is It an Alternative Mechanism?*, See also Shashank Garg (ed.) *Alternative Dispute Resolution: The Indian Perspective*, 4 (Oxford University Press, New Delhi, 2018).

4.1 Infrastructural Hiccups

Lack of judges⁴⁰ and access to courts is again a challenging issue. Training of judges, recruitment, transfers are big issue. Independent judiciary *via* 'collegium' system has kept the power to itself regarding appointment and transfer of judges of Constitutional courts and lower judiciary is fed by local public service commission in the supervision of High Courts. Recent attempt regarding NJAC was turned down by SCORA judgment due to violation of basic feature of Indian Constitution.⁴¹ There has been an alarming call about creation of 'All India Judicial Service' in the line of IAS. Infrastructure of judicial setup is also very poor in shape as the majesty of courts and its presiding officer need adequate participation of bar, police, prosecution agencies, forensic experts, experts and para staff. Most of the para staff still are working on *ad hoc* basis in courts. IT infrastructure, computer, internet and computer peripherals are not supplied to lower ebb and if supplied, due to lack of interest, update and pirated software, go unused.

4.2 Technological Adaptation

Blockchain, IoT, 4.0, Robotics, Data Analytics, Artificial Intelligence are being posed as a panacea for mounting arrears of litigations. Jurimetrics propounded by Jerome Frank in Realist movement was all about the predictability of judgment with the use of computers. Computers with internet has accuracy in pinpointing an issue, retrieval is meticulous, storage and management is unlimited however how open we are going to be to it lies in the womb of future. Use of cyber infrastructure in cases like traffic offences can do wonders which is witnessed by us. However, how much cyber intervention is to be allowed must be left to human discretion. A dispute in India is laced with multiple collateral issues and there can be no 'one size fits all' formula for dispute resolution wherein cyber machines will dispense the justice. Use of technology to aid the judiciary is acceptable but replacing human judiciary with cyber judiciary will have serious consequences.

Infrastructure is needed to do the justice between disputants. Judge, staff, prosecutors, bar and several other stakeholders need to participate to provide justice to people. Population is rising and disputes are scaling up too and meeting the demand against which, supply will be impossible. The

⁴⁰ *There are 20 judges per 10 lakh people in India: Govt*, Livemint (06/02/2019), available at <https://www.livemint.com/politics/news/there-are-20-judges-per-10-lakh-people-in-india-govt-1549457164121.html> last seen on 28/04/2021.

⁴¹ Supreme Court Advocates On Record Association v. Union of India, (2016) 5 SCC 1.

current sanctioned strength in courts is not filled and if filled they do not have adequate para staff to function. Locomotion and function of judiciary is a big issue. Court rooms, record rooms, computer, networks etc. need liberal grants from Government but grants have not been adequate.

4.3 Legal Startups

Law schools and academicians have recently mooted an idea of ‘legal startup’ wherein the investors in a lis having substantive case will invest and after dispute resolution will receive the profits from the fruits of lis. Use of private mediation, conciliation, negotiation and ADRs are seen as huge possibility but we should be mindful of ‘Champerty’⁴² and the ‘real sense of justice’. Investors cannot be allowed to make money in delivery of justice. In this process justice will lose its sanctity and divinity. However, the entrepreneurs may question about expenses and delay in justice.

5. SOLUTIONS & SUGGESTIONS

The problems are many and reasons are various for dilatory justice delivery system but some solutions may be suggested. Like private mediations can be a boon for India. Though it is not very popular and legal fraternity sees it as a serious invasion in their livelihood by non-law fraternity. However, by the Supreme Court it has been made easy that if through a private negotiation a dispute is resolved the same on request can be passed as a decree by the court.⁴³ But this whole idea is yet to popularize and the impetus by 2015 and 2019 amendment of Arbitration and Conciliation Act, 1996 is yet to gain momentum.

5.1 Revitalizing ADR

Arbitration as ADR process has always been seen as an alternative to adversarial trial adjudication. Arbitration supported by Judiciary again could not be effective due to inherent problems of feeding of manpower from conventional mode to non-conventional modes. Win-Win promise, negotiation based on Best Alternative to a Negotiated Agreement (“BATNA”) & Worst Alternative to a Negotiated Agreement (“WATNA”) could not convince people by the remedy delivered for

⁴² Champerty is against public policy of India and hit by Section 23 under Indian Contract Act, 1872: *Vatsavaya Venkata Subhadeayamma Jagapati Bahadur Guru v. Poosapati Venkatapati Raju Garu*, AIR 1924 PC 162.

⁴³ *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P.) Ltd.*, (2010) 8 SCC 24.

wrongs. Dilatory arbitration, setting aside the award became a huge problem, enforcement of awards also became problematic. In evolution ADR also was infested with the problems of adversarial adjudication. Like public policy of India⁴⁴ became a battleground. Recent amendments providing for a pragmatic introduction of time bound arbitration and 'fast track arbitration' is a sign of perplexity and bewilderment. The recent amendment in the chain is again a sign of frustration of people. Lawyers see ADR as a problem for their livelihood. Nani Palkhivala reminds advocates by saying about colossal arrears in courts, "Do we not have to blame to ourselves as members of legal profession for this state of affairs? Lawyers are entitled to earn their living, but not at such an unbearable cost to society."⁴⁵

Trial & Execution has often been delinked in Indian system and recent Hyderabad encounters of rapist & murderers of the veterinary doctor is the frustration of machinery which fails to deliver justice timely. The urge of vengeance of society is tamed and made couth by justice delivered by the State. Delay in justice defeats the whole purpose of it and regular adversarial trials take huge time and energy and after adjudication it takes several more years to execute the same. Execution in India is in poor shape as the stakeholders of execution are often indifferent to the execution process. Execution depends on *ad hoc* staff who have very poor incentives to work.

5.2 Law Schools & Justice Delivery

Law schools and academicians have often been ignored in dispute resolution process. Justice Krishna Iyer identified the role of law schools and law students in dispute resolution process. Justice Iyer says, "Moreover, law students will become an inexpensive and enthusiastic source of manpower which can be used to serve a portion of the community to which adequate legal services have not been available in the past."⁴⁶ National Law School of India University, Bangaluru *via* its ODR and ADR clinics has firmly established that law schools can do wonder by legal aid and legal clinics with the help of judicial and non-judicial members. Academicians like Prof. Buxi, Professor KNC Pillai, Professor N.L. Mitra, Professor M.P. Singh, Professor Nagraj, Professor Balraj Chauhan etc. can play a pivotal role in justice dispensation process.

⁴⁴ See *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 & *ONGC Ltd. v. Western GECO International Ltd.*, (2014) 9 SCC 263.

⁴⁵ Nani A. Palkhivala, *We The Nation: The Lost Decades* 217, UBSPD, New Delhi (2010).

⁴⁶ Justice V.R. Krishna Iyer, *Processual Justice to The People*, 28, Universal Law Publishing Co., New Delhi, (2012).

Use of Law Schools and its students in dispute resolution linked with their assessment and practical training can do the wonders in realization of justice especially for the poor hapless, helpless and hopeless Indians. Law students can be wonderful instruments of justice in providing legal support via drafting the petitions and representing their cause in appropriate forums. However, this huge potential resource has not been put to optimum use till date.

5.3 Judicial Review: Restraint

Judicial review is basic feature of Indian constitution. Review, reference, revision and appeal are different species of review process. Fact finding adjudication by lower and trial courts commit errors which are corrected by law finding review courts at upper level. Review process is *sine quo non* however admitting almost all cases in review in different jurisdictions have created a havoc. It's a good sign that SLPs are being mostly rejected. Appellate jurisdiction of Supreme Court requires a fitness certificate and where tribunals are established, the High Courts have stopped to entertain and restricted their temptation to entertain.⁴⁷ However, Advocates here have to play a cautious moral role in order to avoid invoking multiple jurisdictions without a proper and sufficient cause.

Adversarial adjudication in India is grafted which became gangrenous in the process. Ignoring the potential of Indigenous Dispute Resolution Process like Nyaya Panchayats, Gram Nayalayas which also proved very fatal as simple issues of cattle trespass, land encroachments, petty and trivial offences engaged unsurmountable amount of energy and money in resolution process. Indigenous dispute resolution was ignored which was dream of Gandhi. The majesty and grandeur of temple of justice did not let the worshipper litigant own his problems as he always saw judges as their hero and Robinhood for dispute resolution. This flooded the court with lis and Robinhood was buried in briefs. The charismatic messiah became the dilatory demon. The use of indigenous litigation dispute resolution process can do the wonder. Nyay Panchayats and Gram Nyaylays could resolve petty disputes like nip in the bud. The potential of indigenous model of dispute resolution has been underused. 'Inconclusive litigiousness is outcome of British land policy and

⁴⁷ L. Chandrakumar v. Union of India, 1997 (2) SCR 1186, Union of India v. R. Gandhi, President Madras Bar Association, (2010) 11 SCC 1.

British dispute resolution model therefor and ignorance of indigenous dispute resolution process aggravated the issues.⁴⁸

5.4 Court & Litigation Management

Court management and litigation management was recommended by Justice Rankin Committee in 1925 & Various reports of Law Commissions of India was related to Judicial Reforms like 77th Report of Law Commission of India on Delay and Arrears in Trial Courts” (1978) p. 5. See also 14th, 77th, 78th, 79th, 114th, 128th, 221st, 222nd, 230th, 237th, 238th, 245th, 246th, 253rd, 266th and 277th Report of Law Commission of India. In 2009 Union Government launched ‘National Mission for Justice Delivery and Legal Reforms’ where under many pragmatic steps were taken.

Litigation Management is another interesting issue pertaining to dilatory justice⁴⁹. Docket management with the services like judis, caselist, National Judicial Data Grid, e-Courts services e-legalix, eCMT, justIT has been started but still use is an issue. Pre-trial procedure in India is really in poor stage. All the stakeholders of justice dispensation process need to learn the litigation management.

National Litigation Policy was declared in 2010 and its mission was to decrease the trial period from 15 to 3 years. The average disposal limit for civil suit was fixed as three years and for criminal matters and it was set to one to one and half years for civil matters. No new litigation policy is fixed since then. The current Government is still at draft level of National Litigation Policy.⁵⁰ Government is the biggest litigant and a lot of money and resources are being used on petty issues wherein Government is a party in multiple lower and upper courts. Recently Online Mediation for Government Litigation has been launched⁵¹. In Access to Justice programme Union Government has launched three programmes i.e. Tele Law, Nyaya Bandhu and Nyaya Mitra. In Tele Law, through video and teleconferencing consultation and resolution of disputes are to be secured⁵². In

⁴⁸ Oliver Mendelsohn, *Law and Social Transformation in India* 21, Oxford University Press, New Delhi (2014).

⁴⁹ Hon’ble Mr. Justice J.K. Mathur, *Court Management: A Prospect, High Court of Judicature at Allahabad*, Allahabad High Court, available at http://www.allahabadhighcourt.in/event/court_management_a_prospect.html last seen on 28/04/2021.

⁵⁰ *Action Plan to Reduce Government Litigation*, Department of Justice (13/06/2021), available at <https://doj.gov.in/sites/default/files/action%20plan.pdf>, last seen on 28/04/2021.

⁵¹ *Ibid.*

⁵² *Home*, Tele Law Website, available at www.tele-law.in, last seen on 28/04/2021.

Nyaya Bandhu the Government is assisting District Courts to dispose of 10 year old cases through court management system. Likewise, Allahabad High Court in recent years sorted out infructuous cases where parties were found indifferent to follow their cases, the court disposed them in bunch. In its Nyaya Mitra programme Government is providing legal aid and *pro bono* lawyering⁵³. The android mobile app 'justIT' is also designed to help the Judicial Officers for proper court and litigation management system⁵⁴.

Marc Galanter writes that, "Lawyers are often seen as parasites and mere word mongers who have little to contribute to national development." He further says that, "Innovative lawyers and courts offer themselves as an instrument for carrying out the redistributive and welfare policies of higher state against the resistance of locally dominant groups allied with local state."⁵⁵ The Commercial Court Act, 2015 provides for ample use of ADR techniques like arbitration and mediation. Likewise, in Consumer Protection Act, 2019 an entire Chapter V has been devoted on 'Mediation' providing for nomination of mediators, consumer mediation cell and dispute resolution through mediation.⁵⁶ Recently Bar Council of India also directed Law Schools about making mediation a compulsory subject in Graduate Programmes.⁵⁷ Private mediation must be boosted and fostered for speedier justice delivery process. Synthetic forces have to work in cohesion for speedy dispute resolution process.

6. CONCLUSION

Justice is the highest virtue set by mankind. We have identified right to speedy trial,⁵⁸ right to free legal aid⁵⁹ in our fundamental rights under Article 21 and Article 39A. Timely dispensation of justice is obligation of state. Life, liberty and property of individual is at stake in justice delivery.

⁵³ Home, Nyaya Bandhu Pro Bono Legal Services Website, available at <https://www.probono-doj.in/home/index>, last seen on 28/04/2021.

⁵⁴ *Court Management Through Justis Mobile App*, Department of Justice, available at <https://doj.gov.in/event/court-management-through-justis-mobile-app>, last seen on 28/04/2021.

⁵⁵ Marc Galanter, *Law and Society in Modern India*, 29, Oxford University Press, New Delhi (2018)

⁵⁶ S. 74 to 81, Consumer Protection Act, 2019.

⁵⁷ *Introduction of Mediation (with Conciliation) as compulsory paper/subject to be taught with effect from the Academic Session 2020- 2021 in 3 year and 5 year LL.B degree course/s*, Bar Council of India, BCI:D:1897:2020 (323/202), available at https://www.sconline.com/blog/wp-content/uploads/2020/08/Mediation_Mandatory_Bar_Council_Course.pdf last seen on 28/04/2021.

⁵⁸ Hussain Ara Khatoon v. State of Bihar, AIR 1979 SC 1360.

⁵⁹ M. H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544.

Delay defeats the justice and justice delayed is justice denied. There is dire need to learn the stakeholders that speedy delivery of justice depends on inculcating the value of timely disposal and execution of suits. We need to inculcate the culture of time bound justice delivery and people need to develop the right sense of justice. Pre-trial negotiation and counselling of parties can do wonders. Nani Palakhivala⁶⁰ quotes Mahatma Gandhi about the role of law and lawyers in society. Gandhiji says, “law is not an intellectual legerdemain to make black appear white and white appear black. But it is a ceaseless endeavour to enthrone justice.” The National Mission of Justice Delivery and Legal Reforms of present Government has established a Grid System of Arrear and released sufficient grants for development of e-Courts and infrastructure, increased the sanctioned strength of judges, established Judges Training Academies but much at ground has not changed. It can be said that:

“आसां नहीं इन्साफ की जंजीर हिलाना
दुनिया को जहांगीर का दरबार ना समझो”
अख्तर बस्तवी

⁶⁰ *Supra* 272, at 350.

