

**RIGHT TO INFORMATION
AND
GOOD GOVERNANCE**

RIGHT TO INFORMATION AND GOOD GOVERNANCE

Edited by
SAIRAM BHAT

Assistant Editors

Ashwini Arun

Sindhu V Reddy



NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
Bengaluru

BOOK SERIES - III - 2016

Copyright @ Sairam Bhat, NLSIU 2016

All rights reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic and mechanical, including photocopying, recording or by any information storage or otherwise, without permission in writing from NLSIU.

Price : 2000 INR [Inland - without postage]

Contact

National Law School of India University

Nagarbhavi, P O Box 7201

Bengaluru, Karnataka, India-560242

Email : libray@nls.ac.in

Disclaimer : The views expressed by the author/s in the Book are their personal views and do not reflect the views of National Law School of India University. The Editor and National Law School of India University are not responsible for mistakes if any, and for copyright violations of any kind.

ISBN-978-93-83363-37-7

Printer

Sri Manjunatha Printers, Bengaluru-40

Cover Page Design by

Lingaraj .R, DED - NLSIU

CONTENTS

Sl. No.	Title	Authors	Page No.
	Foreword		vii
	Preface		viii
	List of Cases		xi
I.	Constitution and RTI		
1.	Indian Constitutionalism on RTI	Dr.Sairam Bhat	3
2.	Ambit and Scope of the RTI Act: A Comparative Perspective	Trinadh Kumar Potina & ShivamJaiswal	27
3.	Stairway to Good Governance	Dr.Isheeta Rutabhasini & Kapildeep Agarwal	63
II.	RTI and Good Governance		
4.	The Right to Information as a Human Right	Vaibhav Kumar	88
5.	RTI & Freedom of Information	Avnish Mishra	104
6.	Consumers' Right to Information: Consumer Forum v. Information Commissions	Dr. Sairam Bhat	118
7.	Does Right to Privacy Exempt Right to Know?	Dr. Prem Kumar Agarwal & Sugato Mukherjee	139
8.	RTI and Right to Privacy: Desideratum for Balance	Prerna Saraf	147
9.	Transparency & Privacy: Unconscionable or Amicable	Raj Kamal & Eshanee Awadhya	161
10.	Right to Privacy v Right to Information & Transparency	Dipam Sengupta & Nikita Jaluka	176
11.	RTI and Media Law	Monisha Katiyar & Sreejita Ghosh	194
12.	RTI Act & the Protection of Whistleblowers in India	P. Anantha Bhat	215
13.	Victimisation of Whistleblowers	Nikhil Issar	237
14.	RTI Act & Whistleblowers	Aditi Nidhi & Apporva Roy	255
III.	RTI : Transparency & Accountability		
15.	Role of PIO under the RTI Act, 2005: Bottlenecks in Good Governance	Dr. G. Shaber Ali	274
16.	RTI v/s Judicial Independence	Dr. Sairam Bhat	289

Sl. No.	Title	Authors	Page No.
17.	Enhancing Administrative Transparency and Accountability through Right to Information	Dr. Sairam Bhat	310
18.	Right to Environmental Information	Dr. Sairam Bhat	322
19.	RTI Constricted	Shailesh Gandhi	337
20.	Need for defining Intelligence and Security organisations	M. Kodandaram	355
21.	The Missing Link of Right to Information Act in India	Dr. Subir Kumar Roy	379
22.	RTI & Political Parties	Sameer Avasarala & Shashank Kanoongo	392
23.	Effectiveness of RTI Act in Eradicating Corruption	Rohit Kumar & Vishnu Prabhakar Pathak	408
24.	RTI - A Failing Institutional Mechanism	Utkarsh Kumar Sonkar	417
25.	Right to Information and Good Governance: The Indian and Kenyan Picture	Nyatundo George Oruongo	439
IV. Case Comments			
26.	Information Commission's Judgements on RTI	Dr. Sairam Bhat	461
27.	Definition of Information under the RTI Act	Deva Prasad	492
28.	V.S. Lee, Principal v. State of Kerala (2010)	Anjana Girish	
29.	Judicial Interpretation of RTI Act (cases from Supreme Court, High Courts and CIC)	Rajdeep Banerjee & Joyeeta Banerjee	501
31.	Ambit of RTI Act, 2005 - Wide Enough to Cover Private Aided Colleges ?	Anjana Girish	530
30.	Disclosure of Information in Custody of Financial Institutions: Reserve Bank of India v. Jayantilal N Mistry	Sindhu Venkata Reddy	540
Annexures			
I.	Right To Information Act		549
II.	Prevention of Corruption Act		581
III.	Whistleblowers Protection Bill		596
	About the Editors		616
	About the Authors		618
	Index		624

FOREWORD

PREFACE

The United Nation Convention Against Corruption [UNCAC] was adopted by the United Nations General Assembly on 31st October 2003 by Resolution 58/4. In its 71 Articles divided into 8 Chapters, UNCAC requires that States Parties implement several anti-corruption measures which may affect their laws, institutions and practices. These measures aim at preventing corruption domestic and foreign bribery, embezzlement trading in influence and money laundering. Furthermore, the UNCAC is intended to strengthen international law enforcement and judicial cooperation, and information exchange, and mechanisms for implementation of the Convention. India ratified this Convention in 2011. The NLSIU books series-3 is on the title 'RTI and Good Governance'. The RTI is a tool that can annihilate corruption, render citizens the right to a transparent and accountable Government and protect the institutions of democracy within the country. Freedom of information brings openness in the administration which helps to promote transparency in state affairs, keep government more accountable and ultimately reduce corruption. $\text{Corruption} = \text{M [money]} + \text{D [Discretion]} - \text{A [Accountability]}$. Corruption also equals monopoly plus discretion minus accountability [Robert Klitgaard]. Adarsh Housing Society, Commonwealth Games, 2G, Coalgate and many others are just a few of the scams which have resulted in exposing the levels of corruption in Government functioning in India.

The Second Administrative Reforms Commission was constituted to prepare a detailed blueprint for revamping the public administration system. The Commission in its first report decided to analyze and give recommendations on the freedom of information as the Right to Information Act. Right to Information Act 2005 is hailed as a revolution in India's evolution as a democracy. It empowers the ordinary citizen with the tools of information that propel government decisions. According to the Central Information Commission's ruling, political parties directly qualify as public organizations under the ambit of RTI, by virtue of substantial subsidization and government patronage. While the end result of a political

party is to cater to the needs of the public, it is only logical that the public has the right to know about parties' source of funding and choice of candidature. However, more recently, there have been efforts to amend the RTI to keep the Political Parties away from the reach of people. When the very people who govern the country do not want the RTI, what would be the fate of this Act after these amendments? RTI acts as a deterrent against the arbitrary exercise of public powers. It ensures people centric approach to governance. With access to information, people can function better as an informed citizenry and to hold the elected representative accountable. Further the RTI Act is not only based on the demand and supply of information, but also on the duty of the Public Authorities to provide proactive information. The right to information is particularly powerful because it is a tool for claiming other rights. Development will be more meaningful and inclusive with sharing of information on decision making and on its execution. Transparency in governance also entails administrative reforms. The Act amongst various objectives, also attempted to bring about an attitude shift amongst the Government babus to really respect the term 'public servant'. The Act also uniquely brought about the personal liability of Public Information Officers for delay or denial of information. Further Good governance requires that institutions of Governance should serve all the stake holders within a reasonable time frame. Under the Act providing information [as a service] within 30 days is yet another reason which has brought about the success of the legislation. The enactment of more than sixteen States on the Public Services Guarantee Act [delivery of Government services in a time bound manner] is another step forward and probably has been the direct impact of the RTI movement.

Also, the success of RTI lies in ensuring that whistle-blowers are amply protected and secured from threats to their lives and are given adequate protection under the law. Anna Hazare movement, Aruna Roy and her Jan Sunvahi, the Lokpal and the Lokayuktas Act, 2013, Whistleblower Protection Act 2011 are possible title now popular amongst many Indians. The movement to bring accountability is a continuous one and many more such changes are required to improve governance in India.

