

CONSTITUTIONAL ISSUES CONNECTED WITH THE ENACTMENT OF
THE JAMMU AND KASHMIR RIGHT TO INFORMATION (AMENDMENT) BILL, 2007 (NOW ACT)

Legal Opinion¹

Background

The Legislature of Jammu and Kashmir passed the *Jammu and Kashmir Right to Information Act* (J&K RTI Act or principal Act) in December 2003. It was notified in the Official Gazette in 2004. Rules for implementing this Act were notified by the State Government in 2005. This law is closely modeled on the erstwhile *Freedom of Information Act* (FOI Act) passed by the Indian Parliament in 2002 (never operationalised). In May 2005, Parliament repealed the FOI Act and replaced it with a much stronger Right to Information Act (Central RTI Act) with the intention of engendering transparency in Government at all levels. This law was gazetted in June and came into full force in October the same year.

Owing to the unique constitutional position of the State of Jammu and Kashmir, the Central RTI Act does not extend to this State. Convinced of the immense value of an access to information law to clean and good governance, civil society activists and advocates of right to information have been persuading the State Government of J&K to overcome the many lacunae in the J&K RTI Act and bring it up to par with the Central RTI Act. A private member's Bill to this effect was introduced by Shri Yousuf Tarigami in the J&K Legislative Assembly. This Bill was drafted with substantial inputs from civil society organisations including the Commonwealth Human Rights Initiative.

On 31st August the State Government tabled a set of amendments to the J&K RTI Act in the Legislative Assembly. *The Jammu and Kashmir Right to Information (Amendment) Bill, 2007* (J&K RTIA Bill) was tabled on the recommendation of the Governor under sub-sections (1) and (3) of section 84 of the Constitution of Jammu and Kashmir. The Bill also contained a financial memorandum indicating an expenditure of Rs. 20 lacs per annum likely to be incurred on account of the establishment of the State Information Commission and the payment of salaries and allowances to its members.²

¹ This opinion is based on the information to which we have access, regarding legislative processes in Jammu and Kashmir.

² Extract from *J&K RTI (Amendment) Bill, 2007*, p. 16:

“Financial Memorandum

In the amendment Bill, the Government has to constitute/create a State Information Commission to perform the functions as entrusted therein. The proposed composition of the State Information Commission is a ‘State Chief Information Commissioner’ and two ‘State Information Commissioners’ with the salaries and allowances as are paid to the Chief Secretary of the State and members of Jammu and Kashmir Public Service Commission respectively. The annual financial implications involved are as under:-

1. Salaries	Rs. 8.00 lacs
2. TE	Rs. 3.00 lacs
3. Office Expenses	Rs. 1.00 lac
4. Rent for office accommodation	Rs. 3.00 lacs
5. Telephone	Rs. 2.00 lacs
6. Furniture/fixtures	Rs. 1.00 lac
7. POL	Rs. 1.00 lac
8. Educational Programme and publicity	<u>Rs. 1.00 lac</u>
Total	<u>Rs. 20.00 lacs</u>

(Sd.) CHIEF MINISTER”

There was no visible public consultation conducted prior to the tabling of these amendments. The proposed amendments did not go the whole length of the way to overcome the shortcomings of the J&K RTI Act. Several MLAs strongly argued for referring the J&K RTIA Bill to a joint select committee, consisting of members of both Houses of the J&K Legislature, for detailed consideration of the Act and the amendments, as this is an important law giving effect to a fundamental right of citizens. However the Government pressed for the passage of the Bill because of the majority it enjoys in the Legislature. Later the Bill was presented to the Governor of Jammu and Kashmir for his assent.

