

Date: 06/05/2011

To,
Shri Rajeev Kapoor, IAS
Joint Secretary (AT&A)
Department of Personnel and Training
Government of India
Room #193, North Block
New Delhi- 110 001
Tel: 23093668

Dear sir,

I am writing to draw your attention again to the issue of exercise of the power of delegated legislation under the *Right to Information Act, 2005* (RTI Act) and parliamentary/legislative oversight of the same. You may recollect the discussions held on this topic at a plenary session of the 3rd National Convention on the Right to Information organised by the National Campaign for People's Right to Information in Shillong on 12th March 2011. In my presentation at this plenary session I had pointed towards some lacuna in the scheme of legislative oversight on rule-making in the States under Central Acts. Our understanding of the difficulties involved in the exercise of legislative oversight on rule-making powers of the competent authorities under the RTI Act is explained below.

Statement of the problems: Two problems have arisen in the context of Rules made by appropriate governments and competent authorities under Sections 27 and 28 of the RTI Act:

- a) Whether Legislatures in the States have the power to amend or nullify the Rules made by the State Government under an Act of Parliament?
- b) What mechanism exists to evaluate the exercise of the powers of delegated legislation by competent authorities other than the appropriate governments?

State Legislatures and oversight of delegated legislation under Central Acts: The complexity of the first problem is explained as follows. It is well known that Parliament is competent to make laws under both List I and List III of the Seventh Schedule read with Section 243 of the Constitution. While

making laws on subjects covered by either list, Parliament is competent to delegate the power of rule-making to both the Central and the State Governments. Rules made by the Central Government are required to be tabled in both Houses of Parliament within specific time limits. Parliament has the power to annul, modify or leave such rules unchanged. Section 29(1) of the RTI Act is indicative of this scheme of parliamentary oversight over delegated legislation. In fact this provision has become a standard formula in all recent laws passed by Parliament where the Central Government is vested with the power to make rules. However where a parliamentary statute vests rule-making powers with the State Governments there is only a laying requirement. There is no explicit mention of the power of the State legislature to modify or annul the rules in the manner of Parliament. Section 29(2) of the RTI Act is a typical illustration of this procedure.

At the time of presenting this problem I had learnt about it only through secondary sources (vide S P Sathe's *Administrative Law*, 7th edn. LexisNexis) As this matter was disputed at the Shillong Convention I returned to Delhi to probe into this issue deeper. Having undertaken intensive research, I would like to reiterate that this is a real problem. It has received considerable attention from successive committees on subordinate legislation in the Lok Sabha. I have enclosed a copy of the 20th Report of the Committee on Subordinate Legislation (the Committee) which discusses this very problem. This report was drafted by the said Committee in 1979 under the leadership of Shri Somnath Chatterjee (who later became the Speaker of the 13th Lok Sabha).

The Committee studied the reports of previous committees which dealt with the subject, heard the Ministry of Law and invited views of the State Governments and the State Legislatures. The findings of the 20th Report may be summarised as follows:

A law enacted by Parliament on a subject under the Union List: The Committee observed that the State Legislatures do not have the power to modify Rules made by State Governments under a law enacted by Parliament on a subject contained in the Union List (page 18). The reasons for such a restriction are discussed in detail in the enclosed report. However such laws require the State Government to at least lay the Rules before the Legislature. The State Legislatures may in plenary sessions or through their respective committees on subordinate legislation make recommendations to the State Government to change or withdraw a Rule that is not in tune with the provisions of the principal Act. However they cannot annul or amend any offending Rule in the manner of Parliament.

A law enacted by Parliament on a subject under the Concurrent List: The Committee observed that where a law is enacted by Parliament under a subject contained in the Concurrent List, the State Legislature can modify or annul any Rule made by the State Government. However this will require an enabling provision in some other State law to empower the State Legislature to act in this manner. At the time of authoring its Report the Committee noted that only Uttar Pradesh and Orissa had amended their respective *General Clauses Acts* to empower the State Legislatures to modify the Rules made by the State Governments under a law dealing with a Concurrent subject. The Committee recommended that the Law Ministry under the

Government of India follow-up with the other State Governments to amend their own laws in a similar manner. However our research shows that since the presentation of the 20th Report Rajasthan is the only State to have incorporated such an amendment in its *General Clauses Act* in 1993. Other States have not taken any action yet on this matter for reasons unknown.

Given these two scenarios, the next question to examine is which List does the RTI Act fall under. The Statement of Objects and Reasons attached to the RTI Bill 2004 did not connect it to any subject in any of the Lists. Instead it stated that the proposed legislation would provide an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India. Does this mean that the RTI Act pertains to List III as States can also make laws to give effect to fundamental rights? There is no entry in this List under which RTI can be fitted unequivocally. Or can it be reasoned that Parliament passed this law under its residuary powers of legislation recognized under Article 248? This will put the RTI Act in the domain of exclusive jurisdiction of Parliament. So State Legislatures will not be able to modify or annul Rules notified by the respective Governments. However the Committee did not deal with this scenario in its report.