PART II

Corruption in Governance

CIVIL ENFORCEMENT ACTION AGAINST CORPORATE CORRUPTION: A LEGISLATIVE LACUNAE IN INDIA

Ravidasan N. S¹ and Prof. (Dr.) Vijay Kumar Singh²

Abstract

The paper intends to showcase the lack of civil enforcement against corporate corruption in India. The paper identifies the victims of corporate corruption and suggests the remedies that can be adopted for the restitution of the victims. Civil enforcement is essential to restore the damages incurred by the victims due to acts of corruption. However, Indian legislations only provide for criminal remedies against corruption, which often fail to act as an effective deterrent. The paper attempts to understand the concept of civil enforcement in USA's FCPA and how it has effectively acted against corrupt practices engaged in by foreign companies in India. The primary focus of the paper is to present examples of corruption, wherein the Indian legislations have been unable to prevent or prosecute the acts, whereas a foreign jurisdiction has ensured the companies who have committed such offences are optimally reprimanded. The research showcases the lacunae in the Indian legislation and how it has an adverse effect on the economy and competition in the country. The paper also briefly delves into the provisions of Indian legislations that are used to combat corruption. The paper attempts to contribute insight and advice to policy makers to adopt measures of civil enforcement to combat corporate corruption in India.

Key words: Corruption, Civil Enforcement, remedy, victim, FCPA

1. INTRODUCTION

1.1 Corporate Corruption

Business corporations play a pivotal role in the economic development and the progress of a nation. Corporations influence what people eat or wear or even how they live. However, corporations depend on the society for their resources and have important responsibilities towards the society they exist in. They are prominent vehicles of growth and are increasingly responsible for providing

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employment, goods, services and infrastructure. However, corruption undermines the legitimate economy and escalates ethical problems. It is immoral, unethical, unfair and is violative of equity. Corruption is an antithesis to development and good governance.

Bribery and corruption are major obstacles for socio-economic progress, growth and development of the nation. It increases poverty levels and therefore it is necessary to track the various means through which corruption impacts the economy. Corruption even affects rule of law as it overrides basic human rights. It distorts national and international economic relations. Transnational bribery is a threat to democracy, development, national security, public health and safety.³ Nations' right to honesty and faithful service is deprived by the act of bribery.⁴

Corruption originates from the Latin adjective 'corruptus' meaning spoiled, broken or destroyed.⁵ Corruption is contagious and does not respect sectoral boundaries by undermining legal and moral norms and facilitates further corrupt acts. It is very difficult to restrict corrupt practices since it reduces levels of morality and trust.⁶ The trust in dealing with the business and the state is reduced by corruption. The wider cooperation and competition are lost due to corruption and the business life becomes fractured into the hands of illegal mafias.⁷ The affected party is unaware of his injury and seldom realises that it has lost a profitable contract because of an illegal payment and unhealthy competition.⁸

In this globalised economy, fair and healthy competition among the companies is very vital for increasing their efficiency. Competition in business is a good sign for quality of service to be delivered. Corruption degrades the quality of the services and ruins the life of the common man. Prevention is better than cure and the same applies to corruption also.

³ M.A. Almond & S.D Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 North Carolina Journal of International Law and Commercial Regulation 389, 403 (1996).

⁴ *Ibid*, at 405.

⁵ G.M. Hodgson & S. Jiang, *The Economics of Corruption and the Corruption of Economics: An Institutional Perspective*, 41 (4) Journal of Economic Issues, 1044 (2007).

⁶ *Ibid*, at 1047.

⁷ *Supra* 89, at 1057.

⁸ J. C. Jr. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 American Criminal Law Review 419, 442 (1980).

Hence, it is the responsibility of the government to create a level playing field to increase the competition and sustain the economy.

The evil of corruption has spread its tentacles in all walks of life. Corrupt acts not only raise the price of infrastructure but can also reduce the quality and economic returns to infrastructure investment. Furthermore, it discourages efficiency and weeds out competition.

Developed countries are not immune to corruption, but comparatively, many of the emerging markets have a weak legislative structure and a business culture that tolerates, if not encourages, corruption. This increases the risks for companies that abide by the rules and skews the competition in favour of companies that don't. Therefore, it becomes crucial to highlight the failures of Indian legislations in the prevention of corruption and how such lacunae can be overcome.

1.1.CORRUPTION NOT A VICTIMLESS CRIME

Corruption harms the financial trust and credibility of the government. Corruption is not a victimless crime. Individuals suffer as corruption spirits away funds allocated for public service. Corruption is measured in generations of missed opportunities and hopes made barren.⁹ Bribery is damaging the integrity of governmental, financial and regulatory institutions.¹⁰ Corruption impacts governance, standard of living and rule of law all of which are highly undermined in its prevalence. Bribery and corruption affect a myriad of victims and taxpayers have to pay for the costs of bribes that are added in the price tag.¹¹ Corporate corruption is not a victimless crime. Victims include millions of vulnerable women, children and men.

⁹ Yury Fedotov, *Corruption not victimless crime*, New Straits Times (10/06/2016), available at <https://www.nst.com.my/news/2016/06/150898/corruption-not-victimless-crime>, last seen on 12/04/2021.

¹⁰ *Is Bribery a victimless crime?* FCCD (27/03/2018), available at <https://fced.com/is-bribery-a-victimless-crime/#:~:text=Rationalising%20bribery%20as%20a%20victimless,achieving%20personal%20or%20business%20goals.&text=There%20are%20classic%20examples%20of,the%20monopoly%20of%20natural%20resources>, last seen on 12/04/2021.

¹¹ R. Bistrong, *The Illusion of No Victims: The Final Component of "Rationalizing Bribery"*, Corporate Compliance Insights (11/09/2014), available at <https://www.corporatecomplianceinsights.com/the-illusion-of-no-victims-the-final-component-of-rationalizing-bribery/>, last seen on 12/04/2021.

1.2 Remedies Against Corporate Corruption

All crime involves injury- physical, financial or moral, to another. It is the responsibility of the offender to compensate the victim for the damages caused by his acts and omissions. The consequence of corporate corruption is twofold- criminal and civil. State initiates criminal prosecution against the erring employees and company for their corrupt activities. Conviction and sentence are imposed on the individual offender once the criminal offence is proved beyond reasonable doubts.

Apart from the criminal prosecution, necessary measures may also be taken to make fair restitution to victims and their dependants. Victims' rights to restitution and compensation plays an important role in the administration of justice. Restitution includes the payment of expenses incurred as a result of the victimization, payment for the harm or loss suffered, the restoration of rights, etc. The offender is also liable for civil consequences since substantial expenses are being incurred by the state for the administration of justice. In restitution, the offender makes compensation to the victim, whereas compensation is made to the victims from the public funds.

2. LEGISLATIONS IN INDIA

The legislations in India do not tolerate corruption and consider it as purely criminal offence. The Indian statutes which provide for investigation, prosecution, conviction, sentencing and compensation for corporate corruptions are Indian Penal Code, 1860 ("IPC"), Prevention of Corruption Act, 1988 ("POCA"), Code of Criminal Procedure, 1973 ("CrPC"), Central Vigilance Commission Act, 2003, and Competition Act, 2002.

The Competition Commission of India ("CCI") is vested with ample power to investigate and impose heavy penalties, which acts as deterring punishment for the violation of the Competition Act 2002 ("CCA"). The CCA penalises anti-competitive practices and abuse of dominant position by any person. Deterrent punishments are imposed under the CCA before completion of the inquiry or after completion of the inquiry. The failure to provide information and/or documents for the purpose of investigation to the CCI or Director General ("DG") attracts a penalty which may extend to one lakh rupees for each day during which such failure continues subject to a

maximum of rupees one crore.¹² If any person makes false statement, or omits material facts, or willfully alters, suppresses or destroys any documents then CCI or DG may impose a penalty which may extend to one crore rupees.¹³ Failure to give notice of combination to CCI attracts a penalty which may extend to one percent, of the total turnover or the assets, whichever is higher, of such a combination.¹⁴ If a party to a combination makes a false statement or omits to state any material particulars then such person shall be liable to penalty which shall not be less than rupees fifty lakhs but which may extend upto rupees one crore.¹⁵

In case of abuse of dominance, CCI may after inquiry impose penalty up to three times of the profit or ten percent of average turnover of the last preceding three financial years, whichever is higher.¹⁶ For indulging in anti-competitive practices a total penalty of Rs. 840 crores have been imposed by the CCI on 126 companies in the last three financial years.¹⁷ The compliance of competition law became a necessity considering the hefty penalties imposed, which act as a deterrent punishment.

Corporate criminal liability is recognised under the Indian Penal Code.¹⁸ The two limitations of corporate criminal liability are, firstly, certain offences which are committed, can only be committed by an individual human being, for example, murder, treason, rape, perjury, etc. Secondly, certain offences entail corporeal punishment or imprisonment, and a company cannot be subject to such punishment.¹⁹

The Prevention of Corruption Act is the primary law dealing with offences pertaining to corruption in India and it repealed the provisions of Sections 161 to 165 and 165A of the IPC. It is a social welfare legislation framed to remove corruption in the public service and provides for an

¹² S. 43, The Competition Act, 2002.

¹³ S. 45, The Competition Act, 2002.

¹⁴ S. 43A, The Competition Act, 2002.

¹⁵ S. 44, The Competition Act, 2002.

¹⁶ S. 27, The Competition Act, 2002.

¹⁷ A.S. Thakur, *CCI imposed Rs 840 crore fine on 126 companies in last three financial years*, Financial Express (10/02/2020), available at <https://www.financialexpress.com/industry/cci-imposed-rs-840-crore-fine-on-126-companies-in-last-three-financial-years-says-anurag-singh-thakur/1863368/>, last seen on 12/04/2021.

¹⁸ S.11, The Indian Penal Code, 1860. "Person", The word "person" includes any Company or Association or body of persons, whether incorporated or not.

¹⁹ State of Maharashtra v. Syndicate Transport Co. (P) Ltd., AIR 1964 Bom 195.

expeditious trial by special judges. A noticeable procedural delay in prosecution of public servant under POCA is the prior sanction of the competent authority for the court to take cognisance of the offence.

The Central Vigilance Commission (“CVC”) has been constituted to enquire into the offences alleged to have been committed under the POCA by certain categories of public servants. On receipt of a complaint against a public servant CVC inquires and investigates the offences and it also supervises the vigilance and anti-corruption work in the Government and other public sector undertakings. It is an independent apex anti-corruption body for the eradication of corruption in India.

Statutory coverage for compensation in India is provided in the Criminal Procedure Code. As per 41st Law Commission Report (1969) section 357 has been incorporated in the CrPC to provide compensation to the victims of crime. In the interest of justice, the court may award compensation to the victim but, unfortunately the discretion is being rarely used by the judges. A scheme for the compensation of the victims of crime or his dependents shall be prepared by the state government in coordination with central government. The quantum of compensation to be paid from the scheme shall be decided by the legal services authority on the recommendation made by the court. State is liable to award to compensation to the victim or his dependents, if the offender is not traced or identified.²⁰ A duty is cast upon the state to pay compensation to the victims as per section 357A (1), (4) and (5) of the CrPC which is a substantive law and not a procedural law. The victims are entitled to compensation under Section 357A (4) of the CrPC for the incidents that happened prior to coming into force of the section.²¹

Chapter XXXII of the CrPC provides for the recovery of fine and money awarded under the code. Section 421 of the CrPC empowers the court to attach and direct the sale of movable and immovable property of the offender to compensate the victims. However, the conditions prescribed in the proviso to sub-section (1) of section 421 must be satisfied prior to the issuance warrants for imprisonment in default. As per section 431 of the CrPC, the court can recover any money (other than a fine) payable by virtue of the order passed under the CrPC. The court is

²⁰ S. 357A, The Code of Criminal Procedure, 1973.

²¹ District Collector Alappuzha v. District Legal Services Authority Alappuzha, W.P. (C) 7250/2014 (Kerala High Court, 22/12/2020).

competent to impose sentence of imprisonment for non-payment of fine under Section 64 of the IPC.

While awarding the compensation, the court is duty bound to consider the nature of the crime, injury suffered, justness of the claim for compensation, the capacity of the offender to make compensation and other relevant circumstances.²² Supreme Court in *Hari Singh v. Sukhbir Singh and Ors*²³ held that power of the court under Section 357 of the CrPC to award compensation is not ancillary to other sentence but in addition thereto and it is intended to reassure the victim that he or she is not forgotten while administering the justice. The compensation awarded must be reasonable and all the criminal courts should exercise this power liberally to meet the ends of justice.

Compensation is treated as alternative to imprisonment was held by the Supreme Court in *Swaran Singh vs. State of U.P.*²⁴ In times courts have also used the compensation as a mitigating factor and reduced the quantum of sentence imposed. In order to have deterrent and effective punishment, the measure of damages payable by the tortfeasor must be correlated to the magnitude of the crime and the capacity of the enterprise to pay the compensation.²⁵

To obtain evidence from a person, who is directly or indirectly involved in the crime, Section 306 and 307 of the CrPC empower the court to grant pardon to an accomplice on the condition of making full and true disclosure of the facts to his knowledge. The pardon would be granted on the condition that the accomplice makes a full disclosure and the court can revoke the pardon, if it is not satisfied with the disclosure or is of the view that accomplice has concealed essential evidence. Section 133 of the Indian Evidence Act 1872 says that accomplice shall be a competent witness against the accused.

The individual offenders are only considered in the sentencing framework existing under the Indian legal system. If a corporation is convicted for the criminal offences, then effective deterrent punishment is to be imposed to prevent the corporation from committing further crimes. Fine is

²² *Swaran Singh v. State of Punjab*, AIR 1978 SC 1525.

²³ *Hari Singh v. Sukhbir Singh and Ors.*, AIR 1988 SC 2127.

²⁴ *Singh vs. State of U.P.* (1998) 4 SCC 75.

²⁵ *Union Carbide Corporation v. Union of India*, AIR 1990 SC 273.

the only option available to the court since bodily imprisonment cannot be imposed on artificial person like a company.²⁶

Sentencing policy in India in relation to corporate crime ought to focus on corporation as a collective and individuals to achieve the purpose of deterrence.²⁷ However, none of the above laws have had any effective measure to compensate the victim as a restitution for the corrupt acts committed. Unlike the Foreign Corrupt Practices Act, in USA, there is no comprehensive legislation that effectively deals with corrupt practices and the remedies against it.