On 10th September CHRI submitted a detailed analysis of the positive and negative features of the State RTI Act and the proposed amendments to the Governor urging him to withhold assent to the J&K RTIA Bill. Urgent action appeals were issued through emails to civil society organisations, requesting them to communicate to the Governor, their disappointment over the proposed amendments. The media also highlighted the collective demand of civil society organisations that the Governor withhold his assent. On 4th January the Governor gave his assent to the J&K RTIA Bill.³ The J&K RTIA Bill was deemed to be a Money Bill.⁴

Issues for Determination

- 1) Whether the labelling of the J&K RTI Amendment Bill (now Act) as a ‘Money Bill’ was accurate?**
- 2) The circumstances under which the Governor can declare or withhold assent to a Bill duly enacted by the J&K State Legislature.**

Issue No.1

Whether the labelling of the J&K RTI Amendment Bill (now Act) as a ‘Money Bill’ was accurate?

A Money Bill is defined in section 77 of the J&K Constitution as follows-

“Definition of ‘Money Bills’.— (1) For the purposes of this Part, a Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters, namely: —

- (a) the imposition, abolition, remission, alteration or regulation of any tax;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the State, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the State;
- (c) the custody of the Consolidated Fund or the coverage or the Contingency Fund of the State, the payment of moneys into or the withdrawal of moneys from any such Fund;
- (d) the appropriation of moneys out of the Consolidated Fund of the State;
- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of the State, or the increasing of the amount of any such expenditure;
- (f) the receipt of money on account of the Consolidated fund of the State or the Public Account of the State or the custody or issue of such money; or
- (g) any matter incidental to any of the matters specified in clauses (a) to (f)...”

³ Source of information: media reports published in J&K and at the national level.

⁴ Source of information: Author’s telephonic conversation with the Commissioner/Secretary, Department of Law Government of J&K, on 10th January, 2008

Is there a match between constitutional criteria and the content of the J&K RTIA Bill?

If the J&K RTIA Bill was required to pass the test of being a Money Bill it must have satisfied one or more of the aforementioned criteria.

- (a) None of the provisions of the J&K RTIA Bill sought to impose, abolish, remit alter or regulate any tax as understood in clause (a) of sub-section (1) of section 77.
- (b) None of the provisions of the J&K RTIA Bill related to the custody of the Consolidated Fund or the Contingency Fund of the State or the payment of money into or the withdrawal of moneys from any such fund as understood in clause (c) of sub-section (1) of section 77. The financial memorandum was merely a financial implication and did not *authorise* the actual withdrawal of any moneys from the Consolidated Fund.
- (c) None of the provisions of the J&K RTIA Bill authorised the State Government to appropriate moneys out of the Consolidated Fund of the State as understood in clause (d) of sub-section (1) of section 77. With the enactment of the J&K RTIA Bill the State Information Commission does not come into existence automatically. The State Government will be required to issue a separate notification at a later date stating that it is constituting the State Information Commission under section 8A contained in para 5 of the J&K RTIA Bill (now Act). The need for the authorisation to spend Rs. 20 lacs on the establishment of the State Information Commission will arise only after the Commission is constituted and when an instrument seeking such authorisation is tabled in the Assembly. Such instrument would qualify as a Money Bill within the meaning of the definition contained in sub-section (1) of section 77.
- (d) None of the provisions of the J&K RTIA Bill related to the receipt of money on account of the Consolidated Fund of the State or the Public Account of the State or the custody or issue of such money as understood in clause (d) of sub-section (1) of section 77. Para 7 of the J&K RTIA Bill (now Act) proposed to substitute section 12 of the principal Act on the topic of imposition of penalties. It provided for the imposition of monetary penalties on Departmental Information Officers for contraventions of the law specified in sub-section (1) which when collected will probably be deposited in the Public Account of the State.⁵ However these are enabling provisions for the proposed State Information Commission and do not relate to actual receipts of money in the Public Account. Furthermore according to sub-section (2) of section 77 a Bill shall not be deemed to be a Money Bill merely because it provides for the imposition of fines or other pecuniary penalties.⁶
- (e) None of the provisions of the J&K RTIA Bill contained anything that was incidental to any matters contained in clauses (a) and (c) to (f) as understood in clause (g) of sub-section (1) of section 77.
- (f) Two more criteria are mentioned in clause (b) of sub-section (1) of section 77. None of the provisions of the J&K RTIA Bill sought to regulate the borrowing of money by the State nor the giving of any guarantee by the State as understood in the first part of this clause. So the contents of the J&K RTIA Bill did not match the criterion mentioned in the first part of this clause.
- (g) The J&K RTIA Bill sought to amend the principal Act in several respects. One of the amendments proposed to set up a State Information Commission and the appointment of State Chief Information Commissioner and State Information Commissioners. According to the J&K RTIA Bill this involved an 'annual financial implication' of Rs. 20 lacs (details given at f.n. #1 above). Therefore it might be said that the financial memorandum relates to a financial obligation to be undertaken by the State. **So the**