In terms of education about the law and its right to know, we must all celebrate September 28 Right to Know Day as it is done in other countries. I hope we can continue to celebrate this day to educate and highlight the

use of RTI and as citizens equally contribute and participate in ensuring Good Governance. It is mostly with the support of the social activists and Civil Society Organizations that a person even in a village is able to use the RTI Act for ensuring his basic rights. However given the geographical size & population, the reach of RTI is been limited. Media too has played an important role in generating awareness at a mass scale.

This book is yet another effort to contribute to the jurisprudence in this area and we hope that it will be used for researching, teaching and advocacy of RTI. I am extremely delighted that the books series has gained momentum and impetus under the seasoned and accomplished leadership of Professor (Dr.) R. Venkata Rao, Vice Chancellor, NLSIU. On behalf of the editorial committee, I express our sincere and deep felt thanks to him for his sustained and continued support to our activities.

I, whole heartedly, thank all the contributors who have contributed to the book. I must place on record my appreciation of Ms. Ashwini Arun, who has displayed tremendous discipline and sincerity in finalising this publication. I also thank the DED team lead by Ms. Susheela who has coordinated the printing job and Mr. Lingaraj who has designed the cover page and finalised the layout.

Dr. Sairam Bhat
Associate Professor of Law
NLSIU

LIST OF CASES

Sl. No.	Case Name	Citation	Page No.
1.	A. L. Motwani v. ITI Limited	CIC/MA/A/2008/1233/AD	43
2.	AbneIngty v. CPIO, Delhi University, Delhi	CIC/SA/C/2015/901116	51
3.	AC BhanunniValluvanattukara v. Commissioner, Malabar Devaswom Board	WP(C).No. 7237 of 2009(Y)	391
4.	Agriculture Produce Market Committee, Wardha v. MeghrajPundlikraoDongre and Ors.	AIR 2011 Bom 48	495
5.	Anil Krishna (Dr.) v. Krishna Prasad	CIC/SG/A/2009/002343	50
6.	Ansari Masud A.K v. Ministry of External Affairs	CIC/OK/A/2008/987/AD	166
7.	Anumeha v. Central Board of Direct Taxes	CIC/AT/A/2007/01029 & 1263-1270	52
8.	Ashok Kumar Dixit v. Delhi Technological University	2014 SCC CIC 3161	425
9.	Ashwani Kumar v. Department of Expenditure	F.No.CIC/AT/A/2010/000643	217
10.	Attorney General v. Time News Papers Ltd.	1973 3 ALL ER 54	387
11.	AvishekGoenka v. Union of India	W.P. 33290(W) of 2013	40
12.	Avtar Singh v. State	AIR 2013 P&H 192.	505
13.	B. Bhattacharjee v. The Appellate Authority, High Court of Meghalaya, Shillong and Ors.	AIR 2016 Meghalaya 1.	516
14.	B. R. Kapoor v. State of Tamil Nadu and Anr	(2001) 7 SCC 231	330
15.	B.L. Sinha v. Company Affairs	CIC/AT/A/2007/00256	44
16.	Babu Ram Verma v. State of Uttar Pradesh	(1971) 2 Serv. L.R.659	148
17.	Bangalore International Airport Limited v. Karnataka Information Commission	ILR 2010 KAR 3214	393
18.	Bank Nationalization case RustomCavasjee Cooper v. Union Of India	AIR 1970 SC 564.	453

Sl. No.	Case Name	Citation	Page No.
19.	Barium Chemicals Ltd v. Company Law Board	AIR 1957 SC 295	452
20.	Bennet Coleman v. Union of India	AIR1973 SC 106 1973 SCR (2) 757 453, 490	87, 178, 360,
21.	Bhagat Singh v. CIC	W. P. (C) No. 3114/2007	46, 329
22.	Bhoj Raj Sahu v. SEBI (Central Information Commission, 2009)	F.No.CIC/AT/A/2008/01083	483
23.	Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi&Anr Civil Appeal No. 9052 of 2012, dated December 13, 2012, Supreme Court of India.	(2012) 13 SCC 61	168, 502
24.	Black-Clawson International Ltd v Papierwerke	AG [1975] A.C. 591 HL	131
25.	Block Development and Panchayat Officer v. State Information Commissioner and Anr.	AIR 2015 P&H 191,	496, 515
26.	Bombay Environmental Action Group and others v. Pune Cantonment Board	Unreported case - Ref. Armin Rosencranz and Shyam Divan; Environmental Law and Policy in India, Oxford University Press, p. 143.	8, 15
27.	C J Karira v. CBI	File No.CIC/SM/C/2012/000374	358-59,
28.	C. G. Raveendran and Ors. v. C.G. Gopi and Ors.	AIR 2015 Ker 250.	498
29.	Celsa Pinto v. Goa State Information Commission (Bombay High Court, 2008)	2008 (110) Bom L R 1238	484
30.	Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors.	2011 AIR SCW 4888 (2011) 8 SCC 497	138, 299, 487, 497, 501
31.	Central Bureau of Investigation v. Central Information Commission and Anr.	AIR 2015 Cal 21.	504

Sl. No.	Case Name	Citation	Page No.
32.	Chander Mohan Khanna v. National Council of Educational Research and Training and Ors.	AIR 1992 SC 76.	523
33.	Chandigarh University, Village Gharuan v. State	AIR 2013 P&H 187	493
34.	Chandra Prakash Twiwari v. Shakuntala Shukla	AIR 2002 SC 2322	126
35.	Chennai v. A. Kanagaraj and Anr.	AIR 2013 Mad 186.	146, 499
36.	Chetan Kothari, Mumbai v. President's Sect, Vice President's Secretariat, Prime Minister's Office	Appeal No. WBA-8-658, WBA-8-1453 & 1454, WBA/09/667 dated 24-4-2008 & 16-6-2009.	456-57
37.	Chief Information commissioner & Anr v. State of Manipur & Anr	AIR 2012 SC 864	160
38.	Cippecv. Federal Government, Department Of Public Welfare	Executive Order 1172 Of 2003, On Action For Protection Law , C. 830. Xlvi, National Supreme Court Of Justice Argentina	106
39.	Claude Reyes et al v. Chile	Inter-American Court of Human Rights (International / IACHR), Series C No. 151, decided on 19 September 2006	165
40.	Common Cause v. Union of India	(2015) 6 SCC 332 (Criminal Misc. Petition No. 387 of 2015)	223
41.	Common Cause v. Union of India	AIR 1996 SC 3081	394
42.	Conway v. Rimmer	[1968] A.C. 910	172
43.	CPIO, Supreme Court of India v. Subhash Chandra Agrawal	W.P. (C) No. 188/2009and W.P. (C) No. 288/2009	44, 50,
44.	D. C and G. M v. Union of India	AIR 1983 SC 937.	453
45.	D.C. Dhareva& Co. v. Institute of Chartered Accountants of India	Decision No.560/IC/2007, dated 22/2/2007.	450
46.	Dasharathi v. Food & Civil Supplies Dept., Govt. of NCT, Delhi	CIC/WB/C/2006/00145.	462
47.	Decision No. CIC/SG/A/2009/001990/5042	Appeal No. CIC/SG/A/2009/001990	333