3. FOREIGN CORRUPT PRACTISES ACT

The Foreign Corrupt Practices Act (“FCPA”) 1977, which was enacted in the wake of Watergate, paved the way for more transparent global economy in the United States.²⁸ It is the most aggressive effort by the government to enforce honesty in international business transactions.²⁹ It is a unique legislation with extraterritorial reach prohibiting its nationals from engaging in any bribery abroad.³⁰

FCPA makes it unlawful for the individual or corporation to make, offer, authorise, promise to pay or make payment of anything of value to the public official to influence his or her official capacity to secure an improper advantage.³¹ The heart of FCPA is the anti-bribery provision, which prohibits corrupt practises to secure an improper advantage to obtain or retain business.³²

Department of Justice (“DOJ”), Securities Exchange Commission (“SEC”) and the Office of General Counsel for the Department of Commerce is the multi- agency structure that supports the FCPA enforcement.³³ Both civil and criminal enforcement actions are permitted under FCPA. DOJ

²⁶ T.K.Bhaskar & V.Umakanth, *Corporate Criminal Liability and Law*, 38 Journal of the Indian Law Institute 218, 226 (1996).

²⁷ *Ibid*, at 228.

²⁸ *Supra* 87, at 393.

²⁹ *Ibid*, at 394.

³⁰ *Ibid*.

³¹ J.A. Fanjul, *Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics, and the Foreign Corrupt Practices Act*, 26 Penn State International Law Review 735, 737 (2008).

³² F.J. Warin, M.S. Diamant & V.S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 University of Pennsylvania Journal of Business Law 321, 323-324 (2011).

³³ J. Lippman, *Business Without Bribery: Analyzing the Future of Enforcement for the UK Bribery Act*, 42(3) Public Contract Law Journal 649, 664 (2013).

may bring civil and criminal enforcement actions whereas SEC initiates civil actions.³⁴ FBI may also be involved in the investigations.³⁵

As a condition precedent for the settlement of FCPA violation investigations, DOJ or SEC imposes appointment of an independent compliance monitor.³⁶

FCPA imposes liability on those who purposefully avoid actual knowledge, make conscious disregard, wilful blindness or deliberate ignorance of the bribery schemes for avoiding the liability.³⁷

FCPA contains a broader ‘knowledge standard’ for the violation of the anti-bribery provisions and actual knowledge is not a pre-requisite for a violation.³⁸ Usage of third-party consultants or creation of innovative corporate structures cannot insulate a company from FCPA liability. Where the payer knows or has reasons to know that paying or authorising payment of anything of value will be used to bribe a public official, it serves to be a sufficient ground to incur liability under the FCPA.³⁹

Knowledge is established, if an individual or entity is aware of the high probability of the existence of an activity prohibited by FCPA anti-bribery provisions. Knowledge is satisfied, if the organisation consciously disregards the acts of its employees, representatives, agents or partners. Reasonable affirmative steps are to be taken by the company to know the purpose for which the money is being spent. Affirmative duty casts upon the company the obligation to keep the books and records reflecting the accurate and fair transaction or dispositions of the assets of the company.⁴⁰

³⁴ *Ibid*, at 325.

³⁵ *Ibid*, at 664.

³⁶ *Ibid*, at 322.

³⁷ *The unknown known: The knowledge standard for bribes by third parties*, Clifford Chance Briefing Note (2014), available at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2014/06/the-unknown-known-the-knowledge-standard-for-bribes-by-third-parties.pdf>, last seen on 09/03/21.

³⁸ *FCPA: The Knowledge Standard*, Deming PLLC, available at <http://deminggroup.com/2012/07/01/fcpa-the-knowledge-standard/>, last seen on 09/03/21.

³⁹ R. J. Jr. Hunter, D. Mest & J. Shannon, *A Focus on the Foreign Corrupt Practices Act (FCPA): Siemens and Halliburton Revisited as Indicators of Corporate Culture*, 13 *Atlantic Law Journal* 60, 83 (2011).

⁴⁰ *Ibid*, at 84.

Airbus SE agreed to settle the bribery charges for a sweeping €3.6 billion (\$4 billion) and agreed for the appointment of monitor for its global defence business. Airbus penalty is the largest international settlement ever imposed for the illicit payments made in USA, France and UK for years to secure contracts for its plane and other services.⁴¹ In the year 2020, the US Department of Justice imposed about \$7.76 billion in penalties globally for foreign bribery misconduct, whereas in 2019 penalties of about \$2.83 billion imposed world-wide.⁴²

4. INSTANCES OF CORPORATE CORRUPTION

The researcher wishes to discuss about the certain instances of corporate corruption that happened in India, which would highlight the lack of deterrent legislative measures in India to prevent corporate corruption. In all the instances, the act of corruption occurred within India, but was penalised and prosecuted elsewhere, and no consequent action was taken by the Indian government.

4.1 Walmart

The US Department of Justice (“DOJ”) and Securities Exchange Commission (“SEC”) investigated the allegations against Walmart bribing public officials in India, China, Mexico and Brazil to secure permits for its business, based on the New York Times articles in 2012. The DOJ alleged that third party intermediaries were hired, and Walmart allowed the middlemen to make improper payments to government officials to obtain store permits and licenses.⁴³ In order to operate wholesale cash and carry store, Walmart had a joint venture with Bharti Enterprises⁴⁴

⁴¹ B. Katz & M. Dalton, *Airbus Agrees to Monitoring in \$4 Billion Settlement of Bribery Charges*, The Wall Street Journal (01/02/2020), available at https://www.wsj.com/articles/airbus-bribery-charges-unveiled-after-4-billion-settlement-11580480153?mod=article_inline, last seen on 08/04/21.

⁴² D. Tokar, *Foreign Bribery Enforcement on Track for Record-Breaking Year*, The Wall Street Journal (04/12/2020), available at <https://www.wsj.com/articles/foreign-bribery-enforcement-on-track-for-record-breaking-year-11607114397>, last seen on 08/04/21.

⁴³ N. Bose, *Walmart to pay \$282 million to settle seven-year global corruption probe*, Reuters (20/06/2020), available at <https://in.reuters.com/article/us-walmart-fcpa/walmart-to-pay-282-million-to-settle-seven-year-global-corruption-probe-idINKCN1TL27J>, last seen on 08/04/21.

⁴⁴ *Walmart admits paying speed money for licence, penalised*, The New Indian Express (21/06/2019), available at <https://www.newindianexpress.com/business/2019/jun/21/walmart-to-pay-over-usd-282-mn-for-violating-us-anti-corruption-regulations-in-four-countries-1993290.html>, last seen on 08/04/21.

whose primary priority in India was store expansion.⁴⁵ The bribery in India were met with a ‘wink and nod’ by Walmart’s local business partner.⁴⁶ DOJ stated that Walmart failed to implement measures related to anti-corruption in India from 2009 until 2011 and senior Walmart employees knew about the failures in relation to anti-corruption internal control by their foreign subsidiary.⁴⁷ In the books of accounts, the improper payments made to government officials to obtain store permits and licenses were recorded using vague descriptions like “misc fee, miscellaneous, professional fees, incidental and government fees.”⁴⁸ The retailer pleaded guilty and agreed to settle the case for \$282.7 million, which includes \$137.96 million to be paid to DOJ and \$144.69 million in disgorgement of profits plus interests to SEC.⁴⁹

The Central Vigilance Commission (CVC) started an investigation into the alleged bribery payment by Walmart to the several customs officials to facilitate movement of goods and secure real estate approvals.⁵⁰ However, Walmart India Pvt. Ltd. challenged the jurisdiction of the CVC to conduct enquiry, based on a newspaper report, under Section 8 of the CVC Act.⁵¹ The Delhi High Court allowed the writ petition and held that a newspaper report cannot be construed as a complaint for the purpose of conducting enquiry under Section 8 of the CVC Act. Newspaper report is only information and not a complaint and further it does not allege any employee specified under Section 8(2) of the CVC Act has committed offence under the Prevention of Corruption Act 1988.

⁴⁵ R. Bailay & C. Chakravarty, *Walmart's India fallout started with allegations of bribery in Mexico*, The Economic Times (25/07/2013), available at <https://economictimes.indiatimes.com/industry/services/retail/walmarts-india-fallout-started-with-allegations-of-bribery-in-mexico/articleshow/21319156.cms?from=mdr>, last seen on 08/04/21.

⁴⁶ M. Corkery, *A ‘Sorceress’ in Brazil, a ‘Wink’ in India: Walmart Pleads Guilty After a Decade of Bribes*, The New York Times (20/06/2020), available at <https://www.nytimes.com/2019/06/20/business/walmart-bribery-settlement.html>, last seen on 08/04/21.

⁴⁷ M. Sharma, *Hefty fine! Walmart to pay Rs 1,962 crore for bribing officials in India, 3 other countries*, Business Today (22/06/2019), available at <https://www.businesstoday.in/current/world/walmart-to-pay-rs-1962-core-to-us-dept-of-justice-sec-for-bribing-officials-in-india-brazil-china/story/358178.html>, last seen on 08/04/21.

⁴⁸ *Walmart to pay \$283 mn fine in US over bribery charges in India, other countries*, Livemint (21/06/2019), available at <https://www.livemint.com/companies/news/walmart-to-pay-283-mn-fine-in-us-over-bribery-charges-in-india-other-countries-1561086810397.html>, last seen on 26/04/21.

⁴⁹ *Supra*, at 128.

⁵⁰ M. Venkatesh, *Bribery case: CVC rejects Walmart India’s arguments*, Hindustan Times (19/02/2016), available at <https://www.hindustantimes.com/business/cvc-seeks-help-of-un-anti-corruption-body-over-walmart-bribery-case/story-fNkM6wZBUSn0MPwuJRgqBI.html>, last seen on 26/04/21.

⁵¹ *Walmart India Pvt. Ltd. v. Central Vigilance Commission*, (2018) SCC Online Del 11005.

CVC can conduct inquiry or investigation only on receipt of a reference made to it by the Central Government or on receipt of a complaint alleging that a public servant has committed an offence under the Prevention of Corruption Act 1988. CVC cannot *suo moto* conduct investigation of the offences. Justice can be done, and public interest will be served only when CVC is empowered to conduct *suo moto* inquiry or investigation in cases of serious corrupt practices.

4.2 Alere Healthcare Company

Alere Medical Private Ltd. is a wholly owned Indian subsidiary of Alere Inc. a U.S. corporation that manufactured medical diagnostic testing equipment. In order to increase the sales volume, Alere India obtained or retained business by using distributors or consultants to make improper payments to government officials.⁵² Alere paid four percent commission to its distributors to increase the order for medical testing kits under the tender from 200,000 to 1,000,000 testing kits.⁵³ The increased commission to distributors was intended for local government officials and inaccurately recorded the payments in its books and accounts. Alere agreed to pay penalty of \$9.2 million, disgorge \$3.3 million of its profits and make an interest payment of \$495,000, adding up to a total \$13 million to settle the accounting fraud charges.⁵⁴

4.3 Stryker Corporation

SEC charged Stryker Corporation with violation of FCPA when its subsidiaries made \$2.2 million in unlawful payments to healthcare professionals in five countries to obtain or retain business.⁵⁵ The unlawful payments made to the healthcare professionals were incorrectly described in the books and records as legitimate consulting and service contracts, travel expenses, charitable donations, or commissions. Stryker India is a wholly owned subsidiary of Stryker Corporation and

⁵² The Securities and Exchange Commission, Press Release, *Medical Manufacturer Settles Accounting Fraud Charges*, (28/09/2017) available at <https://www.sec.gov/news/press-release/2017-178>, last seen on 26/04/21.

⁵³ R. L. Cassin, *Alere pays \$13 million to resolve accounting fraud and FCPA offenses*, The FCPA Blog (28/09/2017), available at <https://fcpublog.com/2017/09/28/alere-pays-13-million-to-resolve-accounting-fraud-and-fcpa-o/>, last seen on 26/04/21.

⁵⁴ P. Burugula, *Uber not alone in facing US probe for India 'graft'*, The Economic Times (16/04/2019), available at <https://economictimes.indiatimes.com/news/company/corporate-trends/uber-not-alone-in-facing-us-probe-for-india-graft/articleshow/68898109.cms#:~:text=Massachusetts%2Dbased%20healthcare%20company%20Alere,to%20a%20total%20%2413%20million>, last seen on 26/04/21.

⁵⁵ T. Sullivan, *Stryker Corp. Pays \$13.2 Million to SEC to Settle FCPA Allegations*, Policy & Medicine (06/05/2018), available at <https://www.policymed.com/2013/12/stryker-corp-pays-132-million-to-sec-to-settle-fcpa-allegations.html>, last seen on 26/04/21.

its business transaction involved sales of orthopaedic products to dealers, which in turn sold to private hospitals. The dealers appointed by the Stryker issued inflated invoices to the hospitals which in turn passed it on to the patients or its insurers. Private hospitals retained the price difference between the inflated payments and the negotiated price with Stryker. The dealers did not maintain proper financial records and provided improper payments to healthcare professionals.⁵⁶ Stryker paid commissions to the dealers without supporting documents. Stryker agreed to pay the \$13.2 million to settle the SEC's charges and SEC also imposed a compliance monitor.⁵⁷

Even though no public official or instrumentality of state was involved in this case, FCPA was able to successfully initiate action against erring corporate and individuals involved in the corrupt activity.

4.4 Uber

It was alleged that Uber bribed Delhi police officials and hospital authorities to obtain the medical report and other records of a rape victim. Office of Commissioner of Police of Delhi Police did not take any action on the complaint made by a lawyer to Delhi Police's vigilance department with respect to bribes taken by the police in the rape case. In 2017, DOJ launched a probe to investigate whether Uber violated FCPA. Later, DOJ closed the probe against the Uber and did not issue its press release. Uber and the victim agreed to settle a civil lawsuit filed in US.⁵⁸

4.5 Embraer-Military Aircraft Contract

In 2009, Brazilian aircraft manufacturer Embraer paid \$5.76 million as bribe to a shell company to secure a contract worth \$208 million to sell three aircrafts to Indian Air Force. In connection with the deal, it engaged services of an unknown agent pursuant to an agency agreement executed in January 2005 with a shell company domiciled in UK. As per the agreement, it agreed to pay the

⁵⁶ M. Volkov, *Stryker Suffers "Strike Two" and Settles SEC FCPA Case*, Volkov Law Blog (01/10/2018), available at <https://blog.volkovlaw.com/2018/10/stryker-suffers-strike-two-and-settles-sec-fcpa-case/>, last seen on 26/04/21.

⁵⁷ R.L. Cassin, *Stryker hit with second FCPA enforcement action*, The FCPA Blog (28/09/2018), available at <https://fcpublog.com/2018/09/28/stryker-hit-with-second-fcpa-enforcement-action/>, last seen on 26/04/21.