⁵ According to sub-section (1) of the same section monies such as revenues received by the Government, all loans raised by the Government by the issue of treasury bills, loans or ways and means advances and all moneys received by the Government in repayment of loans shall form the Consolidated Fund of the State. According to sub-section (2) of section 115 all public moneys received by or on behalf of the Government other than revenues credited to the Consolidated Fund of the State shall be credited to the Public Account of the State. See **Justice A S Anand, *The Constitution of Jammu and Kashmir: Its Development and Comments*, Fifth Edn., Universal Law Publishing Co., New Delhi, 2006: p. 310.**

⁶ "A Bill shall not be deemed to be a Money Bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees or licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission alteration or regulation of any tax by any local authority or body for local purposes." *Ibid.* p. 267.

J&K RTIA Bill, at first glance, appears to have met the criterion contained in the second part of clause (b) of sub-section (1) of section 77.

Was this match sufficient for the J&KRTIA Bill to be labeled a ‘Money Bill’? In our opinion it is not sufficient for this purpose. According to the opening sentence of sub-section (1) of section 77 – for a Bill to be properly termed and treated as a Money Bill it should contain **only** those provisions specified in the sub-section and nothing more. The Bill should contain no other provision. According to Chief Justice (retd.) Dr. A S Anand, “The word ‘only’ in the definition of the Money Bill implies that a Bill shall be deemed to be a Money Bill if it contains any of the provisions in clauses (a) to (g) of section 77 **without any extraneous provisions.**”⁷ (emphasis added)

The primary purpose of the J&K RTIA Bill was contained in its name. It was tabled solely to make several amendments in the principal Act. These amendments were in the nature of insertion of new provisions and substitution or deletion of existing provisions. All of these are ‘extraneous provisions’ in the light of the criteria specified in sub-section (1) of section 77. For example - among other things - the J&K RTIA Bill:

- 1) sought to change the designation of officers who deal with information requests and appeals;
- 2) sought to define the scope of the right to information;
- 3) sought to add more grounds to the long list of reasons for rejecting information requests;
- 4) sought to authorise the State Government to constitute the State Information Commission;
- 5) sought to lay down the appointment and removal procedures and fix the salaries and conditions of service applicable to members of this Commission;
- 6) sought to delineate the powers, duties and responsibilities of the State Information Commission and
- 7) sought to place an obligation on the State Government to educate people about the rights to information.

Therefore in our opinion the labeling of the J&K RTIA Bill as a Money Bill was incorrect and inappropriate.

How is a Money Bill different from Ordinary Bills?

The significance of labeling a law correctly as an ordinary piece of legislation or as a Money Bill lies in important and rational differences in legislative procedure. Under the J&K Constitution an ordinary Bill may be tabled before either House of the State Legislature. Amendments may be passed by either House. When duly passed in a form that has the final approval of the Legislative Assembly, it is sent to the Governor for assent. These processes are within the legislative prerogatives of the Council and the Assembly. The Governor’s prerogative lies in being able to examine an Ordinary Bill and sign it into law or withhold assent and ask the legislature to reconsider some or all of its aspects.⁸

However, a Money Bill has to go through special procedures.⁹ It cannot be introduced in the Legislative Council. It must be introduced only in the Legislative Assembly and with a recommendation from the Governor.¹⁰ The Legislative Council cannot make any amendments to a Money Bill. It can make recommendations for change but they must secure the approval of the Legislative Assembly. When duly

⁷ Ibid. p. 269.