Sl. No.	Case Name	Citation	Page No.
48.	Delhi Sikh Gurudwara Management Committee and Ors v. Mohinder Singh Mathar	AIR 2013 Del 3.	
49.	Delhi Stock Exchange v. K.C.Sharma	MANU/DE/0514/2002	34
50.	Dev Dutt v. Union of India and others	(2008) 8 SCC 725, AIR 2008 SC 2513.	291, 504
51.	DhananjayTripathi v. Banaras Hindu University	Decision No. CIC/OK/A/00163, dated 7/7/2006.	479
52.	Diamond Jubilee Higher Secondary School v. Union of India	(2007) 3 MLJ 77	391
53.	Dimes v. Proprietors of Grand Junction Canal	1852 3 H.L. Cas. 759 by the House of Lords.	285
54.	Dinesh Trivedi, M.P. v. Union of India	(1997) 4 SCC 306	8, 253, 267, 323, 363, 416
55.	DivyaRaghunendan v. Dept Of Biotechnology		473
56.	Durga Shankar Mehta v. Raghuraj Singh	1955 (1) SCR 267	414
57.	EhteshamQutubuddin Siddiqui v. Ministry Of Culture (Central Information Commission, 2012) BS/0284	File No. CIC/SM/A/2011/001713/BS & CIC/SM/A/2012/000239/	485
58.	Election Commission of India v. Central Information Commission and Others	2009 (164) DLT 205.	514
59.	Essar Oil Ltd v. HalarUtkarshaSamiti	AIR 2004 SC 1834	59
60.	European Commission v. Agrofert Holding	C-477/10 P.	106
61.	Fair Air Engineers Pvt Ltd v. N K Modi	1996 CPJ 1 (SC)	127
62.	Federal Communications Commission v. AT&T Inc.	562 U.S. ____ (2011), Docket No.09-1279	333
63.	Fernando v. Sri Lanka Broadcasting Corporation and Others	30 May 1996, SC Application No. 81/95.	103

Sl. No.	Case Name	Citation	Page No.
64.	Forests Survey Inspection Request Case Petitioner v. Supervisor of County of Ichon	1 KCCR 176, 88Hun-Ma22	109
65.	G.R. Rawal v. Director General of Income Tax	CIC/AT/A/2007/00490	45
66.	Ganga Agnihotri, Professor in Electrical Engineering v. Maulana Azad National Institute of Technology, Bhopal	Appeal No. CIC/MA/A/2005/00004 – Order dated 02-05-2006.	457
67.	Gardenreach Shipbuilders and Engineers Ltd v. Akshat Commercial Pvt. Ltd and Anr.,	AIR 2015 Cal 103.	498
68.	Gaskin v. United Kingdom	12 EHRR 36	102
69.	Ghaziabad Development Authority v Balbir Singh	2004 (2) CLT 628,	119
70.	Girish Ramchandra Deshpande v. Central Information Commissioner & Ors	(2013) 1 SCC 212 Special Leave Petition (Civil) No. 27734 of 2012 (@ CC 14781/2012).	
71.	Gita DewanVerma v. Urban Development Department, Delhi	CIC/WB/C/2006/00182 Appeal No. CIC/WB/C/2006/0018, dated 29/6/2006	42, 469
72.	Gobind v. State of Madhya Pradesh	(1975) 2 SCC 148.	412
73.	Gopal Kumar v. Army HQs	CIC/AT/A/2006/00069	
74.	Gopalanav. State of Madras	1950 SCR 88.	6
75.	Govind v. State of M. P	AOT 1975 SC 1378.	16
76.	Griswold v. Connecticut	381 U.S. 479 (1965),	136
77.	H.E. Rajasekarappa v. State Public Information Officer	AIR 2009 Kar 8	166
78.	Hansumukh v. State of Gujarat	AIR 1981 SC 28.	6
79.	Hardev Arya v. Chief Manager (Public Information Officer) and Other,	AIR 2013 Raj 97.	503
80.	Hemant Dhage, Ahmednagar v. Department of Legal Affairs, Govt of India	CIC/SA/A/2015/000435	37

Sl. No.	Case Name	Citation	Page No.
81.	Hindu Urban Cooperative Bank Limited and Ors. v. State Information Commission and Ors	1 (2011)ILR 2Punjab and Haryana64	390
82.	HossainaraKhatun v. State of Bihar	[AIR 1979 SC 1371]	6
83.	I.R.Coelho v. State of Tamil Nadu	AIR 2007 SC 861	414
84.	Imperial Chemicals Industries v Colmer	[1996] 2 All ER 23, p. 32.	123
85.	In re Articles 27 and 42 of Decree 1799 of 2000	C-872/03, Constitutional Court of Colombia	108
86.	In re the Constitutionality of Act LXV of 1990 on Local Governments	32/1992 (V.29) AB, Constitutional Court, Hungary	109
87.	In Re: S Mulgaokar v. Unknown	(1978) 3 SCC 339	209
88.	Inder Grover v. Ministry of Railways	CIC/OK/A/2006/00121/27/06/2006.	450
89.	Indian Express Newspaper v. Union of India	AIR 1986 SC 515 (1985) 1 SCC 641	5, 111
90.	Indian Olympic Association v. Veeresh Malik and Ors	(WP)© No. 876/2007	393
91.	Indira Jaising v. Registrar General, Supreme Court of India	(2003) 5 SCC 494.	164
92.	Indirect Tax Practitioners Association v. R. K.Jain	(2010) 8 SCC 281	222
93.	Institute of Chartered Accountants of India v. Shaunak H. Satya and Ors.	AIR 2015 Kar 165.	500
94.	Ishan Ghosh (Dr.) v. PIO Eastern Railway	CIC/AD/A/2011/001501	31
95.	J.D. Sahay v. Ministry of Finance Department of Revenue, New Delhi	CIC/AT/A/2008/00027 & 33	46
96.	JamiaMilliaIslamia v. Sh. Ikramuddin	AIR 2012 Del 39	490, 503
97.	Jarnail Singh v. Registrar, Cooperative Societies Delhi	Complaint No. CIC/WB/C/2006/00302, dated 9/4/2007.	455
98.	Jayasankar v. Deputy Secretary Indian Council of Agricultural Research, KrishiBhawan Delhi	CIC/AT/C/200600052	Remove
99.	Jiwan v. Commissioner, Central Excise and Customs, Surat	20/ICA/2006	470

Sl. No.	Case Name	Citation	Page No.
100.	Johnson B. Fernandes v. Goa State Information Commission, Panaji, Goa and Anr.	AIR 2012 Bom 56.	512
101.	Joint Registrar (Judicial) cum Public Information Officer v. State Information Commission and Others	Patna High Court [CW]C No. 15814 of 2009]	334
102.	Joint Registrar (Judicial)-cum-Public Information Officer, High Court of Judicature at Patna v. State	AIR 2010 Pat 176.	506
103.	Justice Bhattacharjee case (RavichandranIyer v. Justice A. M. Bhattacharjee)	[1995] 5 SCC 457	284
104.	KP Muralidharan Nair v Reserve Bank Of India	CIC/SG/A/2011/002841/16732]	296
105.	K. K. Sharma v. State,	AIR 2013 P&H 198.	505
106.	K. Veeraswami case	1991 (3) SCC 655.	293
107.	K.M. Mishra v. Central Bank of India and others,	(2008) 9 SCC 120, AIR 2009 SC 1114.	505
108.	Kali Ram v. State Public Information Officer-Cum-Deputy Excise and Taxation, Gurgaon [East], Haryana	Dated 9.10.2013. S. M. Kantikar as Presiding Member.	130, 132,
109.	Kamal Anand v. Central Board of Direct Taxes (CBDT)	CIC/AT/A/2007/00617	43
110.	Kaneko v. Japan	Sup.Ct. 1969.11.26 Keishu 23-11-1490.	105
111.	Kerala Public Services Commission v. The State Information Commission	Civil Appeal No. 823-854 of 2016	486
112.	Keshavananda Bharti case	AIR 1973 SC 1461.	289
113.	KetanKantilal Modi v. Central Board of Excise and Customs	CIC/AT/A/2008/01280	41
114.	KhanapuramGandaiah v. Administrative Officer &Ors	AIR 2010 SC 615	31
115.	Kharak Singh v. State of Uttar Pradesh	AIR 1963 SC 1295 1964 SCR (1) 332	158,174, 412,490
116.	Kishan Lal v. Rohit Prasad	CIC/SG/C/2011/001273/17356	425