⁵⁸ S.K. Singh, *Rape case: US Justice Dept shuts probe on Uber bribery charges*, Outlook (21/01/2020), available at <https://www.outlookindia.com/newscroll/rape-case-us-justice-dept-shuts-probe-on-uber-bribery-charges/1713830>, last seen on 26/04/21.

agency nine per cent of the value of the defence contract obtained in India. On 8th February 2005, Embraer executed a memorandum of understanding with Defence Research and Development Organisation, which ultimately resulted in a contract to supply three Embraer-145 aircrafts.⁵⁹ Embraer did not voluntarily disclose the FCPA violation but co-operated with the department's investigation. Embraer entered into a three-year Deferred Prosecution Agreement ("DPA") and agreed to pay more than \$107 million to resolve FCPA charges.⁶⁰ The Government of India asked CBI to probe corruption charges⁶¹ and a case has been registered against Vipin Khanna, an 87-year-old defence consultant for receiving bribes in the aircraft purchase.⁶² Latest details of the investigation are currently unknown.

4.6 Oracle Corporation

The Indian subsidiary of California based Oracle Corporation, during the period 2005 to 2007, set aside money from the company books that was used to make unauthorised payments to phoney vendors in India.⁶³ The SEC alleged that the employees of the Indian subsidiary arranged the transaction with the government of India to hold more than \$2.2 million unauthorised side funds.⁶⁴ On fourteen different occasions, some extra margins were added while dealing with the distributors, during execution of the eight contracts with government.⁶⁵ The secretly parked money from the sales with the Indian Government was used in an unauthorized manner for bribery or

⁵⁹ *Embraer paid \$5.76 million to shell company for Indian Air Force plane deal*, Deccan Chronicle (25/10/2015), available at <https://www.deccanchronicle.com/nation/current-affairs/251016/embraer-paid-576-million-to-shell-company-for-indian-air-force-plane-deal.html>, last seen on 26/04/21.

⁶⁰ *Embraer Agrees to Pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges*, Justice News, Department of Justice, United States of America (24/10/2016), available at <https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>, last seen on 26/04/21.

⁶¹ V. Raghuvanshi, *India Begins Corruption Investigation Against Embraer of Brazil, Asia Pacific*, Defense News (15/09/2016), available at <https://www.defensenews.com/global/asia-pacific/2016/09/15/india-begins-corruption-investigation-against-embraer-of-brazil/>, last seen on 26/04/21.

⁶² S. Unnithan, *Bribes from Brazil*, India Today (02/11/216), available at <https://www.indiatoday.in/magazine/special-report/story/20161114-embraer-embraer-deal-india-cbi-drdo-iaf-embraer-bribery-scandal-829812-2016-11-02>, last seen on 26/04/21.

⁶³ R. L. Cassin, *Oracle Settles SEC Charges*, The FCPA Blog (16/08/2012), available at <https://fcpublog.com/2012/08/16/oracle-settles-sec-charges/>, last seen on 26/04/21.

⁶⁴ Securities Exchange Commission, Press release, *Charges Oracle Corporation with FCPA Violations Related to Secret Side Funds in India*, available at <https://www.sec.gov/news/press-release/2012-2012-158htm>, last seen 26/04/21.

⁶⁵ *Oracle fined \$2mn for bribery in India*, Hindustan Times (18/08/2012), available at <https://www.hindustantimes.com/business/oracle-fined-2mn-for-bribery-in-india/story-CkN7HOXu473bZsYt0AQaaM.html>, last seen on 26/04/21.

embezzlement.⁶⁶ The Oracle Corporation violated the books and records, and internal control provisions of the FCPA and agreed to pay \$2 million to settle the matter.⁶⁷

4.7 Belgian Brewer Ab Inbev

Crown Beers India Private Limited (Crown) is a wholly owned subsidiary of AB InBev, a Belgium based global brewer. It also owned 49 percent of the joint venture, InBev India International Private Limited (“IIPL”) managed the marketing and distribution of Crown Beer. The sale of liquor is regulated by the states in India and in Tamil Nadu, the wholesale and retail of the liquor is controlled by the instrumentality of the state. The company used outside third party promoters from 2009 to 2012, to make improper payments to Indian government officials to obtain beer orders and to increase brewery production hours for Crown in 2011. In its books, Crown recorded the payment made to IIPL as legitimate promotional costs.⁶⁸ SEC stated that the company prohibited employees from communicating with the agency about potential anti-bribery violations.⁶⁹ AB InBev has agreed to pay \$6 million to resolve the FCPA accounting provision and whistle-blower charges.

4.8 Spirits Maker Beam Suntory Inc.

Beam Global Spirits & Wine (India) Private Ltd. is a subsidiary of Chicago-based spirits maker Beam Suntory Inc. Beam, which paid bribes and other improper payments to Indian government officials from 2006 to 2012 to obtain retail business in the Indian market.⁷⁰ The bribe was paid through third party promoters and distributors and falsely recorded the bribery expenses disguised

⁶⁶ S.P. Boggs, *Oracle Corporation Agrees to Pay \$2 Million to Settle Books and Records and Internal Controls Violations of the FCPA*, The Anti-Corruption Blog (21/08/2012), available at <https://www.anticorruptionblog.com/foreign-corrupt-practices-act/oracle-corporation-agrees-to-pay-2-million-to-settle-books-and-records-and-internal-controls-violations-of-the-fcpa/>, last seen on 26/04/21.

⁶⁷ *Ibid.*

⁶⁸ Anheuser-Busch Inbev SA/NV, Administrative Proceeding, File No. 3-17586 (Securities and Exchange Commission) available at <https://www.sec.gov/litigation/admin/2016/34-78957.pdf>, last seen on 26/04/21.

⁶⁹ S. Barlyn, *AB InBev to pay SEC \$6 million to settle bribery charges*, Reuters (28/09/2016), available at <https://www.reuters.com/article/us-a-b-i-sec-fine-idUSKCN11Y21R>, last seen on 26/04/21.

⁷⁰ L.K. Jha, *US company bribed Rs 10 lakh to Indian official for license approval: Department of Justice*, Outlook (28/10/2020), available at <https://www.outlookindia.com/newscroll/us-company-bribed-rs-10-lakh-to-indian-official-for-license-approval-department-of-justice/1965459>, last seen on 26/04/21.

as commission expenses.⁷¹ Corrupt payments were made to secure the orders for Beam products at government controlled depots and retail outlets, acquire and renewal licenses and label registrations and to obtain prominent placement for Beam products in the retail stores.⁷² In one instance, Beam paid an Indian official ten lakhs Rupees, approximately \$18,000 at the exchange rate at the time, to approve a bottling license.⁷³ Beam not only paid bribes but also falsified its accounts to conceal the bribery activity. Beam intentionally failed to implement internal controls to prevent bribery and conspired with others to violate FCPA. The press release issued by DOJ did not name the Indian official or officials who allegedly received the bribes.⁷⁴ In July 2018, Beam settled related civil claims with SEC by paying \$8.2 million.⁷⁵ In October 2020, Beam agreed to pay \$19.6 million and entered into a three-year Deferred Prosecution Agreement (DPA) with DOJ to settle the charges.⁷⁶

4.9 Mondelēz International

The Central Government has given full excise duty exemption to the expanded units of industrial houses in Himachal Pradesh. The duty exemption is for a period of 10 years from the date of production and the units should have been established before March 2010 for availing excise duty exemption.⁷⁷

In February 2010, Mondelez International, Inc., a Virginia company acquired Cadbury plc an English company and its subsidiaries, including Cadbury India Limited.

⁷¹ H. Cassin, *DOJ fines 'uncooperative' Beam Suntory \$19.6 million for FCPA offenses*, The FCPA Blog (27/10/2020), available at <https://fcpablog.com/2020/10/27/doj-fines-uncooperative-beam-suntory-19-million-for-fcpa-offenses/>, last seen on 26/04/21.

⁷² *Supra* 68.

⁷³ D. Tokar, *Beam Suntory to Pay \$19 Million to Settle Bribery Probe*, The Wall Street Journal (27/10/2020), available at <https://www.wsj.com/articles/beam-suntory-to-pay-19-million-to-settle-bribery-probe-11603836951>, last seen on 26/04/21.

⁷⁴ *Supra* 68.

⁷⁵ *Supra* 71.

⁷⁶ *Supra* 69.

⁷⁷ A. Shrivastava, *CVC refers Cadbury tax evasion case to CBI*, India Today (13/09/2017), available at <https://www.indiatoday.in/pti-feed/story/cvc-refers-cadbury-tax-evasion-case-to-cbi-1043735-2017-09-13>, last seen on 26/04/21.

In January 2017, SEC charged Mondelez with poor internal controls and violation of FCPA in India.⁷⁸ Company hired tile and marble dealer Deepak Chandel to liaise with the state to obtain licences and approvals for a chocolate factory in Baddi, Himachal Pradesh.⁷⁹ In order to claim excise and income tax benefit of more than INR 600 Crores over a span of 10 years, company sought to designate production lines of 5-star and Gems in Baddi factory as a separate unit (Unit II). Bribes had been paid to retrospectively secure permissions for a factory extension in Baddi, which has been hastily constructed to get advantages of tax concessions.⁸⁰ This would enable Cadbury to make an internal rate of return of 58.5%.⁸¹

SEC alleged that Cadbury India did not conduct proper due diligence or monitor the agent and its books and records did not fairly reflect the nature of service rendered by agent.⁸² Failure to implement compliance control measures created the risk that funds paid to agent were used for improper and unauthorised purpose.

The agent submitted five invoices totaling \$110,446, during the period from February 2010 to July 2010, for providing consultation services, arrange application for the statutory clearances, preparation of documents for submitting it with public officials for specific licenses. The company did not execute any written contract with the agent and upon receipt of the invoices, paid \$90,666 after deducting withholding tax. Cadbury did not receive any supporting documents for the service rendered. During this period Cadbury received certain licenses and approvals for the Unit II,

⁷⁸ D. Narayanan, *Mondelez India bribery case may see top guns face off in the US*, The Economic Times (21/04/2017), available at <https://economictimes.indiatimes.com/news/company/corporate-trends/probe-into-seven-year-old-mondelez-india-bribery-case-likely-to-conclude-by-month-end/articleshow/58287616.cms?from=mdr>, last seen on 26/04/21.

⁷⁹ D. Narayanan, *Mondelez to pay \$13 million to settle India FCPA violation charges*, The Economic Times (09/01/2017), available at <https://economictimes.indiatimes.com/industry/cons-products/food/mondelez-to-pay-13-million-to-settle-india-fcpa-violation-charges/articleshow/56422345.cms?from=mdr>, last seen on 26/04/21.

⁸⁰ S. Srivastava, *Cadbury's worms of graft: Whistleblower reveals all*, Forbes India (26/04/2017), available at <https://www.forbesindia.com/article/special/cadburys-worms-of-graft-whistleblower-reveals-all/46821/1>, last seen on 26/04/21.

⁸¹ *Supra* 77.

⁸² R.L. Cassin, *Mondelez pays \$13 million to settle FCPA charges*, The FCPA Blog (09/01/2017), available at <https://fcpublog.com/2017/01/09/mondelez-pays-13-million-to-settle-fcpa-charges/>, last seen on 26/04/21.

including de-amalgamation approval to designate Unit II property was built as a distinct entity from that of the existing manufacturing facility.⁸³

Mondelez agreed to pay \$13 million (approximately Rs 90 crores) to settle the related FCPA charges without admitting or denying the charges that its subsidiary paid to an agent who suspected to have bribed public officials to obtain licences and approvals for a chocolate factory in Baddi, Himachal Pradesh.⁸⁴ The whistle-blower Mr. Rajan Nair resigned from Mondelez in January 2013 but has continued to support investigations.⁸⁵ The DOJ investigation is still in progress.

Apart from the DOJ investigation, CBI is conducting investigation against Mondelez for the violation of Prevention of Corruption Act 1988.⁸⁶ The investigation was undertaken on the recommendations of the CVC regarding evasion of excise duty of Rs.580 Crores by bribing public servants. The Directorate General of Central Excise Intelligence (“DGCEI”), started a probe against Cadbury India for purported misuse of area-based exemption for its Unit II in Baddi plant.⁸⁷ The officials found that Mondelez claimed excise duty exemption for its Unit II relating to a period before it came into existence.⁸⁸

4.10 Diageo

Diageo India Pvt. Ltd. is a wholly owned indirect subsidiary of London based Diageo plc a leading producer and/or distributor of premium branded spirits, beer, and wine. In India, Diageo paid \$1.7 million in bribes through its third-party distributors to 900 or more government employees in India, from 2003 to June 2009. The reimbursement of the illicit payments made by the distributors are falsified in the books and records as ‘market scheme settlement, deposit with excise dept., miscellaneous expenses, factory expenses, travelling expenses, telephone expenses, incentives, special incentives or business promotion expenses.’ Diageo disguised the improper payments as

⁸³ Matter of Cadbury Limited and Mondelēz International, Inc, Administrative Proceeding, File No. 3-17759 (, Securities and Exchange Commission)available at <https://www.sec.gov/litigation/admin/2017/34-79753.pdf>, last seen on 26/04/2021.

⁸⁴ *Supra* 76.

⁸⁵ *Supra* 78.

⁸⁶ *Supra* 76.

⁸⁷ *Supra* 75.

⁸⁸ *Central Vigilance Commission refers Cadbury tax evasion case to CBI*, Business Standard (13/09/2017), available at https://www.business-standard.com/article/current-affairs/central-vigilance-commission-refers-cadbury-tax-evasion-case-to-cbi-117091300668_1.html, last seen on 26/04/2021.

legitimate vendor expenses and failed to devise and maintain sufficient internal accounting controls.⁸⁹ Diageo’s subsidiaries routinely used third parties, inflated invoices, and other deceptive devices to mask the improper payments made to the foreign officials in India, Thailand, and South Korea.⁹⁰ SEC has imposed civil penalty of \$16 million on Diageo to resolve FCPA offenses.⁹¹ Unexpectedly DOJ opted not to press FCPA violation charges against Diageo.⁹²

4.11 Price Waterhouse Coopers

The five India-based PwC Network Firms of PricewaterhouseCoopers (“PwC”) served as independent auditors of Satyam Computer Services Limited. Satyam fraudulently falsified financial accounting of company’s revenue, income, earnings per share, cash, and interest-bearing deposits. Contrary to the audit reports, PwC did not conduct Satyam’s audits in accordance with Public Company Accounting Oversight Board (“PCAOB”) Standards and failed to spot a \$1.7 billion fraud.⁹³ PwC have agreed to pay a combined \$17.5m in fines in the US.⁹⁴

4.12 Pride International Inc.

Pride International Inc is a Delaware corporation headquartered in Houston, which owned and operated numerous oil and gas drilling rigs throughout the world. SEC alleged that Pride paid three

⁸⁹ The Matter of Diageo Plc., Administrative Proceeding, File No. 3-14490, (Securities and Exchange Commission) available at <https://www.sec.gov/litigation/admin/2011/34-64978.pdf>, last seen on 26/04/21.