⁸ Section 78. Ibid. pp. 270-271.

⁹ Section 76. Ibid. pp. 265-266.

¹⁰ Section 84(1). Ibid. pp.277-278.

passed by both Houses, the Money Bill is sent to the Governor for assent. The Governor cannot withhold assent to a Money Bill.

The rationale behind these different procedures is that a democratically elected government must not be impeded in its function by the possibility of any other authority, outside the elected representatives, refusing sanction for proposals of taxation or expenditure.

In order to ensure that no other kind of legislation bypasses the ordinary procedure for law-making in the guise of a Money Bill, the Constitution of J&K specifies special provisions such as a positive certification from the Speaker of the House who is a bi-partisan entity but still an elected representative. Hence also, any arrangement for levying any tax on the public or taking money out of the Consolidated Fund, is isolated from all other law making processes, so that there is absolute clarity of content. A properly certified Money Bill still goes to the Governor but he must assent to it. That way he has knowledge of its nature and contents and quite rightly must bow to the fiscal wisdom of the elected rulers of the state. Contrariwise where an ordinary law outside a Money Bill is concerned, the Governor's powers are built into the Constitution to make sure that nothing inappropriate slips through in political haste and everyone benefits from the advice of a non-party political entity. This is the system of checks and balances imperative to preventing the concentration of all powers in one body. Each authority – here the legislature and the Governor – has its own autonomous discretion and power which are designed to act as brakes on the other. Each power centre is of course bound to exercise its role within its own jurisdiction, reasonably, without arbitrariness or bias and always in the public interest.

The General Administration Department, being the Administrative Department for the J&K RTIA Bill, and the Department of Law, which has the responsibility for vetting it, were primarily responsible for the preparation of this Bill before it was tabled in the Legislative Assembly.

In our opinion the Government committed an error of procedure by tabling this Bill under sub-section (1) of section 84.¹¹ The J&K RTIA Bill ought not to have been tabled as a Money Bill as it did not meet the criteria mentioned in sub-section (1) of section 77 as demonstrated above.

Who makes the decision as to whether a Bill is a Money Bill or not?

The next question that needs to be addressed is who has the power to certify a Bill as a Money Bill. A related question is whether the original error of mislabeling a legislative instrument can be corrected during the legislative process or not. According to sub-section (4) of section 77 of the Constitution of J&K, the Speaker of the J&K Legislative Assembly is required to certify that a legislative instrument is a Money Bill on two occasions –

- 1) when the Bill is transmitted to the Legislative Council under section 76 and
- 2) when it is presented to the Governor for assent under section 78.¹²

The Speaker gives his certificate at the foot of the Bill stating as follows –

“I do hereby certify that this Bill is a Money Bill within the meaning of section 77 of the Constitution of J&K.”¹³

¹¹ Recommendation of the Governor contained in the *J&K RTI (Amendment) Bill, 2007*: p. 17. The Bill was tabled under sub-section (3) of section 84 as well. This point will be discussed below separately.

¹² “There shall be endorsed on every Money Bill when it is transmitted to the Legislative Council under section 76 and when it is presented to the Governor for assent under section 78, the certificate of the Speaker of the Legislative Assembly signed by him that it is a Money Bill.” See Justice A S Anand, *The Constitution of Jammu and Kashmir... etc.* p. 267.

¹³ Rules of the Legislative Assembly, 1957 *vide* Justice A S Anand, *The Constitution of Jammu and Kashmir...etc.* p. 269.