Sl. No.	Case Name	Citation	Page No.
117.	Kishore Lal v Chairman, Employees' State Insurance Corporation,	2007 (4) SCC 579,	119
118.	Kishur J. Agarwal v. Indian Rare Earths Ltd.(Dept. of Atomic Energy), Mumbai	Appeal No: CIC/WB/A/2006/00015 - Dated: 02/06/'06.	476
119.	Kuldip Kumar v. Police Headquarters, New Delhi	F.NO.CIC/AT/A/2006/00071	460
120.	L. Chandra Kumar v. Union of India	AIR 1997 SC 1125	414
121.	L.K. Koolwalv. State of Rajasthan	AIR 1988, RAJ 2.	14
122.	Lakshmi Narayan Singh v. State,	AIR 2011 Pat 32.	513
123.	Lawson v. FMR LLC	2014 SCC online US SC 32	220
124.	Leander v. Sweden	9 EHRR 433	102
125.	Legaspi v. Civil Serviced Commission	G.R. No. 72119, Constitutional Court of Phillipines	109
126.	Life Insurance Corporation of India v. Prof. Manubhai D. Shah	1992 (3) SCC 637	416
127.	Lt. Gen. S.S. Dahiya (Retd.) v. CPIO, Ministry of Defence&Ors	CIC/LS/C/2011/001107 & CIC/LS/A/2011/001848	34
128.	M M Lal v. Customs Department	CIC/AT/A/2008/01489.	451
129.	M. K. Tyagi v. K. L. Ahuja and another	W.P. © 7372/2007 & Crim Appeal 14017/2007	224
130.	M.C. Mehta v. Union of India	AIR 1992 SC 382	15
131.	M.P Choudhary v. Ministry of Consumer Affairs./Department of Food & Supplies,	GNCT Delhi Appeal No.CIC/WB/A/2006/00891 dated 1.12.2006;	117
132.	M.P Gupta v. CGHS, New Delhi, (Central Information Commission, 2009)	CIC/AD/C/09/00083	480 ,486
133.	M/s Esab India Limited v. Special Director Of Enforcement	F.No.CIC/AT/A/2008/01438	364
134.	Madhab Kumar Bandhopadhyay v. State,	AIR 2013 Cal 128.	511
135.	MadhuBadhuri v. Director, DDA	CIC/C/1/2006	39
136.	Madras Bar Association v. Union of India	(2010) 11 SCC 1	415

Sl. No.	Case Name	Citation	Page No.
137.	Mahipal Sahu v. Department of Food, Supplies & Consumer Affairs, Government of NCT of Delhi, New Delhi,	File No. CIC/AD/A/2012/000664.	117
138.	Mallu Ram Jakhar v. Joint Commissioner of Police (Crime Branch), Police Headquarters, Delhi	Appeal No. CIC/AT/A/2006/00029 – Order dated 07-04-2006.	458
139.	Maneka Gandhi v. Union of India	1978 AIR 597	179,181, 194,267
140.	Manish Bhatnagar v. Mr. R. N. Mangla, SPIO, Dept of Women & Child Development	CIC/SG/A/2010/001790	46
141.	Manish Khanna v. High Court of Delhi	CIC/WB/A/2006/00839 & 00900 and CIC/WB/A/2007/01118	33
142.	Manjeet Singh Khera v. State of Maharashtra	(2013) 9 SCC 276	257
143.	Manohar Manikrao Anchule v. State of Maharashtra and Anr.	AIR 2013 SC 681.	512
144.	Manohar Parrikar & Ors v. Accountant General of Goa, Orissa and Punjab	CIC/AT/A/2007/00274, CIC/AT/A/2008/00726, CIC/AT/A/2009/000732	33
145.	Manoj Chaudhry v. DDA	CIC/WB/A/2006/00194.	451
146.	Manoj H. Mishra v. Union of India & Ors	(2013) 6 SCC 313 2014 SCC Online Jhar 943; 2013 III LLJ 289.	225,252
147.	Maruti Udyog Ltd v. Ram Lal	2005-SCC-2-638.	123
148.	Mother Dairy Fruit and Vegetable Private Limited v. Hatim Ali and Anr	AIR 2015 Del 132	492
149.	Mukesh Kumar v. Addl. Registrar of the Supreme	Court (Decision No. CIC/AT/A/2006/00113, dated 10/7/2006).	473
150.	Mysore Paper Mills Ltd v. Mysore Paper Mills Officers Assn	(2002) 2 SCC 167	522
151.	N. B. S. Manian v. Department of Post dated 10/1/2007.	Appeal No.267/ICPB/2006,	473

Sl. No.	Case Name	Citation	Page No.
152.	Nagar Nigam, Dehradun v. Chief Information Commissioner and Anr.,	AIR 2015Uttarakhand 118.	513, 512
153.	Nagoya Citizen Ombudsmen v. Director of the Central Japan Economics and Industry Bureau of the Ministry of Economics and Industry	Nagoya District Court, 1083 Hanrei Times 311	108,
154.	Namit Sharma v. Union of India	(2013) 1 SCC 745	381, 408, 410, 411, 415, 416, 417, 427, 489, 508, 509, 522.
155.	Narayan Singh v. Kallaram alias KalluramKushwaha and Ors.,	AIR 2015 MP 186.	498
156.	Narender Kumar v. The Chief Information Commissioner, Uttarakhand,	AIR 2014 Uttarakhand 40.	512
157.	Nathi Devi v. Radha Devi Gupta	(2005) 2 SCC 201	47, 330,
158.	National Film Development Corporation Limited v. Commissioner of Income Tax	Appeal No. CIC/AT/A/2008/00896	334
159.	National Stock Exchange of India Limited, Mumbai v. Moneywise Media Private Limited, Mumbai and others	MANU/MH/2384/2015	225
160.	Navarro Gutierrez v. Lizano Falt	Exp: 02-000808-0007-CO, Res: 2002-03074, Supreme Court of Costa Rica, Constitutional Chamber	108
161.	NeelamBhalla v. Union of India and ors.	AIR 2014 Del 102.	515
162.	NeerajMunjal v. Atul Grover	2005 (3) CLT 30.	120
163.	New Tirupur Area Development v. State of Tamil Nadu	AIR 2010 Mad 176	391
164.	New York Times Co. v. Sullivan	376 US 254, 11 L 2nd Ed 686(1964)	185
165.	Nixon v Warner Communications, Inc.	435 U .S. 589 [1978].	297

Sl. No.	Case Name	Citation	Page No.
166.	O'Connor v. Nova Scotia	2001 NSSC 6, Supreme Court of Nova Scotia	108
167.	Olmstead v. U.S	AIR 1975 SC 865	180
168.	Owen Thomas Mangin v IRC,	[1971] 2 WLR 39, p. 42 [PC] [Lord Donovan]: [1971] 1 All ER 179	123,
169.	P. Mahendran v. State of Karnataka	AIR 1990 SC 405	356
170.	Paramveer Singh v. Panjab University	CIC/OK/A/2006/00016	37, 461, 475
171.	ParmodGoyal v. State Bank of Patiala case	CIC Appeal No: CIC/DS/A/2011/000929	217
172.	People's Union for Civil Liberties v. Union of India	AIR 2004 SC 1442 (2004) 2 SCC 476	412, 490,
173.	PhinjoGombu v. Tom Mitchinson Assistant Commissioner et al.	Docket Nos. M28630 & 28684 //[2002] O.J. No. 3309, Supreme Court of Ontario	108
174.	PIO, Illayankudi Co-operative Urban Bank Ltd., Sivagangai District v. Registrar, Tamil Nadu Information Commission, Chennai and Ors.	AIR 2015 Mad 169.	493
175.	PoornaPrajna Public School v. Central Information Commission	Manu/DE/2577/2009	31
176.	PrabhaDutt v. Union of India	AIR 1982 SC 61.	5
177.	PrabhuDutt v. Union of India	AIR 1982 SC 6	195
178.	Pradyuman Prasad Sah v. State of Jharkhand	2014 SSC Online Jhar 943	226
179.	Prakash Chandra v. Govt of NCT of Delhi	CIC/SG/A/2009/00015/2695	45
180.	Pramod Kumar Gupta v. Canara Bank, P&D Wing	CIC/MA/A/2006/00308	50
181.	Prem Prakash Kumar v. National Fertilizers Limited	CIC/MA/A/2006/00374 & 375 dt. 28.8.2006	456
182.	Principal, Nirmala Institute of Education, Goa v. State	AIR 2013 Bom 28.	512
183.	Professional Assistant for Development Action (PRADAN), Ranchi v. Jharkhand State Information Commission and Ors.,	AIR 2010 Jharkhand 147.	495