There are two reasons why this issue must be resolved quickly. First, State Governments have started making Rules that are in violation of the spirit of the Act. Karnataka and Bihar have imposed word limits and subject matter restrictions on RTI applications since 2008. Orissa and Sikkim seek proof of citizenship from every RTI applicant. To the best of our knowledge these Rules were never discussed or debated in the respective State Legislatures despite strong demand from RTI users and activists for the withdrawal of such retrograde Rules. The non-availability of oversight mechanisms pointed out by the Lok Sabha Committee way back in 1979 is a major reason for these retrograde Rules going unchallenged in the State Legislatures. The option of challenging the Rules in a court of law must be used last because it is possible to find solutions to this problem in the legislative domain. It is better to let people's elected representatives have an avenue to correct the anomalies caused by the State Governments do instead of dragging the Courts to decide upon such matters.

Second, the number of Central laws granting rule-making powers to the State Governments is increasing every year. There is an urgent need to push for the adoption of effective oversight mechanisms in the State Legislatures to regulate the rule-making powers of the State Governments. However I am willing to be corrected in this regard if you will to point towards any document that explains how this issue has been resolved since the presentation of the Committee's report in 1979.

Absence of oversight on the rule-making power of other competent authorities: Section 28 of the RTI Act vests the power to make Rules in certain competent authorities such as the presiding officers of the Houses of Parliament and the State Legislatures, the Chief Justices of High Courts and the Chief Justice of India. There is no requirement in the RTI Act for even laying the Rules made by these authorities before Parliament or the State Legislatures, as the case may be. Experience has shown that there are serious problems in the RTI Rules notified by various High Courts. Several competent authorities in the judiciary have notified Rules that are

clearly in violation of the principles that should guide the exercise of the powers of delegated legislation. For example, several High Courts have RTI Rules that impose additional exemptions to disclosure over and above Sections 8 and 9 of the RTI Act. RTI Rules notified by the Chief Justices of some High Courts empower the imposition of penalties over and above Section 20 and require the confiscation of the property of RTI applicants to realise unpaid fees. These are but a few examples of the misuse of the rule-making power by some competent authorities. CHRI has already brought to your attention the lacuna in the RTI Rules applicable to the courts in Delhi through its publication of 2010 entitled: *An Analysis of the RTI Rules of the Supreme Court, the Delhi High Court and the Subordinate Courts*.

There is an urgent need to subject the Rules made by competent authorities to a credible oversight mechanism. Parliament is the obvious choice for exercising such oversight. Parliament being the law-making body that vested the competent authorities with the power of delegated legislation is alone competent to examine them against the letter and spirit of the parent law. Rule 317 of the *Rules of Procedure and Conduct of Business in Lok Sabha* (14th Edn., 2010) describes the power of the House to vet rules made by any authority as follows:

“317. There shall be a Committee on Subordinate Legislation to scrutinize and report to the House whether the powers to make regulations, rules, subrules, bye-laws etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation.”

Similarly Rule 204 of the *Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha)* (7th edn., 2010) also vests the power to examine the exercise of delegated legislation by any authority.

“There shall be a Committee on Subordinate Legislation to scrutinize and report to the Council whether the powers to make rules, regulations, bye-laws, schemes or other statutory instruments conferred by the Constitution or delegated by Parliament have been properly exercised within such conferment or delegation, as the case may be.”

The aforementioned Rules make it clear that both Houses of Parliament can examine the RTI Rules notified by the Chief justices. This will not affect the independence of the judiciary as the committees on subordinate legislation will only examine whether the powers granted by Parliament to the respective Chief Justices for implementing RTI in their jurisdiction are being exercised within stipulated limits or if there is overreach. However due to the absence of a specific mention in the RTI Act of the laying requirement for these Rules they have escaped mandatory scrutiny by the parliamentary Committees on Subordinate Legislation. There is an urgent need to remedy this problem as well.

As the administrative department for the RTI Act, your Department has an obligation to initiate action towards bringing RTI Rules in the States under the effective scrutiny of the respective State Legislatures. Similarly your Department has an obligation to initiate action to bring the RTI Rules framed for all High Courts to the attention of the twin parliamentary committees on subordinate legislation. I request you to initiate action in this regard immediately. If you wish to

discuss this matter further please feel free to call me at 43180215; 9871050555 or email me at venkatesh@humanrightsinitiative.org.

I have copied this email to Shri Somnath Chatterjee to keep him informed about this continuing matter. As this is a matter of public interest this letter will be made available on our website and disseminated through RTI networks for increasing awareness amongst RTI users and activists about this problem. I would be grateful for an early reply from you in this regard.

Yours sincerely,

Venkatesh Nayak
Programme Coordinator
Access to Information Programme

Enclosures:

1. Photocopy of an extracted page from S P Sathe, *Administrative Law*, 7th edn. LexisNexis.
2. Photocopy of the 20th Report of the Lok Sabha Committee on Subordinate Legislation, 1979.
3. Printout of Rule 317 of the *Rules of Procedure and Conduct of Business in Lok Sabha* (14th Edn., 2010)
4. Printout of Rule 204 of the *Rules of Procedure and Conduct of Business in the Council of States (Rajya Sabha)* (7th edn., 2010)

Cc:

Shri Somnath Chatterjee, Former Speaker, Lok Sabha.