⁹⁰ R.L. Cassin, *Diageo Pays \$16.4 Million In SEC Settlement*, The FCPA Blog (28/07/2011), available at <https://fcpublog.com/2011/07/28/diageo-pays-164-million-in-sec-settlement/>, last seen on 26/04/21.

⁹¹ *Diageo fined \$16-million by SEC for Bribing officials in India, Thailand, South Korea*, The Economic Times (30/07/2011), available at <https://economictimes.indiatimes.com/industry/cons-products/liquor/diageo-fined-16-million-by-sec-for-bribing-officials-in-india-thailand-south-korea/articleshow/9414372.cms?from=mdr#:~:text=BANGALORE%3A%20The%20US%20Security%20and,sales%20and%20earn%20tax%20benefits>, last seen on 26/04/21.

⁹² S. P. Boggs, *Drink to This: Diageo Settles FCPA Administrative Enforcement Action*, The Anti-Corruption Blog (30/07/2011), available at <https://www.anticorruptionblog.com/foreign-corrupt-practices-act/drink-to-this-diageo-settles-fcpa-administrative-enforcement-action/>, last seen on 26/04/21.

⁹³ Matter of Lovelock & Lewes, Price Waterhouse, Bangalore & Ors., Administrative Proceeding, File No. 3-14321, (Securities and Exchange Commission) Available at <https://www.sec.gov/litigation/admin/2011/34-64184.pdf>, last seen on 26/04/21.

⁹⁴ *Satyam and PwC are fined in US for accounting fraud*, BBC News (06/04/2011), available at <https://www.bbc.com/news/business-12981738>, last seen on 26/04/21.

bribes totaling approximately \$500,000 to influence the customs litigation relating to importation of drilling rig.⁹⁵

Pride agreed to pay a fine of about \$32.6 million to DOJ and a civil penalty of \$23.5 million to SEC totaling \$56.1 million as part of its settlement of FCPA charges.⁹⁶ Pride executed a deferred prosecution agreement with DOJ for settling the FCPA criminal charges.

4.13 Louis Berger International

Louis Berger International Inc., a New Jersey-based construction management company, was involved in a \$3.9 million bribery scam to secure water projects in Goa and Guwahati.⁹⁷ It has admitted to the FCPA violation charges and agreed to pay \$17.1 million to DOJ for resolving the criminal charges that it bribed public officials in India and three other countries between 1998 and 2010. It executed a deferred prosecution agreement and agreed to retain a compliance monitor for three years.⁹⁸ Neither the Company nor the DOJ disclosed the names of the bribe takers.⁹⁹

A public interest litigation was filed before the Guwahati High Court¹⁰⁰ seeking CBI enquiry into the alleged bribery which is registered as Dispur Police Station case no.1498/2015 under section 7 r/w 13 of the Prevention of Corruption Act 1988. The High Court ordered the CBI to take over the case and bring the case into logical conclusion.

⁹⁵ SEC v. Pride International, Inc., Civil Action No. 4:10-cv-4335 (S.D. Texas, 04/11/2010), available at <https://www.sec.gov/litigation/litreleases/2010/lr21726.htm>, last seen on 26/04/21.

⁹⁶ B. Goldsmith, *Pride settles with DOJ, SEC in bribery case*, The Business Journals (07/12/2010), available at <https://www.bizjournals.com/houston/news/2010/12/07/pride-settles-with-doj-sec-in-bribery.html>, last seen on 26/04/21.

⁹⁷ A. Chowdhury, *Louis Berger fears bribery scam may cost it some work*, The Economic Times (11/08/2015), available at <https://economictimes.indiatimes.com/news/politics-and-nation/louis-berger-fears-bribery-scam-may-cost-it-some-work/articleshow/48417758.cms?from=mdr>, last seen on 28/04/21.

⁹⁸ *Louis Berger International Resolves Foreign Bribery Charges*, Department of Justice, USA, Justice News (17/07/2021) available at [https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges#:~:text=\(LBI\)%2C%20a%20New%20Jersey,to%20secure%20government%20construction%20management](https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges#:~:text=(LBI)%2C%20a%20New%20Jersey,to%20secure%20government%20construction%20management), last seen on 28/04/21.

⁹⁹ *Indian Bribe Takers Not Named In \$3.9 Mn Louis Berger Bribery Scam*, Mid-day (21/07/2015), available at <https://www.mid-day.com/articles/indian-bribe-takers-not-named-in--3-9-mn-louis-berger-bribery-scam/16388167>, last seen on 28/04/21.

¹⁰⁰ Bhaben Handique & Ors. v. State of Assam & Ors., PIL No.85/2015.

4.14 CDM Smith

CDM Smith India Private Limited was a wholly owned subsidiary of CDM Smith, Inc. a privately held engineering and construction firm incorporated and headquartered in Boston, Massachusetts. From 2011 to 2015 CDM Smith paid bribes of about \$1.18 million (Rs 7.5 crore) to public officials to win contracts and avoid service tax payments.¹⁰¹ CDM Smith secured a highway construction supervision and design contract from NHAI and a separate water project in the state of Goa through illegal means.¹⁰² DOJ alleged that 2-4% of the contract price was paid as a bribe through fraudulent subcontractors.¹⁰³ CDM Smith agreed to disgorge \$4 million which represents the profits it made from the illegally obtained contracts in India.¹⁰⁴ A special investigation team (“SIT”) was set up by CVC to enquire into the matter and later CBI registered a FIR based on the SIT report.¹⁰⁵

4.15 Dow Chemical Company

The Dow Chemical Company wholly owns DE-Nocil Crop Protection Ltd., which was remade as Dow AgroSciences India Pvt Ltd. From 1996 to 2001, DE-Nocil made improper payment estimated \$ 2,00,000 to several Government officials in India. SEC complaint alleged that bribery was being paid to officials in India's Central Insecticides Board to expedite the registration of three DE-Nocil products.

¹⁰¹ D. Singh, *ET Investigation Part I: How an American firm bribed its way to lucrative contracts in India*, The Economic Times (10/02/2018), available at <https://economictimes.indiatimes.com/news/politics-and-nation/et-investigation-how-us-company-bribed-indian-officials-to-win-contracts/articleshow/62701302.cms?from=mdr>, last seen on 28/04/21.

¹⁰² *In Re: CDM Smith, Inc.*, Department of Justice, USA (29/06/2021), available at <http://fcpa.stanford.edu/enforcement-action.html?id=664>, last seen on 28/04/21.

¹⁰³ *Note verbale dated 21 June 2017 from the Criminal Division of U.S. Department of Justice*, (29/06/2017) available at <https://www.justice.gov/criminal-fraud/page/file/976976/download>, last seen on 28/04/21.

¹⁰⁴ *Ibid*

¹⁰⁵ A. Srivas, *Widespread Bribery at NHAI Penalised by US Authorities, But Remains Uninvestigated at Home*, The Wire (18/04/2018), available at <https://thewire.in/political-economy/illegal-tax-refunds-nhai-bribery-concerns>, last seen on 28/11/20.

The bribes were made through contractors who added fictitious charges on its bills, or issued false invoices, to DE-Nocil.¹⁰⁶ De-Nocil also made payments to state officials to promote, distribute and sell its products through distributors.¹⁰⁷ SEC levied civil penalty of \$325,000 on Dow Chemicals for settlement of FCPA violation charges.¹⁰⁸

5. FAILURE OF LEGAL ENFORCEMENT MECHANISMS IN INDIA

Indian legislation considers corruption as a criminal offence and involvement of public official or instrumentality of state in the alleged offence is mandatory to run the wheels of the legal system in India. The Prevention of Corruption Act, 1988 is oblivious of the fact that corporates are actively involved in the bribery and/or connived to commit corruption for its business purposes. The Prevention of Corruption Act, 1988 is majorly concerned with the passive bribery.

Serious Fraud Investigation Office (“SFIO”) has been established to investigate into the frauds relating to the Companies.¹⁰⁹ It is a multi-disciplinary organisation for carrying out the investigation for the prosecution of the white-collar crimes and serious corporate frauds. SFIO is equipped with experts from the field of law, corporate affairs, accounting, forensic audit, information technology, capital market, etc.¹¹⁰ In public interest also the Central Government assigns investigation into the affairs of the company to SFIO.¹¹¹ SFIO can arrest any person, based on the materials in possession, if it believes that the said person has committed an offence under section 447 of the companies act.¹¹² The punishment under section 447 of the companies act will be attracted for the fraudulent activities mentioned herein below

¹⁰⁶ DOJ Quietly Releases Another “Declination with Disgorgement” – This One \$4 Million Regarding CDM Smith Inc., FCPA Professor (30/07/2007), Available at <https://fcpaprofessor.com/doj-quietly-releases-another-declination-disgorgement-concerning-cdm-smith-inc/> last seen on 28/04/2021.

¹⁰⁷ S. Dubey, *US fines Dow Chemicals for bribery by Indian subsidiary*, Down to Earth (04/07/2015), available at <https://www.downtoearth.org.in/news/us-fines-dow-chemicals-for-bribery-by-indian-subsidiary-5631#:~:text=Published%3A%20Saturday%2004%20July%202015,Indian%20subsidiaries%2C%20De%2DNocil.&text=Dow%20also%20denied%20knowledge%20or%20approval%20for%20these%20payments,> last seen on 28/04/2021.

¹⁰⁸ *Dow fined in US for bribes in India: NGO*, Hindustan Times (16/02/2007), available at <https://www.hindustantimes.com/india/dow-fined-in-us-for-bribes-in-india-ngo/story-iiy4awEO4pbWhXfEfOf8mO.html>, last seen on 28/04/2021.

¹⁰⁹ Central government notification F. No. A-35011/2011-admn. III (21/07/2015).

¹¹⁰ S. 211(2), The Companies Act, 2013.

¹¹¹ S. 212(1), The Companies Act, 2013.

¹¹² S. 212(8), The Companies Act, 2013.

- (i) Furnishing of false or incorrect information or suppression of material information during incorporation of the company¹¹³
- (ii) Company incorporated by fraudulent means by furnishing false or incorrect information or suppression of material information¹¹⁴
- (iii) Misleading or untrue statement in the prospectus¹¹⁵
- (iv) Fraudulently inducing a person to invest money in securities¹¹⁶
- (v) Personation for purchase of securities¹¹⁷
- (vi) Issuance of duplicate share certificates¹¹⁸
- (vii) Fraudulent transfer of shares by depository of depository participant¹¹⁹
- (viii) Concealing the name of creditor who is entitled to object for the reduction in share capital, or misrepresenting the claim of the creditor, or abets the concealment or misrepresentation as aforesaid¹²⁰
- (ix) Direct or indirect fraudulent act by auditor, or abetting or colluding by auditor about company, its directors and officers¹²¹
- (x) Business of the company is carried on for a fraudulent or unlawful purpose¹²²
- (xi) Conducting the business of the company with intent to defraud the creditors or for unlawful purpose¹²³
- (xii) Furnishing of false statement, mutilation and destruction of documents¹²⁴
- (xiii) Fraudulent application for removal of name from company register¹²⁵
- (xiv) Fraudulent conduct of business¹²⁶
- (xv) Making false financial statements, return, certificate, prospectus, etc¹²⁷

¹¹³ S. 7(5), The Companies Act, 2013.

¹¹⁴ S. 7(6), The Companies Act, 2013.

¹¹⁵ S. 34, The Companies Act, 2013.

¹¹⁶ S. 36, The Companies Act, 2013.

¹¹⁷ S. 38(1), The Companies Act, 2013.

¹¹⁸ S. 46(5), The Companies Act, 2013.

¹¹⁹ S. 56(7), The Companies Act, 2013.

¹²⁰ S. 66(10), The Companies Act, 2013.

¹²¹ S. 140(5), The Companies Act, 2013.

¹²² S. 206(4), The Companies Act, 2013.

¹²³ S. 213, The Companies Act, 2013.

¹²⁴ S. 229, The Companies Act, 2013.

¹²⁵ S. 251, The Companies Act, 2013.

¹²⁶ S. 339, The Companies Act, 2013.

¹²⁷ S. 448, The Companies Act, 2013.

Inclusive definition of ‘fraud’ is given for the purpose of section 447 of the Companies Act, 2013. Any person who commits any act or omission or abuses his position or conceals facts with intend to deceive, to gain undue advantage or injure the interest of the company, its shareholders, creditors or any other person, shall be punishable with imprisonment for a term which shall not be less than six months but shall be extendable up to ten years, irrespective of the wrongful gain or wrongful loss. If public interest is affected due to the fraud in question, then the term of imprisonment shall not be less than three years. It also provides that fine equivalent to the fraudulent amount in question, which may extent up to three times that of the fraudulent transaction amount.

Indulgence in corrupt activities by the corporates for securing or retaining business is not covered within the ambit of ‘fraud’ under the Companies Act. In order to attract punishment for fraud under section 447 of the Companies Act, the alleged act or omission must injure the interest of the company, its shareholders, creditors or any other person. SFIO since its inception in 2003 upto 2016-17 has investigated 312 cases and 1237 prosecution cases filed in various courts.¹²⁸

Companies act does not consider the profit made by the individual or company due to the act of fraud while imposing the penalty. In order to have more deterrent effect, the penalty amount should have been equivalent, or more than the consequential benefit enjoyed by the company or the individual, instead of concentrating on the amount involved in the fraudulent transaction. Companies act does not and/or authorise SFIO to impose any penalty on companies that indulges in fraudulent activities like that of UK Serious Fraud Office. *Suo moto* power to investigate is not given to SFIO and investigation can be conducted only on assignment by the Central Government. FCPA serves as an example to the countries seeking to prevent bribery and United States leads the world in prosecuting corruption.¹²⁹ FCPA is part of Securities Exchanges Act 1934 and is divided in to two parts:

- a) Anti-bribery Provisions: which makes bribery to foreign officials a crime;
- b) Accounting provisions: bookkeeping obligations are imposed upon companies.

¹²⁸ S. Mathur, *Treating the SFIO as a Joke is Costing the Country Dear*, Moneylife (23/08/2018), available at <https://www.moneylife.in/article/treating-the-sfio-as-a-joke-is-costing-the-country-dear/55101.html> last seen on 12/04/21.

¹²⁹ J. Lippman, *Business Without Bribery: Analyzing the Future of Enforcement for the UK Bribery Act*, 42(3) Public Contract Law Journal 649, 663 (2013).

Anti-bribery provisions require actus reus and mens rea whereas the bookkeeping provisions impose affirmative obligations on companies.¹³⁰ In India, the accounting and bookkeeping obligations of the companies are not utilised in its true sense to prevent and detect corporate corruption.