Sl. No.	Case Name	Citation	Page No.
184.	Public Information Officer v. Central Information Commission	(2014) 7 MLJ 1	426
185.	Public Information Officer, Urban Improvement Trust, Ajmer, Rajasthan v. Tarun Agarwal	Dated 16.12.2013. J M Malik, Presiding Member and S M Kantikar as Member	130
186.	Public Service Commission, U.P v. State Information Commission and anr.,	AIR 2014 All 38.	501
187.	Pyare Lal Verma v. Ministry of Railways & Ministry of Personnel Public Grievances & Pensions	CIC/OK/A/2006/00154 LAWS(CI)-2007-1-40	33, 37
188.	R S Misra v CPIO, Supreme Court of India,	CIC/2011-12-10.	293
189.	R. K. Jain v. Union of India and Anr.,	AIR 2013 Del 2,	506
190.	R. Rajagopal v. State of TN (1994)	1995 AIR 264, 1994 SCC (6) 632	16, 139,158, 343,412, 490.
191.	R. Sharma v. Director (E) & CPIO, Ministry of Defence	F.No. CIC/AT/A/2006/00073 Dated the 4th July, 2006.	458
192.	R.S. Raghunath v. State of Karnataka	AIR 1992 SC 81.	125, 294
193.	Raid Laban College Society and Anr v. State of Meghalaya and Anr.,	AIR 2010 Gau 173.	494
194.	Raj Kumar Agrawal and Ors v. Jaipur Stock Exchange Ltd, NSEIL, SEBI and MOF	CIC/AT/A/2006/00684 & CIC/AT/A/2007/00106	34
195.	Rajasthan Public Service Commission v. Pooja Meena and Anr	AIR 2012 Raj 52	491
196.	Rakesh Kumar Singh v. Lok Sabha Secretariat	Appeal No. CIC/WB/A/2006/00469; & 00394	145
197.	Ram Chander Singh v. Delhi Jal Board	Appeal No. CIC/2006/WB/C/2006/ 00301, dated 30/12/2006.	471
198.	Ram Jethmalani v. Union of India	(2011) 8 SCC 1	412
199.	Rama Krishna Rao v. Naval Ship Yard, Port Blair	CIC/LS/A/2012/002430/RM	46
200.	Ranjit D. Udeshi v. State of Maharashtra	AIR 1965 SC 881	191

Sl. No.	Case Name	Citation	Page No.
201.	RavichandranIyer v Justice A. M. Bhattacharjee	(1995 (5) SCC 457)	284
202.	Ravinder Kumar v. B.S.Bassi, Jt. Commissioner of Police	CIC/AT/A/2006/00004	45,474
203.	Ravinder Kumar v. A K Sinha	CIC/At/A/2006/00005.	45,474
204.	ReetaJayasankar v. Deputy Secretary (P) & PIO, Indian Council of Agricultural Research, KrishiBhawan, Delhi	CIC/AT/C/2006/00052 - Dated, the 4th September, 2006.	458
205.	Registrar General v. A.Kanagaraj	W.P.No.28202 of 2012	146
206.	Registrar General, High Court of Madras	AIR 2011 SC 3336.	499
207.	Registrar, Office of the Karnataka Lokayukta, Bangalore v. Karnataka Information Commission, Bangalore and anr.,	AIR 2014 Kar 68,	516
208.	Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. & Others	AIR 1989 SC 190	157,375, 416
209.	Reserve Bank of India v. Jayantilal N. Mistry,	AIR 2016 SC 1, RBI	496, 506
210.	Richmond Newspapers v. Virginia	448 U.S. 555, 587-588(1980)	372
211.	Roberson v. Rochester Folding Box Co.	171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).	136
212.	Roe v. Wade	410 U.S. 113 (1973)	137
213.	RomeshThapper v. State of Madras	AIR 1950 SC 124	195
214.	RPSC v. JagdishNarainPande,	AIR 2012 Raj 170.	499
215.	S P Gupta v. Union of India,	AIR 1982 SC 149.	28,59,10 9,426
216.	S P Thirumala Rao v. Municipal Commissioner, Mysore.	Revision Petition No 1975 of 2005 Decided on 28th May 2009. National Consumer Disputes Redressal Commission. As Per Justice Shri R K Batta, Presiding Member.	116, 121, 126-27, 130,
217.	S. K. Shrivastava v. State and Ors.,	AIR 2016 Chhattisgarh 1.	499

Sl. No.	Case Name	Citation	Page No.
218.	S.C Sharma v. Ministry of Home Affairs	Decision No. CIC/BS/A/2013/001420/5623	182
219.	S.K. Lal v. Ministry of Railways	Appeal No.CIC/OK/A/2006/00268-272, dated 29/12/2006.	477
220.	S.K. Ranga v. Container Corporation of India Ltd.	Appeal No.CIC/OK/A/2006/00260, dated 2/1/2007.	33,455
221.	S.K.Ranga v. Container Corporation of India Ltd	CIC/OK/A/2006/00260	33,455
222.	S.P. Gupta v. Union of India	AIR1982 SC 149 (1981) Supp SCC 87	59, 291, 303,363, 372,374, 416, 426
223.	S.P. Sampath Kumar v. Union of India	(1987) 1 SCC 124.	415
224.	S.R. Goyal v. PIO, Services Department, Delhi	Appeal No.CIC/WB/A/20060523, dated 26/3/2007.	472
225.	S.S. Ranawat v. Mr. Ashwani Kumar, CBI	CIC/SM/C/2011/000129/SG/13251	355
226.	Sainik Co-operative House Building Society Limited, Goa v. BismarkFacho and Ors.	AIR 2015 Bom 153	493
227.	Saiyed Hussain Abbas Rizwi v. State Information Commission, Patna and others	AIR 2011 Patna 103	168,502
228.	Sama Alana Abdulla v. State of Gujarat	(1996) 1 SCC 427	421
229.	Sandeep Unnithan v. Integrated HQ, Ministry of Defence (Navy)	CIC/WB/A/2007/01192	43
230.	Sanjay Hindwan v. State,	AIR 2013 HP 30.	511
231.	Sanjay Singh Thakur v. State of Chhattisgarh and ors	AIR 2014 Chhattisgarh 65.	516
232.	Sanjay Singh v. P.W.D CIC/WB/A/2006/00144.	Appeal No.	456
233.	Sanjay Singh v. UPPSC	AIR 2007 SC 950	51,456, 526
234.	Santosh Mathew v. DOPT	Decision No. 236/IC(A)/2006 - F. No. CIC/MA/2006/00636 - Dated, the 11th September,	459