A plain reading of sub-section (3) of section 77 indicates that the endorsement given by the Speaker as to whether an instrument is a Money Bill or not, is final.¹⁴

However the issue that still needs to be addressed is the nature of the power of certification that is vested in the Speaker and the manner in which it ought to be exercised. The power granted under the sub-section is not to be exercised mechanically but after due application of mind. This is the reason why criteria for the exercise of the Speaker's power in this regard are provided in sub-section (1) of section 77. The Speaker has a constitutional obligation to ascertain for himself/herself whether the contents of a Bill tabled in the Assembly do indeed meet the specified criteria for being labeled a Money Bill. The power of endorsement has to be exercised with greatest care as it has the effect of affixing the seal of correctness on a document which will become the law of the land and create obligations duties and justiciable rights.

In our opinion when an action of this nature does not meet the criteria laid down in the Constitution it is open to challenge in a court of law on grounds of the argument provided above.¹⁵

J&K RTIA Bill (now Act) was a financial Bill

In our opinion the J&K RTIA Bill ought to have been introduced in the Legislative Assembly as a financial Bill and not as a Money Bill. There is a clearly evident difference between Money Bills and financial Bills even though in common parlance the two terms happen to be used synonymously. References to financial Bills can be found in sections 74 and 84 of the J&K Constitution simultaneously with Money Bills.¹⁶ The procedure for introducing financial Bills in the Assembly is provided in sub-section (3) of section 84 of the J&K Constitution. As shown above, the procedure for introducing Money Bills is also provided in the same section under sub-section (1). As the procedure for introduction and passage in the Assembly is common to both kinds of Bills, this section is entitled - "**Special Provisions for Financial Bills**". The Constitution-makers in J&K wanted to provide similar procedural safeguards discussed above for all non-Money Bills with financial implications as they did for pure Money Bills.

According to H M Seervai, legislative procedure "... in Parliament and the State Legislatures falls into three classes, namely, procedure relating to –

(i) Money Bills

(ii) other financial matters and

¹⁴ "If any question arises whether a Bill introduced in the Legislature is a Money Bill or not, the decision of the Speaker of the Legislative Assembly thereon shall be final." Ibid., p. 267.

¹⁵ In our opinion the immunity from legal challenge provided to legislative proceedings, under section 89 of the Constitution of J&K, may not be applicable to this matter.

¹⁶ According to sub-section (1) of section 74: "Subject to the provisions of sections 76 and 84 with respect to Money Bills and other financial Bills, a Bill may originate in either House of the Legislature."

Further according to Section 85: "**Special provisions as to financial Bills.** — (1) A Bill or amendment making provisions for any of the matters specified in clauses (a) to (f) of sub-section (1) of section 77 shall not be introduced or moved except on the recommendation of the Governor and Bill making such provision shall not be introduced in the Legislative Council:

Provided that no recommendation shall be required under this sub-section for the moving of an amendment making provision for the reduction or abolition of any tax.

(2) A Bill or amendment shall not be deemed to make provisions for any of the matters aforesaid by reason only that it provides for the imposition of fines, pecuniary penalties, or for the demand or payment of fees for licenses or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of the State shall not be passed by a House of the Legislature of the State unless the Governor has recommended to that House the consideration of the Bill." Ibid. pp. 263 and 277- 278.

(iii) other matters...”¹⁷

Bills that cannot be deemed to be Money Bills but having financial implications on the Consolidated Fund of the State if enacted and operationalised, fit into the second category of legislative procedure. Further according to Kaul and Shakhder, where a Bill contains among other things, one or more proposals involving expenditure from the Consolidated Fund of India, e.g., by providing for the appointment of officers or other authorities or for the establishment of an institution, it becomes a Financial Bill.¹⁸ Such Bills will not only contain one or more Money-related matters of the type specified in sub-section (1) of section 77 but also other provisions that are not Money-related. **The Governor has the power to withhold consent to a financial Bill as it is not a Money Bill.**

In our opinion the J&K RTIA Bill belonged to the category of financial Bills as its enactment would have involved expenditure from the Consolidated Fund of the State when the State Information Commission were to be set up.