6. ADVANTAGES OF CIVIL ENFORCEMENT

The recovery of assets from the accused is possible only on conviction of the persons on proving the charges beyond reasonable doubts. Hence the confiscation, forfeiture and recovery of assets of a public servant or the proceeds of the corruption is a major challenge in India. In USA, SEC uses a number of non-criminal enforcement mechanisms such as fines, non-prosecution agreements, disgorgement of profits, pre-judgment interest, cease and desist order prohibiting current and future violations. Non-criminal enforcement mechanisms help judicious utilisation of scarce prosecutorial resources and prevents loss of revenue. The multiple avenues for enforcement ensure a working relationship and coordination with the business community. Collateral consequences of criminal prosecution are that companies do not cooperate fully with the investigation, disciplining of the delinquent employees is not possible and there is remote possibility of restitution of the victims. Alternative procedures provide a diverse set of enforcers and enhance the effectiveness of anti-corruption measures. Enforcement through multiple agencies creates multiple avenues of anti-corruption enforcement and facilitates monitoring relationship with the companies. It also reduces the burden of the court and prevents backlog of cases in the courts. Alternative enforcement mechanism decreases the concentration of power in one agency and extra judicial enforcement mechanisms facilitates recovery of assets from the public officials and impose fines on the bribe giving company without initiation of criminal charges.¹³¹

¹³⁰ L.A. Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62(2) Duke Law Journal 445 (2012).

¹³¹ E. Solomon, *Targeting Corruption in India: How India Can Bolster its Domestic Anticorruption Efforts Using Principles of the FCPA and The U.K. Bribery Act*, 34(3) University of Pennsylvania Journal of International Law 901, 950 (2013).

Imprisonment wastes both society's resources and the offender's productive capacity.¹³² Fines do not involve costs of prison system, hence it is cheaper to society and the victims can be compensated.¹³³ The frequency of enforcement of corporate crime legislations are less and its penalties are often lower than those under the corporate civil liability.¹³⁴ Government agencies as well as private litigants enforce corporate civil liability whereas corporate criminal liability is enforced by Department of Justice.¹³⁵

Potential reputational harm, expenses and uncertainty forces companies to shy away from FCPA litigation.¹³⁶ Prosecutorial freedom and weighty criminal sanction incentivises the FCPA investigation targets to enter into non-prosecution agreements or plea bargains. Those who support the investigation or self-report, co-operate or assist the government investigations are given lessened punishment.¹³⁷

7. CHALLENGES

In order to make financial gains, private litigants may bring frivolous or questionable suits against corporations.¹³⁸ Prosecutors acting within their limited resources, in order to maximise convictions, generally do not indulge in frivolous criminal prosecutions and prosecute matters which are truly in the public interest.¹³⁹ Corporates are inclined for criminal prosecutions since they can influence criminal enforcement agencies by lobbying and they cannot do it for civil liability enforcement by private litigants.¹⁴⁰ Corporates would prefer law enforcement by state agencies due to its infrequency.¹⁴¹ Criminal liability requires proof beyond reasonable doubt and

¹³² J. C. Jr. Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 American Criminal Law Review 419, 421 (1980).

¹³³ *Ibid.*

¹³⁴ V.S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 Washington University Law Quarterly 95 (2004).

¹³⁵ *Ibid.*

¹³⁶ L. A. Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62(2) Duke Law Journal 445 (2012).

¹³⁷ M. J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 Cornell International Law Journal 469, 473 (2016).

¹³⁸ *Supra* 218.

¹³⁹ E.D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?* 61 Tulane Law Review 777, 807 (1987).

¹⁴⁰ *Supra* 217.

¹⁴¹ *Ibid.*

there is a bar on double jeopardy whereas in civil enforcement the proof of liability only by preponderance of the evidence is sufficient.¹⁴²

The enforcement action against companies are settled out of court through plea agreements, deferred prosecution agreements, or non-prosecution agreements, consequently, there is no substantial opportunity for judicial review of the unsettled legal questions that arise from FCPA.¹⁴³ The approval of settlement agreement by the courts acts as a system of checks and balances in the exercise of discretion by the enforcement agency. The publication of the settlement agreement in the website fosters transparency and consistency and encourages companies to voluntarily disclose anti-corruption activities.

8. CONCLUSION

Corruption disturbs capital inflows, undermines the markets and prevents domestic and foreign investment. It creates uncertainty in the business environment and is disruptive to economic growth. Corruption leads to loss of opportunity, economic underperformance, inefficiency, and is a major obstacle for the growth and development of the nation. Sufficient measures shall be taken to curb corporate corruption by increasing transparency and accountability in the public services.

The legislations in India consider corporate corruption as a purely criminal offence and assumes that claims of the victims are satisfied, if the offender is punished by the state. In India, there is no specific law like FCPA for taking civil enforcement action against corporate corruption. In order to have deterrent effect and prevent corporate corruption, the legislature in India must enact a new law for taking civil enforcement action which will act as an additional mechanism in the prevention of corporate corruption. Multiple legal avenues will act as deterrent mechanism to prevent corporates from indulging in corrupt business practises.

¹⁴² *Ibid.*

¹⁴³ V.C. Romano, *Extraterritoriality and US Corporate Enforcement*, Whitecase, available at <https://www.whitecase.com/publications/article/extraterritoriality-and-us-corporate-enforcement>, last seen on 12/04/2021.

The Competition Act has in place a system to penalize the cartelization, abuse of dominance and other anti-competitive practices by imposing hefty fines. An apex body similar to CCI may be established, which upon receipt of a complaint or information take *suo moto* cognizance, inquire and investigate the unethical and corrupt practises committed by the corporates in their business practises.

Part III:
Research on Good Governance

THE SUCCESS AND FRUSTRATION OF THE RTI ACT IN SALVAGING A CERTIFIED LAND PLAN: AN OBSERVATIONAL ANALYSIS

B. Muthu Kumar¹

Abstract

Fifteen years have been passed since the enforcement of the Right to Information Act, 2005 (“RTI Act”) and it is a true blessing for every citizen to participate in the democratic system and make the government accountable for its actions, thereby creating nightmare for corrupt politicians and bureaucrats. Nonetheless, the operation of the RTI Act has changed from bad to worse through consistent amendments and reading down the provisions of the Act by the Hon’ble Supreme Court, exempting more authorities, leading to less accountability. The importance of certified land plan and management of railway lands has been examined vis-à-vis transparency and accountability. The paper would navigate through the ordeals faced by the author between 1997 and 2018 in retrieving a certified land plan of railway station from the Department of Southern Railway, Madurai Division. The use of RTI Act was successful in recovering the certified land plan but the delay in each and every process, particularly in Central Information Commission (“CIC”), and subsequently, the enforcement of the Order of the CIC before the Hon’ble High Court, was horrendous experience. The author would like to analyze based on the observation in each progression that ‘How the RTI mechanism acts as a panacea for non-transparent and unaccountable government? On the other side, the inherent drawbacks both in letter and spirit of the RTI Act have been examined to suggest robust reforms to make the RTI Act, an effective piece of legislation in the promotion of good governance.

Keywords: Central Information Commission, Certified land plan, Delay in Information Commissions, Enforcement of the Order of Information Commissions, Railway Lands, Right to Information.

1. INTRODUCTION:

The “right to information” can be gauged under natural law rights as it is one of the basic human rights of a citizen governed under a democratic system. It took almost three decades after recognizing “Right to Know”² that it is implicit in freedom of speech and expression under Article

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² *State Of U.P vs Raj Narain & Ors*, AIR 1975 SC 865.

19(1)(a) of Indian Constitution by the Hon'ble Supreme Court of India³ and more than two decades of long struggle led by the Mazdoor Kisan Shakti Sangathan, to know that it consists not only of posh educated groups but also the working class across the country, to enact the Right to Information Act, 2005⁴ ("RTI Act"). The Right to seek information from the government is nevertheless, 'right to question the government' that would enable the spirited citizens to actively participate in the decision making process and to keep the government accountable for all its do's and don'ts. The hallmark of this historic legislation is to produce well-informed citizenry to keep a check on public authorities, which eventually reduces corruption and promotes transparency in governance.

Since its enforcement in 2005, the RTI Act in its resilient journey has held many authorities accountable. Recently, the Supreme Court through its Constitution Bench held, the office of the Chief Justice of India would come under the ambit of RTI Act without compromising its independence.⁵ Nonetheless, the growing misgivings about the current functioning of Information Commissions both at the Centre and States due to non-filling up of vacancies and huge pendency of cases, has to be addressed promptly. The frequent changes in the RTI Act either through the amendments⁶ or interpretations⁷ turned it into a slack law, which certainly affects the adjudication standards of the Commissions. It has to be agreed that the RTI Act is more generous in its inception, and created apprehension among the bureaucrats for withholding information without genuine reasons. Moreover, the Commissions are restrained to invoke the penal provisions even in deserving cases, which promotes the culture of impunity among public authorities.⁸ In spite of these drawbacks, the RTI Act still acts as an effective tool, just like a saying "something is better

³ Madan B. Lokur, *Resurrecting the right to Know*, The Hindu (19/08/2020), <https://www.thehindu.com/opinion/op-ed/resurrecting-the-right-to-know/article32387743.ece>, last seen on 19/11/2020

⁴ Anjali Bhardwaj & Amrita Johri, *A Concerted attack on RTI*, The Hindu 7 (14/10/2020) <https://www.thehindu.com/opinion/op-ed/a-concerted-attack-on-rti/article32846738.ece>, last seen on 19/11/2020

⁵ Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481.

⁶ The Right to Information (Amendment) Act, 2019, (No. 24 of 2019) empowers the Central Government to determine the tenure and salaries of all Information Commissioners both at the Centre and State.

⁷ In the case of Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, the Court interpreted section 8 and provides a long tentative list of personal information protected from disclosure subject to larger public interest. This judgment impliedly overrides the verdict and reasoning in Girish Ramchandra Deshpande v. Central Information Commission, (2013) 1 SCC 212.

⁸ Special Correspondent, Act 15, *RTI Act crippled by huge backlog*, The Hindu, 12 (12/10/2020) <https://www.thehindu.com/news/national/at-15-rti-act-crippled-by-rising-backlog/article32827394.ece>, last seen on 19/11/2020

than nothing” to expose many scams and scandals mushroomed in our corrupt administrative system. The author in this paper has examined the management of railway lands and the importance of certified land plan. The pros and cons of the RTI Act has been analyzed through the ordeals encountered by the author and his father, in different forums between 1997 and 2018 to retrieve a certified land plan of railway station from the Department of Southern Railway, Madurai Division. It is an observational analysis about the application of the RTI Act and understood, it cannot be fully realized unless there is a sound record management.

2. RAILWAY LANDS:

The term ‘Railway land’ has been defined under the Railway (Amendment) Act, 2005⁹ as “any land in which a Government Railway has any right, title or interest”.¹⁰ The Government Railway has title over 58588.16 hectares of land as on March 31, 2014, which includes 930.75 hectares of encroached land.¹¹ The Indian Railways has a long history dating back to reign of East India Company but there was no proper land management as several railway companies¹² and state railways existed and operated in different regions of India. They obtained lands to lay railway lines from the respective provincial government and princely states till the Land Acquisition Act, 1894 was enacted, and thereafter lands were acquired under the Statute. The lands obtained and acquired before Independence by these companies and state railways were integrated and organized under Indian Railways, a department of the Union of India, ever since independence. However, the complete land records were either unavailable or not made, which eventually led to many encroachments. In 1980, the Department of Railway was instructed to give importance to land management and augment the land resources through commercial undertakings. Subsequently, in 1982, a separate Directorate of Land Management was established in the Railway Board to compile data on various aspects of lands, such as land plans, encroachments, etc., and the Land

⁹ Inserted by Act No. 51 of 2005, s. 2 (w.e.f. 01.07.2004).

¹⁰ Sec. 32A., Railway (Amendment) Act, 2005

¹¹ *Report on Management of Vacant Land in Indian Railways*, Ninety Third Report of the Public Accounts Committee 2017-18, (Sixteenth Lok Sabha) PAC No. 2127, 7, (27/03/2018) available at http://164.100.47.193/lsscommittee/Public%20Accounts/16_Public_Accounts_93.pdf, last seen on 19/11/2020.

¹² East Indian Railway Company, Great Indian Peninsula Railway, Central India Railway, North-Western Railway, and railway companies operated by Princely States. See *Report of the Railway Lands and Land Use Policy*, Estimates Committee 1992-1993 (Tenth Lok Sabha), 3, (29/04/1993) available at https://eparlib.nic.in/bitstream/123456789/757859/1/ec_10_29_1992.pdf, last seen on 19/11/2020.

Management and Amenities Directorate, in the Railway Board became the apex body for land management in the Indian Railways.¹³

It was a herculean task for the Indian Railways to bring all land records together, which were once possessed by different companies both public and private, and state railways. Moreover, the land plans has to be certified by the revenue authorities of the concerned State, to be a valid document. Thus, the certified land plan acts as a title deed for the Railways to own, possess and utilize their lands to its optimization.¹⁴ The Railway Act, 1989 was amended in the year 2005¹⁵ and chapter II-A was introduced, which leads to the creation of Rail Land Development Authority (“RLDA”), a separate authority existing since January 2007. The major task of RLDA is to check the commercial exploitation of Railway lands, and the Land Management Cell has been constituted at Zonal level to provide impetus to RLDA. It dealt with almost all issues of land, such as commercial licensing, prevention of encroachments, maintenance of land records etc., and related court cases.¹⁶

2.1 Certified Land Plan:

The Indian Railways holding a vast stretch of lands on the both sides of the railway track. The center of the railway track is the fixed point to measure a railway land situated on either side of the track. The Indian Railways rely on Land Plans, Land Record Register, Land Boundary Verification Register and Encroachment Inspection Registers as basic land records in accordance with instructions contained in Para 850 of Indian Railways Code for Engineering Department¹⁷ and also Paras 806, 807 and 812 of Indian Railways Works Manual.¹⁸ The land plan is a vital document containing all the details of the land, such as total area, particulars of locality, dimension of land, particulars of adjoining land, title of such land, etc.¹⁹ These particulars are helpful if there

¹³ Supra 10, at 14.

¹⁴ Ibid, at 5.

¹⁵ Inserted by Act No. 47 of 2005, s. 3 (w.e.f. 30.08.2006).

¹⁶ *Report on Disaster Management and Land Management in Indian Railways*, Sixteenth Report of the Public Accounts Committee 2009-10, Fifteenth Lok Sabha, PAC No. 1911, 15, (29/04/2010) available at https://eparlib.nic.in/bitstream/123456789/64531/1/15_Public_Accounts_16.pdf, last seen on 19/11/2020.