Sl. No.	Case Name	Citation	Page No.
		2006.	
235.	SanwaliajiMandir Mandal, Rajasthan v. Chief Information Commissioner, Rajasthan, Jaipur	AIR 2016 Raj 16	493
236.	Sarabjit Roy v. Delhi Development Authority	10/01/2005-CIC, dated 25/2/2006.	456
237.	Sarwan Singh v. Kasturilal,	[1977-AIR (SC)-0-265 1977-SCC-1-750).	123
238.	Satish Kumar v. Haryana Staff Selection Commission, Panchukla	Case No. 1118 and 1119 of 2006, Haryana SIC.	477
239.	Satya Narain Shukla v. Union of India and others,	(2006) 9 SCC 69, AIR 2006 SC 2511	505
240.	Satyapal v. CPIO, TCIL	Appeal No. IC(PB)/A-1/CIC/2006	33
241.	Satyendra Dubey murder case	Writ Petition © No.539/2003.	212,227, 231,233, 256
242.	Saurabh Yadav v. Dinesh Chand	CIC/SG/A/2011/002724/16 593	420
243.	SC Advocates on Record case	AIR 1994 SC 268	290
244.	Secretary General, Supreme Court of India v. Subhash Chandra	LPA No.501/2009, 12-01-2010	145, 149 436,491
245.	Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal	(1995) 2 SCC 161	5
246.	Seema Bhattacharya v. Deputy Commissioner, Shahdara, MCD	CIC/WB/A/2006/00377	38
247.	Shalit v. Peres	48(3) PD 353 [1990]	106
248.	ShamaParveen v. National Human Rights Commission	Appeal No.CIC/OK/2006/00717, dated 18/4/2007.	472
249.	ShanmugaPatro v. Rajiv Gandhi Foundation	CIC/WB/C/2009/000424	34
250.	Sharma Parveen v. National Human Rights Commission	CIC/OK/2006/00717	472
251.	SheelBarse v State of Maharastra	AIR 1983 SC 378.	6
252.	Sheela Barse v. State of Maharashtra	1987 (4) SCC 373	416
253.	Shekhar Chandra Verma v. State,	AIR 2012 Pat 60.	496

Sl. No.	Case Name	Citation	Page No.
254.	Shekhar Singh and Others v. Prime Minister's Office	CIC/WB/C/2006/00066	41, 470
255.	ShipraSud v. UPSC	CIC/SM/A/2012/000135	50
256.	Shital C. Joshi v. Gujarat State Road Transport	(2003) 4 GLR 674	182
257.	Shrikant Pandya v. State of M.P	AIR 2011 MP 14	167, 505
258.	Shyam Singh Thakur v. Dept of Science & Technology	CIC/WB/A/2006/00365	40
259.	Skypack Couriers Ltd v. Tata Chemcials Ltd,	AIR 2000 SC 2008	127
260.	Srimathi v. Union of India	Writ petition Nos. 21556 of 1994 Decided on March 6, 1996.	127
261.	State Bank of India v. Mohd. Sahjahan	AIR 2010 Del 205	167,
262.	State Bank of India v. Central Information Commission and another	AIR 2014 HP 21	491
263.	State Consumer Disputes Redressal Commission v. Uttarakhand State Information Commission and Ors.,	AIR 2015 Uttarakhand 106.	498
264.	State of Himachal Pradesh v. Raja Mahendra Pal	1995 Supp (2) SCC 731	415
265.	State of Jharkhand and Anr. v. Navin Kumar Sinha and Anr.,	AIR 2008 Jharkhand 19.	503
266.	State of Madhya Pradesh v. DharamBir	(1998) 6 SCC 165	416
267.	State of Maharashtra & Ors v. BrijlalSadasukhModani	2016 SAR (Criminal) 232	215
268.	State of Maharashtra v. Bharat Shanti Lal Shah	(2008) 13 SCC 5 490	159, 412,
269.	State of Uttar Pradesh v. Raj Narain	1975 AIR 865 (1975) 4 SCC 428 1975 SCR (3) 333	6, 8, 28, 90, 109, 115, 143, 178, 247, 253, 269, 287, 314, 322, 347, 362, 386, 409, 489

Sl. No.	Case Name	Citation	Page No.
270.	State Trading Corporation of India v. Commercial Tax Officer	AIR 1963 SC 184.	452
271.	Stichting Greenpeace Nederland And Pesticide Action Network Europe v. European Commission	Case T 545/11, 8 Oct 2013, EU Court of Justice	107
272.	Subhash Chandra Agrawal & Anr v. Indian National Congress & Ors	CIC/SM/C/2011/001386 and 000838 [2013] 121 SCL 43 (CIC)	35
273.	Subhash Chandra Agrawal v. Office of the Attorney General of India	W.P.(C) 1041/2013	36
274.	Subhash Chandra Agrawal v. Supreme Court of India	CIC/WB/A/2008/00426	36
275.	Suchi Pandey v. Ministry of Urban Development	CIC/WB/2006/00133	33
276.	Sudhir Vohra v. Delhi Metro Rail Corporation	CIC/LS/A/2009/000987	47
277.	Sukhdev Singh v. Union of India and others	(2013) 9 SCC 566, AIR 2013 SC 2741.	
278.	Sunflag Iron and Steel Company Ltd., Nagpur v. State Information Commission, Nagpur and Ors.,	AIR 2015 Bom 38.	507
279.	Sunil Kumar v. Pgimer, Chandigarh (Central Information Commission, 2010)	File No. CIC/LS/C/2009/000617	487
280.	Superintendent of Police, Central Range Office of the Directorate of Vigilance and Anti-Corruption, Chennai v. R. Karthikeyan and Anr	AIR 2012 Mad 84.	516
281.	Surendra v. Directorate of Education, Delhi Government.	Appeal No. CIC/WB/A/2006/00521, dated 5/4/2007.	468
282.	Surup Singh HyraNaik v. State of Maharashtra	AIR 2007 Bom 121	146
283.	T. S. R. Subramanian v. Union of India and Ors.,	AIR 2014 SC 263.	502
284.	Talukdar v. C.E. (E), CPWD, Kolkata	Complaint Nos. CIC/WB/C/2007/00104 & 105	451

Sl. No.	Case Name	Citation	Page No.
285.	Tamil Nadu Newsprint & Papers Ltd. v. State Information Commission	CDJ 2008 MHC 1871	391
286.	Tata Engineering and Locomotive Co v. State of Bihar	AIR 1965 Sc 40.	452
287.	Tata Press Ltd. v. Maharashtra Telephone Nigam Limited	(1995) 5SCC 139	143, 416
288.	Thalappalam Ser. Coop. Bank Ltd. & Ors. v. State of Kerala &Ors	2013 (12) SCALE 527 SLP © No.24290 of 2012	34, 413, 416, 425, 493-95, 523
289.	Thirumurugan Co-operative Agricultural Credit Society v M. Lalitha,	2004 (1) CLT 456.	127
290.	Thiruvalluvar Transport Corporation v. Consumer Protection Council	(1995) 2 SCC 479.	125
291.	Tirath Singh v. Bachittar Singh	AIR 1955 SC 830,	129
292.	TMA Pai Foundation v. State of Karnataka	(2002) 8 SCC 481 para 25.	525
293.	TokughaYephthomo [Dr.] v Apollo Hospital	JT (1998) 7 SC 626.	16
294.	U.P.P.S.C. v. Subhash Chandra Dixit	AIR 2004 SC 163	51
295.	Uma Kant and Others v. Central Bureau of Investigation C.G.O. Complex and Others	Criminal Revision Defective No.143 of 2009 26 May 2015, LNINDU 2015 LUCK 83; LNIND 2013 SC 1124	225
296.	Union of India v. Association for Democratic Reforms & Another	AIR 2002 SC 2112 (2002) 5 SCC 294	10, 16, 61, 329, 338, 374, 387
297.	Union of India v. Central Information Commissioner &Anr	2009 (165) DLT 559	47
298.	Union of India v. Hardev Singh	W.P(C) No.3444/2012 decided on 23.8.2013, Delhi High Court.	504
299.	Union of India v. J. Krishnan	W.P.(C) No. 2651/2012	111
300.	Union of India v. Motion Picture Association	1999 (6) SCC 150	416

