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Opinion on the communication from the Central government to the State governments asking them to repeal their State Right to Information Acts.

After the enactment of the Freedom of Information Act by Parliament, the Central government has written to the state governments asking them to repeal their State Acts in view of the Central legislation. This has been done even before the Central Act has been notified to bring it into effect. It has presumably been done on the basis that the Central Act will override the State Acts, or perhaps on the earlier opinion of the Attorney General that a Right to Information Act can only be enacted under the residuary entry of the Union list, on which only Parliament has legislative competence.

The correct legal position, in my opinion, on this is as follows: --

Though there is no specific entry in the seventh schedule dealing with Right to Information, it would be open to any legislative body to provide for access to information on any subject on which it has legislative competence. This is implicit in its legislative competence on that subject. Thus, if the State can enact legislation on law and order, it can also provide in that legislation for Right to Information on all matters covered by that legislation. This Right to Information can be provided by the State legislation either by an appropriate clause in each piece of legislation, or even by a separate enactment on the Right to Information. The State legislation can however give this right only in respect of those subjects on which it has legislative competence, which means subjects covered by the State list or the concurrent list.

On the other hand, Parliament can make use of the residuary entry to enact a comprehensive law on Right to Information. If therefore, there is also a Central legislation on right to information, it will override the State legislation to the extent that there is a conflict between the State legislation and the Central legislation. Thus, for instance, if the State Act provides for access to official notings and the Central Act says that information on official notings may be restricted, and someone seeks information regarding notings on a subject relating to education which is a subject in the concurrent list, in my opinion, this would not be a case where there's a conflict between the Central Act and the State Act, unless the Central act expressly prohibits the release of information on official notings. If the Central act merely says that information on notings may be restricted, and the State Act says that there shall be such a right to information, the State Act can still be used to access that information in areas covered by the State List

or the Concurrent list. If however, the Central Act says that the release of information regarding notings will be prohibited, the Central Act will apply, since there is now a conflict between the Central Act in the State Act. Similarly if the State Act provides for a penalty against an official who willfully refuses information, which he is obliged to give, and the Central Act is silent on this, again the State Act can be used to impose a penalty, since there is no conflict. There are in fact many areas in the Concurrent list such as Criminal law and procedure, Civil procedure, where there are central as well as State legislations. In such cases the State legislations are applied in those States provided there is no conflict.

Thus, the enactment of the Central legislation (after it has been notified and has come into force), would only mean that the Central Act will override the State Acts, if there is a conflict between the two. However the State act will continue to apply to areas covered by the State list as well as areas covered by the concurrent list, provided there is no conflict with the Central legislation. There is thus no occasion for the repeal of the State Right to Information Acts even after the Central Act has been notified.

However all of the above is without prejudice to the position that Right to Information is a fundamental right of citizens under Article 19 of the Constitution as declared by the Supreme Court in many cases, including the most recent one involving the disclosure of information regarding election candidates. Thus, legally, each citizen has a right to seek information on all subjects from all governments, provided the disclosure of such information does not prejudice public interest in any way. In fact various exclusions in the Central Act and the State Acts can be challenged on this basis.

The State governments can therefore respond to the directive of the Central government on the basis of the above legal position.

(PRASHANT BHUSHAN)