¹⁷ *Code for the Engineering Department*, Engineering Code upto ACS 48, http://iricen.gov.in/iricen/Works_Manuals/Engineering%20code%20upto%20ACS%2048.pdf, last seen on 19/11/2020.

¹⁸ *Indian Railway Works Manual Incorporated ACS upto 10*, IRWM CS upto 10, http://www.iricen.gov.in/iricen/Works_Manuals/IRWM%20CS%20UPTO%2010.pdf, last seen on 19/11/2020.

¹⁹ Indian Railways Institute of Civil Engineering, *Hand Book on Land Management*, Indian Railways 16-17 (2016).

is any government or private building which is likely to be constructed near the railway land. The Indian Railways Works Manual (“IRWM”) in para 827 has stipulated certain limitations such as leaving open space of approximately 30 meters between the Railway land boundary and the nearest edge of the building so as to avoid future encroachments through accrual of easement right on railway land over a period of time. Nevertheless, it provides certain exemptions to construct buildings within 30 meters subject to “No Objection Certificate” issued by the Railways after thorough scrutiny, inspection and supervision of the site and ensuring the safety of the railway track and trains during and after the construction of buildings.

The draftsman update the land plan when it warrants under the supervision of chief engineer and duly authenticate it from the officer in the rank of Divisional Railway Manager (Works) and the State revenue authority in the rank of Tahsildar. The certification by the Tahsildar is a must to avoid any discrepancy of title of the land, and if it is not complied with, then it would be a mere land plan and not a certified land plan. The officer in the rank of Assistant Divisional Engineer (“ADEN”)/Senior Section Engineer (“SSE”) – Works/Permanent Way of field units are in charge of maintaining the copies of certified land plans within their jurisdictions showing complete dimensions of the land. It is to be noted as on March 31, 2014, only 80.41% of certified land plans have been digitally scanned and computerized and 6374 land plans were missing or unauthenticated.²⁰ The author along with his father, both of them being lawyers, had fought under the RTI Act to retrieve a certified land plan of Thiruppuvanam Railway Station adjoining to their agricultural lands situated at Thiruppuvanam Taluk of Sivaganga District in Tamil Nadu. It took almost two decades (1997 to 2018) to accomplish it after exhausting all remedies under Revenue, Civil Courts, RTI Act and Hon’ble High Court. In this horrendous journey, the author has learned the working of the RTI Act and how the executive circumvents it, leading to unethical, unaccountable, corrupt and non-transparent governance that ultimately defeats the purpose and object of the RTI Act.

3. TIMELINE OF DEVOLUTION AND DISPUTE:

The author has ancestral agricultural properties belonging to his father and two paternal uncles situated in survey nos. 96/2A, 96/2B, 96/2C1, 96/C2 96/2D and 96/2E measuring 8 Acres and 54

²⁰ Supra 10, at 6.

Cents in Thiruppuvanam Pudur Village, Thiruppuvanam Taluk, Sivagangai District. The land was originally situated in survey no. 96, which was acquired for the construction of Railway Station at Thiruppuvanam. After the construction, the surplus lands were relinquished by the Railways on 29/11/1944 to the Department of Revenue administration, Government of Madras. The Railway lands including the Thiruppuvanam Railway Station was sub-divided as survey no. 96/1 and the relinquished land as survey no. 96/2 by the District Revenue authorities.

The relinquished land in survey no. 96/2 measuring 8 Acres and 54 Cents was put to auction by the Tahsildar of Sivaganga on 04.03.1946. The sale was confirmed in the name of the successful bidder and auction purchaser, Shri. R.M.K. Chinnasamy Naidu on 10.04.1946.²¹ On 20.12.1956, the author's great grandfather Shri. M. Muthu Servai purchased it from Shri. R.M.K. Chinnasamy Naidu. Being in possession of the same, Shri M. Muthu Servai received a letter dated 12.02.1968 from Divisional Superintendent, Works Branch asking the former to stop cultivation in survey no. 96/2 as the land belongs to Railway Department.²² It was strongly objected through a series of letters averring that the railway administration has no claim in the above said lands, and also requested the railways to replant the survey stones in accordance with the sub-divisions made by revenue authorities, after relinquishment of lands by the railways, to avoid further confusion.²³ Later, Shri. M. Muthu Servai and his grandsons including author's father (Shri M. Balaguru) entered into a registered partition on 01.12.1975, and the land bearing the survey no. 96/2 was subdivided into 96/2A to 96/2E.

3.1 Title Dispute and Exhaustion of Executive Remedy:

The subdivided agricultural lands bearing survey nos. 96/2A to 96/2E were under cultivation by our family members till 1997. Unfortunately, the railway authorities blocked the agricultural activities stating the updated land plan no. D. 2460.30 Sheet No. 6, certified by the Tahsildar, Manamadurai indicateing clearly that the entire land in survey no. 96 belongs to the Railways. We came to know the Tahsildar had certified the land plan as prepared by the Railways without cross-

²¹ Devakottai Revenue Divisional Officer's N.Roc. 12929/45 dated 10.04.1946; Collector's D.Dis. 15461/45 dated 21.01.1946 and Collector's R.Dis.6963/44 dated 16.09.1945 and Collector's R.Dis.3393/46 dated 09.05.1946 (on file with the author).

²² Letter No. U/W.274/TVN dated 12.02.1968 (on file with the author).

²³ The copy of the reply letter sent by Shri. M. Muthu Servai on 26.02.1968, 20.03.1968 & 13.05.1969 (on file with the author).

checking or further scrutiny, as it is being a routine procedure. Thus, the oversight of the Tahsildar cost us dearly.

The Assistant Engineer/Central/SR/Madurai mailed us, asking to produce all the relevant documents and to have a joint inspection relating to survey no. 96/2 to prove it as patta lands.²⁴ After scrutiny of our documents, the concerned official shot a letter on 24.09.1997 to Tahsildar, Manamadurai Taluk seeking authenticated Field Measurement Book (“FMB”) Sketch copy and adangal register copy of survey no. 96 of Thiruppuvanam Pudur Village. The Tahsildar had sent the same establishing our clear title over the said land.²⁵ It hardly convinced the railway authorities, and to confirm the stance taken by the Tahsildar, they had sent a letter to District Collector, Sivagangai.²⁶ The District Collector, Sivagangai directed the Revenue Divisional Officer to have an inspection of the land and submit a report. It was inspected on 22.07.1999 in presence of both the parties and a report was submitted to Divisional Revenue Officer, Sivagangai.²⁷ Further, the District Collector of Sivagangai through the letter dated 12.10.2000 had communicated that the land bearing survey no. 96/2 and its sub-divisions are entitled to us and Railways do not have any right or title over the said land.

3.2 Civil Suit against Railway Department:

The railway authorities were not satisfied with the decision taken by the revenue department including the District Collector, and they kept preventing us from doing cultivation. Left with no other remedy, a suit has been filed before the Additional District Munsif cum Magistrate Court of Manamadurai²⁸ to declare us, the owners of the property in the respective survey no., and sought permanent injunction to restrain the railway authorities from interfering with the peaceful

²⁴ Letter No. L/2/MDU from the office of the Assistant Engineer/Central to Shri. M. Balaguru, dated 07.07.1997 (on file with the author).

²⁵ The copy of the Letter No. O.Mu.A13/1186/98 from the Tahsildar, Manamadurai to Assistant Engineer/Central/SR/Madurai dated 20.03.1998 (on file with the author).

²⁶ The copy of the Letter No. U/W.278/MDU/Misc. from the Divisional Railway Manager (Works) to District Collector, Sivagangai dated 24.04.1998 (on file with the author).

²⁷ The copy of the Letter No. Na.Ka.A1 7251/98 from Revenue Divisional Officer to District Revenue Officer of Sivagangai dated 02.08.1999 (on file with the author).

²⁸ Original Suit No. 60 of 2004. Initially, the suit was filed before the Subordinate Judge of Sivagangai as O.S. No. 39 of 2003. Due to Tamil Nadu Civil Courts (Amendment) Act, 2003 (Act No. 1 of 2004), the pecuniary jurisdiction for District Munsif Court has been raised from thirty thousand rupees to one lakh, thus, the suit was transferred to the District Munsif of Manamadurai from Subordinate Judge of Sivagangai.

possession and enjoyment of our agricultural lands. The Hon'ble Court has decreed the suit in our favour on 23.02.2005. Aggrieved by the Judgement and Order passed by the Additional District Munsif Court, the Railway Department preferred an appeal before the Subordinate Judge of Sivagangai²⁹ and the Hon'ble Court dismissed the appeal on 29.10.2007. Unfortunately, the agony did not end here. The dispute recurred in 2012 based on the boundary and non-availability of updated certified land plan.

4. RTI – AN APPROPRIATE REMEDY:

In 2012, when we resumed cultivation, the railway authorities stopped our work stating the survey nos. 96/1 (Railway land) and 96/2A to 96/2E were not clearly demarcated and also claimed they do not possess the updated certified land plan for survey no. 96/1, and it required them more time to prepare it by complying the Court Orders, and insisted us not to carry out any work till they accomplish it. One of the railway officers demanded Rs. 2 lakhs to prepare the certified land plan and claimed that without giving bribe, nothing will move to draft the updated land plan.

Since, the revenue records for survey nos. 96/2A to 96/2E are standing in our names, we made a request to Tahsildar, Manamadurai Taluk on 06.08.2012, to survey the lands and to fix the boundary, which eventually demarcate our land from the adjacent railway lands. The Senior Section Engineer/Permanent Way/Meter Gauge/Madurai (“SSE/PW/MG/MDU”) represented the railway department on 24.08.2012 and sought time to prepare the updated land plan as it involves many departmental formalities. Thereafter, we repeatedly reminded the office of SSE/PW/MG/MDU for the updated land plan but in otiose. We were dragged on from pillar to post for nearly two months without any progress. I have learnt the RTI Act is the best option and found a similar case³⁰ decided by the Hon'ble Central Information Commission (“CIC”), wherein the CIC directs the respondents to collect the measures of the piece of land from different sources; reconcile it and provide a map together with measurements to the applicants which is full, final and incontrovertible by fixing a deadline.³¹ Finally, we filed a RTI application under Sec. 6(1) of the RTI Act, 2005 to seek information about the updated certified land plan for Survey Nos. 96 &

²⁹ Appeal Suit No. 63/05.

³⁰ Central Information Commission, *Shri Nabaw Singh Sanger v. Northern Central Railway*, Decision No.CIC/OK/C/2007/00709, dated June 13, 2008, available at <https://dsscic.nic.in/cause-list-report-web/downloaded>, last seen on 24/11/2020.

³¹ *Ibid*, at 3.

104 of Thiruppuvanam pudur village, Manamadurai Taluk (presently Thiruppuvanam Taluk), Sivagangai District and details about fixation of boundaries on the date of joint survey.

Instead of getting information for the above queries, we got a copy of a letter addressed to Tahsildar, Thiruppuvanam Taluk, requesting to conduct a joint survey of survey nos. 96/2A to 96/2E in order to reply to the queries sought under RTI Act, 2005³². I have realized the effect of RTI Act for the first time but a short-lived excitement.

4.1 Appeal to First Appellate Authority:

The lands were joint surveyed on 19.01.2013 as directed by the Tahsildar³³, Thiruppuvanam Taluk.³⁴ However, boundaries were marked with the help of Revenue records i.e. FMB on all sides of survey nos. 96/2A to 96/2E. To that effect, stones were laid on all markings. But, fencing was objected due to non-availability of updated certified land plan. Moreover, the railway official claimed in his communication to firka surveyor, as per Railway Plan No. L-2460-34 Sheet No. 6, that there is a difference in perpendicular offset between Railway land plan and the Revenue FMB Sketch, and objected to fencing till it is resolved through the updated land plan based on revenue records along with the approval of ADRM/DRM, Southern Railway, Madurai Division and Tahsildar of Thiruppuvanam Taluk.³⁵ Meanwhile, we have preferred an appeal before the first appellate authority (“FAA”) on 07.01.2013 stating even after the expiry of 35 days, I have not received any information from the Public Information Officer. Finally, we have received the information from the FAA on 04.02.2013 that no certified land plan relating to Survey Nos. 96 & 104 of Thiruppuvanam Pudur Village, jointly signed by Tahsildar of Manamadurai and Divisional Railway Manager/Works/Madurai is available in this office and to that effect the boundaries could not be fixed on the date of joint survey.

³² The copy of the Letter No. U/W.277/Land/GI from Divisional Office, Works Branch, Madurai to Tahsildar, Thiruppuvanam Taluk, Sivagangai District, dated 26.11.2012 & 21.12.2012 (on file with the author).

³³ The copy of the Letter No. FL No/450/2012 from Firka Surveyor to Divisional Railway Manager (Works), Southern Railway, Madurai, dated 07.01.2013 (on file with the author).

³⁴ The copy of the Letter No. N.K.FL 450/2012 from Tahsildar Office, Thiruppuvanam to Firka Surveyor, Thiruppuvanam dated 24.12.2012 (obtained under RTI Act, 2005 and on file with the author).

³⁵ The copy of the letter No. MDU/14 (P.L. No. 83058618) from SSE/PWAY/MG/MDU to Tahsildar dated 19.01.2013 through Firka Surveyor, Thiruppuvanam Taluk, Sivagangai District. (obtained under RTI Act, 2005 and on file with the author).

4.2 Appeal to Hon'ble Central Information Commission:

Aggrieved by the above information that no certified land plan is available and consequently boundaries could not be fixed, we preferred a second appeal and a complaint against public information officer ("PIO") and FAA before the Hon'ble CIC on 04.02.2013. The CIC has passed an Order directing the Railways to provide information sought in fixing the boundaries and enable us to inspect the relevant files and provide photocopies relating to it within 30 days of the Order³⁶ but did not impose any penalties or even reprimand for denying information by PIO or providing information which was false, incomplete, misleading and full of concealment by FAA. On receipt of the Order, we personally visited the railway office and inspected the relevant files, which lead to the discovery of relinquishment register of railway lands including survey no. 96 of Thiruppuvanam. Nonetheless, we were denied a photo copy of the same. The CIC Order was not complied by the Railways, instead they sent a letter to conduct another joint survey to update Railway land plan, so as to comply CIC Order.³⁷ We mentioned in our communication dated 16.03.2015 that the further inspection of land was to victimize us and a prolonging tactics of Railways in preparing the updated land plan. The repeat of same version again and again drove us to prefer a complaint before the Hon'ble CIC on 03.06.2015, for non-compliance of the Order of the Hon'ble Commission, but left no stone unturned. So, we have forced to endure another round of litigation by filing a Writ Petition before the Hon'ble High Court of Judicature at Madras, Madurai Bench to make the Railways to comply the Order of the Hon'ble CIC.