Sl. No.	Case Name	Citation	Page No.
301.	Union of India v. R S Khan	AIR 2011 Del 50 2010 [173] DLT 680.	288, 497,
302.	Union of India v. Anita Singh	AIR 2014 Del 23.	504
303.	Union Public Service Commission v. Gourhari Kamila	Civil Appeal No. 6362 of 2013 dated August 6, 2013, Supreme Court of India.	502
304.	Union Public Service Commission v. R.K. Jain	LPA No.618/2012	147, 149, 222, 251, 506
305.	Unknown v. PritamRoaj (Calcutta High Court, 2008)	W.P. No. 22176 (W) of 2007	480
306.	UPSC v. Shiv Shambu and Ors	LPA No. 313 of 2007	51
307.	V. Chamundeeswari v. Department of Revenue	CIC/AT/A/2009/000277	44
308.	V. Madhav v. T.N.	Information Commission, 2012 Mad 5	166-67
309.	V. Tulasamma v. Sessa Reddy	1977 (3) SCC 99	330
310.	V.R. Chandran v. Directorate of Enforcement	CIC/AT/A/2009/000353	48
311.	V.R. Sharma v. Ministry of Labour and Employment	Appeal No. CIC/SG/A/2011/ 000464: Decision No. CIC/SG/A/2011/000464/12432	162
312.	VeereshaBrashtacharaNirmoolana Vedike v. Canara Bank	14/ICA/2006.	465
313.	VibhorDileepBarla v. Central Excise & Customs	CIC/AT/A/2006/00588	32
314.	Vijay Prakash v. Union of India	AIR 2010 Del 7 2009 (82) AIC 583(Del)	146-47, 166, 168,
315.	Vijayalakshmi v. Union of India	W.P.No.14788 of 2011 & M.P.No.1 of 2011	357
316.	Vilnes and others v. Norway	52806/09 and 22703/10, ECHR.	107
317.	Vimleshwari Devi v. Central Information Commission and Ors	AIR 2016 Uttarakhand 7.	503
318.	Vinay Singh Negi v. KendriyaVidyalaya	CIC Appeal No: CIC/DS/A/2011/00230	217

Sl. No.	Case Name	Citation	Page No.
319.	Vinod Bhandari (Dr.) v. State of M.P	2015 SCC Online SC 96.	226
320.	Vinod Bharti v. Pawan Kumar Bhatia	CIC/SG/A/2009/002597/ 5818/Adjunct-I.	426
321.	X v. Hospital Z	Civil Appeal No. 4641 of 1998, decided on September 21, 1998.	16
322.	Youth Initiatives For Human Rights v. Serbia	Application No. 48315/06, ECHR.	107

CONSTITUTION AND RTI

INDIAN CONSTITUTIONALISM ON RIGHT TO INFORMATION

Dr. Sairam Bhat*

Abstract

While there is a specific right to information and right to freedom of the press in the Constitution of India, the right to information has been read into the Constitutional guarantees which are a part of the Chapter on Fundamental Rights. The legal position with regard to the right to information has developed through several Supreme Court decisions given in the context of all of the above rights, but more specifically in the context of the right to freedom of speech and expression, which has been said to be the obverse side of the right to know, and one cannot be exercised without the other. The interesting aspect of these judicial pronouncements is that the scope of the right has gradually widened, taking into account the cultural shifts in the polity and in the society. The Indian Constitution has an impressive array of basic and inalienable rights. These rights can truly said to be the basis for the development of the Rule of Law in India.

The Right to Information Act 2005 seeks to strengthen the constitutional right to know, this paper seeks to trace the judicial background on the right to know under the Constitution while making an attempt to see the establishment of Rule of Law, especially amongst those who govern the State. The country hopes and aspires that the right to know will change the manner, method and mode of public accountability, transparency and responsibility in the Government of India.

Introduction

The Constitution of India is the primary legal document of the country. It is from this document that the various laws of the country derive their legal sanction. The Constitution is differently described as ‘the fundamental law’, ‘the socio-political manifesto of a nation’, ‘the instrument of governance’ and the like, each signifying an important dimension of the document. It is a living thing with a body and a soul; the soul can possibly be found in the Preamble and the Chapters on rights, duties and directive principles of state policy.¹ The Constitution of India is based on the principles that guided India's struggle against a colonial regime that consistently violated the civil, political, social, economic and cultural rights of the people of India. The freedom struggle itself was informed by the many movements for social

* Associate Professor of Law, National Law School of India University, Bengaluru.

1 N.R. Madhava Menon, *The Beauty of the Indian Constitution lies in its flexibility*, available at <http://marketime.blogspot.com/2006/05/beauty-of-indian-constitution-lies-in.html>, (last accessed on May 10, 2016).

reform against oppressive social practices like sati, child marriage, untouchability etc.²

Disclosure of Government Information in India is governed by a law enacted during the British Rule, the Official Secrets Act of 1889 which was amended in 1923.³ This law secures information related to security of the State, sovereignty of the country and friendly relations with foreign states, and contains provisions which prohibit disclosure of non-classified information.⁴ Civil Service Conduct Rules and the Indian Evidence Act put further restrictions on government officials' powers to disclose information to the public.

While there is a specific right to information and right to freedom of the press in the Constitution of India, the right to information has been read into the Constitutional guarantees which are a part of the Chapter on Fundamental Rights. The Indian Constitution has an impressive array of basic and inalienable rights. These rights have received dynamic interpretation by the Supreme Court over the years and can truly said to be the basis for the development of the Rule of Law in India. As pointed out by H.M. Seervai, "Corruption, Nepotism and Favouritism have led to the gross abuse of power by the Executive, which has increasingly come to light partly as a result of investigative journalism and partly as a result of litigation in the Courts".⁵ The legal position with regard to the right to information has developed through several Supreme Court decisions given in the context of all of the above rights, but more specifically in the context of the right to freedom of speech and expression, which has been said to be the obverse side of the right to know, and one cannot be exercised without the other. The interesting aspect of these judicial pronouncements is that the scope of the right has gradually widened, taking into account the cultural shifts in the polity and in the society.

The very fact is that the people are the real entity for which this Constitution was framed. It has been proved by the Preamble itself - "We

2 Dr. Anjana Maitra, *Human Rights and the Indian Constitution*, available at www.boloji.com/perspective/256.htm (last accessed on May 9, 2016).

3 The Official Secrets Act, 1923.

4 World Report: Libraries and Intellectual Freedom (India), International Federation of Library Association and Institutions (1997).

5. Prof. M P Jain, *Indian Constitutional Law* (Wadna and Co. 5th Edition 2005) at P 988.

the People of India...” Therefore, everything has to be tested on the basis of what serves the people of this country. The accountability of the Government for every action taken has to be to the Legislature, which represents the people of the country. There is a symbiotic relationship between good governance, democracy and the right to information. The right to information is a fundamental tenet of democracy. Across the world, the public is demanding more information from their governments to understand the reasoning behind the policymaking and decisions taken on their behalf. Governments are lagging behind in providing this information. Recognizing that a culture of withholding information leads to corruption and all manner of other malpractices that undermine democratic governance, this paper makes the case for a strong constitutionalism for the right to information in India.

From Free Speech and Expression to Right to Know

The expression ‘freedom of speech and expression’ in Article 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as advertisement, movie, article, speech etc. The Supreme Court has given a broad dimension to Article 19(1)(a) by laying down the proposition that freedom of speech involves not only communication, but also receipt of information. Communication and receipt of information are the two sides of the same coin. Right to know is a basic right of the citizens of a free country and Article 19 protects this right.⁶

The development of the right to information as a part of the constitutional law of the country started with petitions of the press to the Supreme Court for enforcement of certain logistical implications of the right to freedom of speech and expression such as challenging governmental orders for control of newsprint, ban on distribution of papers etc. It was through these cases that the concept of the public’s right to know developed. The landmark case regarding the subject of freedom of the press in India was *Bennett Coleman & Co. v. Union of India*.⁷ In this case, the petitioners, a publishing house bringing out one of the leading dailies, challenged the Government’s newsprint policy which put restrictions on acquisition, sale and

6 Ibid.

7 AIR 1973 SC 106.

consumption of newsprint. This was challenged as restricting the petitioner's right to freedom of speech and expression. The Court struck down the newsprint control order saying that it directly affected the petitioner's right to freely publish and circulate their newspaper. In that, it violated their right to freedom of speech and expression. The judges also remarked, "It is indisputable that by freedom of the press meant the right of all citizens to speak, publish and express their views ... Freedom of speech and expression includes within its compass, the right of all citizens to read and be informed." The dissenting judgment of Justice K. K. Mathew also noted.