Issue No. 2

The circumstances under which the Governor can declare or withhold assent to a Bill duly enacted by the J&K State Legislature.

According to the J&K Constitution when presented with a Bill duly passed by the J&K Legislature the Governor can pursue either of the following courses of action –

- a) declare that he assents to the Bill or
- b) declare that he withholds assent.

If the Governor chooses to withhold assent he may return the Bill together with a message requesting the State Legislature to reconsider the entire Bill or any of its provisions. He may also ask the Legislature to consider any recommendations for amendments. However he cannot withhold assent to a Money Bill. He has no option but to declare assent.¹⁹

In our opinion the Constitution of J&K does not expect the Governor to mechanically give his assent when a Bill is presented to him. Before exercising his prerogative of declaring assent, he has the constitutional obligation to check whether the labelling of a Bill as a Money Bill is correct or not by comparing it with the criteria provided in sub-section (1) of section 77. The Governor’s power to declare assent even to Money Bills is to be exercised after due application of mind. **In our opinion the Governor can withhold assent**

¹⁷ *Constitutional Law of India*, vol. 2 Fourth Edn., N M Tripathy Pvt. Ltd. Bombay, p. 2151.

¹⁸ “Examples of such Bills are: The State Bank of India Bill, 1955, ... the Supreme Court Judges (Number of Judges) Amendment Bill, 1977, the Brahmaputra Board Bill, 1980...” **See M N Kaul, S L Shakhder, *Practice and Procedure of Parliament (with particular reference to the Lok Sabha)*, Fifth Edn., Lok Sabha Secretariat and Metropolitan Book Co. Pvt. Ltd. Delhi, 2004, p. 533-532.** The authors have provided this explanation in the context of the Lok Sabha. Similar provisions regulate the introduction and passage of financial Bills in the State legislatures under section 207 of the Constitution of India. This provision is identical to section 84 of the Constitution of J&K which applies to the J&K Legislature.

¹⁹ *Ibid.* pp. 270–271. Section 78: “**Assent to Bills.**— When a Bill has been passed by both Houses of the Legislature, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom:

Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the Houses will reconsider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned the House shall reconsider the Bill accordingly and if the Bill is passed again by the Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent.”

to a Bill mislabeled as a Money Bill on the limited ground that it does not meet the criteria laid down in the Constitution.

In our opinion where there are clear grounds to show that constitutional duties have been exercised without due application of mind such actions are open to challenge on grounds of the argument provided above.

Conclusion

This means of getting legislation passed has wider implications. The device of treating an ordinary law as a Money Bill denies people's representatives the opportunity to debate and discuss advice from an important source i.e., if and when, the Governor returns a Bill to the Legislature for re-consideration. Subsequent rejection or acceptance of the Governor's suggestions will be an important assertion of the legislative prerogative. All this could not happen in J&K with regard to the J&K RTIA Bill (now Act).

In view of the clear indication that the J&K RTIA Bill (now Act) did not in fact meet the content criteria of a Money Bill, the Speaker's certification and the Governor's assent are now unfortunately open to challenge, and if upheld, important constitutional positions will have been badly compromised by imperfect advice.

Most importantly a precedent for treating all legislation as Money Bills has been set. If the process by which this law has been passed is left unchallenged by the legislature, the Governor and the Speaker himself, every Bill with a financial memorandum attached could be passed in the same way without the benefit of the constitutional checks and balances built in to our law-making. This process will also significantly reduce the value of the Governor's discretion being exercised for granting or withholding assent to Bills.

Prepared by

Commonwealth Human Rights Initiative
B-117, First Floor, Sarvodaya Enclave,
New Delhi – 110 017
Tel: 011-2685 0523 / 2686 4678
Fax: 011-2686 4688
Email: chriall@nda.vsnl.net.in

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