5. RECOURSE TO WRIT REMEDY:

The Writ Petition has been filed to issue a Writ of Mandamus directing the railways to comply the Order of the Hon'ble CIC and to provide a copy of the railway relinquishment register relating to Survey no. 96 and the certified railway land plan for survey nos. 96 and 104 of Thiruppuvanam Pudur Village, Thiruppuvanam Taluk, Sivagangai District within a time frame as the Court deems

³⁶ Central Information Commission, *Shri M. Balaguru v. Central Public Information, Southern Railway, Divisional Office, Works Branch, Madurai*, Decision No. CIC/AD/A/2013/001468/VS/08968 in Appeal No. CIC/BS/A/2013/001468/VS dated 04.02.2015, available at https://ciconline.nic.in/cic_decisions/CIC_AD_A_2013_001468_VS_08968_M_147322.pdf, last seen 24/11/2020.

³⁷ The copy of the Letter No. U/W.193/RTIA/2015 to The Tahsildar from Railways, dated 09.03.2015 (on file with the author).

fit. During the course of the arguments, we have received the copy of the railway relinquishment register but not the updated certified land plan. The Hon'ble High Court in its Order, directed the Railways to survey and demarcate the boundaries of Survey Nos. 96 and 104, and to issue the Certified Railway Land Plan within twelve weeks from the date of receipt of the copy of the Order.³⁸ We have attempted to survey the lands along with Railway officials and Revenue authorities on 28.03.2016, 28.07.2016 and 29.08.2016 but could not accomplish it, due to the intermittent rain and abundant growth of Mesquite (*prosopis juliflora*) plants on railway lands. Finally, the joint survey was completed on 26.10.2016 and boundaries were fixed again in the Survey Nos. 96 and its sub-divisions, and 104 with the help of revenue records sans updated railway land plan. We have sent a legal notice on 03.01.2017 reminding the Railways to comply the Order of the Hon'ble High Court by providing us with the updated certified land plan as directed, or else constraint to initiate further proceedings against the errant officials.

5.1 Contempt to Compel Compliance:

It was a shocking and unfortunate reply from the Railways, informing us, they need not prepare a land plan for the land pertaining to a private party. The plan may be prepared at party's own cost and the same may be submitted to the Railway office for verification and acknowledgement.³⁹ With severe annoyance, we were compelled to proceed with contempt proceedings against the Central Public Information Officers of the Southern Railway, Madurai Division. Finally, they obliged and produced the updated certified land plan when contempt notice was served against them by the Hon'ble High Court.⁴⁰ Thus, the long woe has come to an end.

The picture 1 below is the railway relinquishment register relating to different regions of Tamil Nadu. The 4th item deals with the details of relinquishment of survey no. 96 of Thiruppuvanam Railway Station. The picture 2 is the updated certified land plan for survey nos. 96 and 104 of Thiruppuvanam Pudur Village. We have sacrificed our precious time and money in accessing

³⁸ Central Information Commission, *M. Balaguru v. Central Public Information Officer and Others*, Writ Petition (MD) No. 9156/2015 dated 16.12.2015, available at <https://indiankanoon.org/doc/122812506/>, last seen on 24/11/2020.

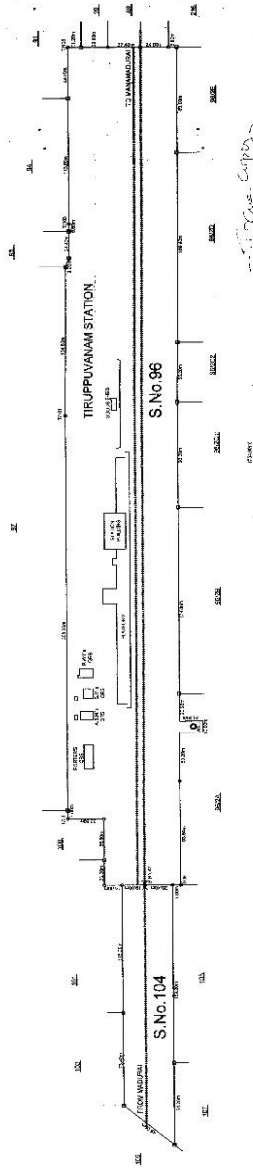
³⁹ Letter No. U/W.193/RTIA/2015 from Divisional Engineer/Central/Southern Railway/Madurai to Shri M. Balaguru dated 20.01.2017 (on file with the author).

⁴⁰ *M. Balaguru v. R. Kannan and others*, Cont.P (MD) No. 139 of 2017 in W.P. (MD) No. 9156 of 2015 dated 01.03.2017.

PLAN SHOWING THE RAILWAY LAND BEARING S Nos 96 & 104 TIRUPPUVANAM
VILLAGE, TIRUPPUVANAM TALUK, SIVAGANGAI DISTRICT

DISTRICT SIVAGANGAI
TALUK TIRUPPUVANAM
VILLAGE No.16 TIRUPPUVANAM

MEASUREMENTS ARE IN METRES
PLAN PREPARED BASED ON REVENUE RECORDS



SRIPATHY/MG/NDU
Sr. P. W. / M. G. / N. D. U.
Sr. P. W. / M. G. / N. D. U.
Sr. P. W. / M. G. / N. D. U.

SRINIVASAN/S.S./S. S. S. S.
S. R. N. I. V. A. S. A. N. / S. S. / S. S. S. S.
S. R. N. I. V. A. S. A. N. / S. S. / S. S. S. S.

Divisions Engineer (Roads)
Southern Railway
Tiruppuvanam

Divisional Engineer (Roads)
Southern Railway
Tiruppuvanam

6. OBSERVATIONAL ANALYSIS:

The author has been instrumental in filing the RTI application and other subsequent processes in getting the updated certified land plan accompanied with his father. It is imperative to analyze the effectiveness of the RTI Act, and lack of transparency and accountability in maintaining land records by the railways through observation gathered under personal experience. The Indian Railways is the only department owning a vast stretch of lands across the country, equally with National Highways Authority of India. Railway lands are soft targets for encroachers, for residential, commercial and religious purposes. The boom in real estate business and increase of land value leads to mismanagement in the grant of NOC to construct superstructures near railway lands and to provide license for commercial usage of railway land. Furthermore, lack of accountability and corruption in land management leads to unnecessary and protracted litigation before different forums, thus, wasting precious time and resources of adjudicatory forums.

The author also found that there were some attitude problems to certain railway officials, which hinders them from disclosing the public document and to torment us in different forums-preventing to realize our legal right. In this context, it is pertinent to quote the observation of Hon'ble Justice Ranganath Misra in the case of *Gonal Bihimappa v. State of Karnataka*⁴¹. The former Chief Justice observed that "A public servant – whatever his status be – is in the position of a trustee. Social power vests in him for the purpose of rendering service to the community. Every public servant has to be cognizant of that obligation. Once the level of that consciousness grows up, there is bound to be a corresponding fall in the attitude to litigate over small issues"⁴²

The record keeping is the fundamental activity of public administration. Without records there can be no rule of law or accountability in governance. The right to information cannot be effectively implemented, if reliable records are not created in the first place, or if they cannot be found when needed, or if the arrangements for their eventful archiving or destruction are inadequate. The certified land plan is a crucial source of information for railway officials to manage railway lands. The maintenance of certified land plan is a continuous process as the Railways acquire and relinquish the lands on a regular basis. The Public Accounts Committee

⁴¹ *Gonal Bihimappa v. State of Karnataka*, 1987 Supp SCC 207.

⁴² *Ibid*, at 226, para 22.

(2018-19) in its 108th report revealed that 4 per cent of land plans were missing in 14 Zones.⁴³ Some land plans have not been certified from State revenue authorities. It is also noted, the Ministry of Railways has developed a web based application called Land Management Module integrated with Track Management System (“TMS”) to maintain all the details of land, including land plan. Till February 2018, 42,037 land plans were uploaded, out of which 38,014 were certified. The Committee insisted the Ministry of Railways to take all necessary and effective measures to ensure reconstruction/authentication of missing land plans in a time bound manner and upload it on TMS on urgent basis.⁴⁴ Thus, it is evident that there are many deficiencies in maintaining land plans, and to overcome it, the railways should pro-actively put out information relating to lands in the public domain as similar to practice followed in revenue department in certain States, such as Tamil Nadu⁴⁵. Sec. 4 of the RTI Act, 2005 mandating *suo motu* disclosure of information by public authorities. Any legislation on freedom of information is effective-only if it voluntarily discloses quality information, thereby reducing the request petitions from the citizens.

The Hon’ble CIC through its full Bench, took cognizance of the significance of sec. 4, and issued a direction to all secretaries of the Government of India under sec. 19(8)(a) of RTI Act to adhere the provision in letter and spirit.⁴⁶ Subsequently, an audit report was submitted on Nov. 2018 to Hon’ble CIC relating to online disclosures by Public Authorities through their websites. The report concluded that institutional transparency is the final frontier of the Right to Information movement.⁴⁷ Recently, the Rajasthan Government launched Jan Sochna Portal (“JSP”) in furtherance of compliance of sec. 4 of the RTI Act. This portal makes the State government

⁴³ Accounts Committee, Lok Sabha, *Management of vacant land in Indian Railways*, 2018-19, PAC No. 2142, 10, (01/08/2018) available at http://164.100.47.193/lsscommittee/Public%20Accounts/16_Public_Accounts_108.pdf, last seen on 25/11/2020.

⁴⁴ *Ibid*, at 11.

⁴⁵ Government of Tamil Nadu, *Land Records e-services*, available at <https://eservices.tn.gov.in/eservicesnew/land/chitta.html?lan=en>, last seen on 27/11/2020.

⁴⁶ *Central Information Commission*, Direction No.: CIC/AT/D/10/000111 dated 15.11.2010, available at https://dtf.in/wp-content/files/CIC_Direction_dated_15.11.2010_-_Section_4_of_the_RTI_Act_-_Direction_to_Public_Authorities_under_Sec._198_of_RTI_Act.pdf, last seen on 27/11/2020.

⁴⁷ A.N. Tiwari and M.M. Ansari, *Transparency Audit of Disclosures u/s 4 of the Right to Information Act by the Public Authorities*, Central Information Commission available at <https://cic.gov.in/sites/default/files/Transparency%20Audit%20of%20Disclosures%20Under%20Section%204%20of%20the%20RTI%20Act%20by%20the%20Public%20authorities.pdf>, last seen on 28/11/2020.

accountable to everyone who accesses the information under it with proper draft guidelines for the development and maintenance of the JSP. Similarly, the Land Management Module integrated with TMS should disclose information about railway lands whoever has access to it. This ensures the maintenance of lands in a transparent way accompanied by accountability of officials that there is no let-up in the availability of information.

Based on the author's experience, there are three major issues needed to be addressed concerning RTI Act, 2005. Firstly, the CIC and SIC are reeling under pressure due to huge backlogs and delay in appointment of Information Commissioners, and at times, the Chief Information Commissioner. The Hon'ble CIC has taken exactly two years to dispose off our appeal but we did not get dejected—that justice is delayed, rather felt bad on the structure and functioning of the CIC. There are almost 37,432 pending cases in the CIC as on November 26, 2020⁴⁸ and it has not functioned with its sanctioned strength for almost four years,⁴⁹ and currently has only seven information commissioners instead of 10.⁵⁰ On the other hand, the situation is worse for Hon'ble SICs. There is no chief for eight SICs.⁵¹ The State of Jharkhand and Tripura Information Commissions have been defunct for months without a single commissioner.⁵² If the same is continued, the Information Commissions would collapse either on its own burden or being defunct for long. Secondly, the remedy under FAA seems to be a sham, as the results are the same when an appeal is lodged within the same department.

Thirdly, the violations under RTI Act have been ignored by the Information Commissions, which promotes a culture of impunity among public authorities. A study conducted on RTI cases disposed by 22 commissions during the period between January 2018 and March 2019, reveals that penalties

⁴⁸ Central Information Commission, *Pending Cases Report*, available at https://dsscic.nic.in/cause-list-report-web/view-pending-cases-web/2?opt=tillDate&date=26%2F11%2F2020&in_charge=&search_button=, last seen on 26/11/2020.

⁴⁹ Priscilla Jebaraj and Sandeep Phukan, *Yashvardhan likely to be next CIC*, 9, *The Hindu* (30/10/2020) <https://www.thehindu.com/news/national/yashvardhan-kumar-sinha-to-be-next-chief-information-commissioner/article32975039.ece> last seen on 26/11/2020.

⁵⁰ Central Information Commission, *Chief IC/IC Profile*, available at <https://cic.gov.in/cic-profile>, last seen on 26/11/2020.

⁵¹ *Supra* 3.

⁵² Special Correspondent, *At 15, RTI Act crippled by huge backlog*, 12, *The Hindu* (12/10/2020) <https://www.thehindu.com/news/national/at-15-rti-act-crippled-by-rising-backlog/article32827394.ece> last seen on 26/11/2020.

were imposed only in 2,091 cases in the deserving 68,900 cases. The State Commissions of Tamil Nadu, Sikkim, Mizoram and Tripura did not impose penalties in any cases during the above said period, and only ten States had invoked the power to recommend disciplinary actions against errant officials for persistent violations.⁵³ Similarly, penalties were imposed only in 1,995 out of 15,700 deserving cases disposed by the 16 Commissions between April 2019 and July 2020.⁵⁴ Thus, the non-imposition of penalties in genuine cases creates a bad precedent that public officials go scot-free after violating the law.

7. CONCLUDING REMARKS:

The RTI Act is not a panacea for information seeker, instead it acts as a harassment tool for public authorities to test the patience and perseverance of the information seeker. The remedy provided under the Act is neither exhaustive nor comprehensive as the functioning of Information Commissions with huge backlogs and vacancies, frustrate the public in enforcing their right. The independence of the Information Commissions could not be realized if they seldom use their powers. The data is evident that Information Commissioners are reluctant in invoking the penal powers against errant public officials, which casts a serious doubt about the effectiveness of the RTI Act. It is an injudicious act to wait for years just to know an information or to procure a piece of record from the mighty public officials. The Hon'ble Information Commissions cannot be expected to rescue the information seeker at all circumstances in retrieving each and every information with lesser time. The only way is to mandate all public authorities to comply Sec. 4 of the RTI Act. In addition to legal obligation, there should be a strong pitch from the civil society for the *suo-motu* disclosure of all information, leading to transparent, accountable and good governance without compromising the national security.

⁵³ Special Correspondent, *RTI violations go unpunished, says study*, 9, The Hindu (12/10/2019) <https://www.thehindu.com/news/national/penalties-levied-for-rti-violations-in-3-of-cases-in-2018-19/article29660236.ece>

⁵⁴ Supra 51.