The freedom of speech protects two kinds of interests. There is an individual interest, the need of men to express their opinion on matters vital to them and a social interest in the *attainment of truth*, so that the country may not only accept the wisest course, but carry it out in the wisest way. Now in the method of political government, the point of ultimate interest is not in the words of the speakers but in the hearts of the hearers.⁸

The basic purpose of the freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know.

Later in 1985, the Lok Sabha Secretariat published the document 'Background to Evolving a National Information Policy'. In this brochure, the Indian press is deemed to have a special relationship with Parliament. 'Most of the raw material for parliamentary questions, motions and debates comes from the daily press and this is an important tool on which a member often relies. In fact, it is generally the press that provides the background needed to bring the work of Parliament in tune with the demands of the times.'

Another development on this front was through a subsequent case *L.I.C v. Manubhai Shah*⁹ in which it was held that if an official media or channel was made available to one party to express its views or criticism, the same should also be made available to another contradictory view. The brief facts of this case were: One Mr. Shah who was also a Director of a voluntary

8 Amitabh Mukhopadhyay, *File notings and Governmentality*, available at http://www.india-seminar.com/2007/569/569_amitabh_mukhopadhyay.htm (last accessed on May 10, 2016).

9 AIR 1993 Sc 171. Also known as Yogakshema case.

consumer rights organisation and had incidentally worked extensively on the right to information, including drafting a Model Bill, wrote a paper highlighting discriminatory practices by the Life Insurance Corporation (LIC) which is a Government-controlled body. LIC published a critique of this paper in its institutional publication, to which Mr. Shah wrote a rejoinder which the LIC refused to publish. The Court held that a state instrumentality having monopolistic control over any publication could not refuse to publish any views contrary to its own. The Supreme Court while upholding the argument observed, “Once it is conceded and it cannot be disputed that freedom of speech and expression includes freedom of circulation and propagation of ideas, there can be no doubt that the right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him”.¹⁰

Discovery of truth is an additional value dimension or objective of freedom of speech and expression. In *Indian Express Newspapers [Bombay] Pvt Ltd v. Union of India*¹¹ J. Venkataramiah propounded fourfold social purposes of free expression: (i) self-fulfilment, (ii) discovery of truth, (iii) strengthening of individual participation in decision-making, (iv) balance between stability and change.¹² In fact, these social purposes address the qualities of good citizenship and equal opportunity for better personality.

In the area of civil liberties, the Courts have built up the right to have a transparent criminal justice system, free from arbitrariness. In *Prabha Dutt v. Union of India*¹³ the Court held that, excepting clear evidence that the prisoners had refused to be interviewed, there could be no reason for refusing permission to the media to interview prisoners in death row.

Repeated violations of civil rights by the police and other law enforcement agencies have compelled the Courts to, time and again, give directions to the concerned agencies for ensuring transparency in their functioning in order to avoid violations like illegal arrests and detention, torture in custody and the like. The Court recognized the right of journalists to interview death convicts, based partly on the right to know and partly on the due

10 See Veena Bakshi, *Right to Reply: A Dissonant Note in the System of Freedom of Expression-Perspective on the Yogakshema case* 1982 1 SCC(J) 1.

11 AIR 1986 SC 515.

12 Affirmed and followed by P B Sawant, J in *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal* AIR 1995 SC 1236.

13 AIR 1982 SC 61.

process right.¹⁴ In cases concerning the right to life and liberty under Article 21 of the Constitution, the Courts have stressed the need for free legal aid to the poor and needy who are, either not aware of the procedures, or not in a position to afford lawyers, and hence unable to avail the constitutional guarantees of legal help and bail.¹⁵ The Courts have said, that it is the legal obligation of the Judge or the Magistrate, before whom the accused is produced, to inform him of that he is entitled to free legal aid if he is unable to engage a lawyer on account of poverty or indigence.¹⁶

Further, the procedural safeguards for arrest and custody were given in *Gopalana v. State of Madras*.¹⁷ Most of these directions translate into the right of the accused or his kin to have *access to information* regarding his arrest and detention such as preparation of a memo of arrest to be counter-signed by the arrestee and a relative or neighbour, preparation of a report of the physical condition of the arrestee, recording of the place of detention in appropriate registers at the police station, display of details of detained persons at a prominent place at the police station and at the district headquarters etc.¹⁸

Developments in administrative law further strengthened this right. In *State of U.P. v. Raj Narain*,¹⁹ the respondent had summoned documents pertaining to the security arrangements and the expenses thereof of the then Prime Minister. The Supreme Court, in examining a claim for privilege of certain documents, summoned the same and gave itself the power to decide

14 See *Sheel Barse v. State of Maharashtra* AIR 1983 SC 378.

15 In the case of *Hossainara Khatun v. State of Bihar* [AIR 1979 SC 1371], the Supreme Court held that the right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held to be implicit in the guarantee of Article 21.

16 Article 39A of the Constitution of India provides that State shall make sure that the operation of the legal system promotes justice on the basis of equal opportunity and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability. Articles 14 and 22(1) also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that the constitutional pledge is fulfilled in its letter and spirit, and equal justice is made available to the poor, downtrodden and weaker sections of the society.

17 1950 SCR 88.

18 See *Hansumukh v. State of Gujarat* AIR 1981 SC 28.

19 AIR 1975 SC 865, at 884.

whether disclosure of certain privileged documents was in the public interest or not. The Court said, “While there are overwhelming arguments for giving to the executive, the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive exclusive power to determine what matters may prejudice the public interest. Once considerations of national security are left out, there are few matters of public interest which cannot be safely discussed in public”. Justice K. K. Mathew went on further to say.

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. The *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. To cover with a veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.²⁰

It was in 1982 that the right to know matured to the status of a constitutional right through the celebrated case of *S P Gupta v. Union of India*,²¹ popularly known as the Judges’ case. This case established the *locus standi* of citizens to raise public interest issues before the Apex Court, by a generous interpretation of the guarantee of freedom of speech and expression. It elevated the *right to know* and the *right to information* to the status of a fundamental right on the principle that certain unarticulated rights are immanent and implicit in the enumerated guarantees. The Court declared, “This is the new democratic culture of an open society towards which every liberal democracy is moving and our country is no exception. The concept of an open government is the direct emanation from the *right to know* which is implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in

20 Ibid.

21 AIR 1982 SC 149.

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.”²² In a country like India which is committed to socialistic pattern of society, *right to know* becomes a necessity for the poor, ignorant and illiterate masses.

In 1986, the Bombay High Court followed the SP Gupta judgment in the well-known case, *Bombay Environmental Group and others v. Pune Cantonment Board*.²³ The Bombay High Court distinguished between the ordinary citizen looking for information and groups of social activists. This was considered a landmark judgment concerning access to information not only by individual citizens, but also by groups and association of persons.

In *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*,²⁴ the Supreme Court reiterated the proposition that the freedom of speech and expression guaranteed by Article 19 includes the right to acquire information and to disseminate the same. Also, in *Dinesh Trivedi, M.P v. Union of India*,²⁵ the Supreme Court dealt with the right to freedom of information and observed, “in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare”. The Court further observed: “Democracy expects openness and openness is concomitant of a free society, and sunlight is the best disinfectant”.²⁶

There have been numerous cases favouring disclosure of governmental information and transparency, but the *State of U.P. v. Raj Narain* was easily one of the strongest formulations of that right in all its manifestations. However, legislative action was not quick or willing enough to give teeth to these important fundamental principles for governance. Due to the lack of a clear legislation on this, people continue to knock on the doors of the Courts every time they want to enforce this right. While the Courts have almost always responded positively, this is obviously not the ideal way for

22 CUTS 1995, *Access to the Constitution - A Neglected Right*, available at <http://www.cuts-international.org/1-1995.pdf> (last accessed on May 10, 2016).

23 Unreported case-Refer Armin Rosencranz and Shyam Divan, *Environmental Law and Policy in India*, (Oxford University Press) p. 143.

24 AIR 1995 SC 1236.

25 [1997] 4 SC 306.

26 Ibid.

securing such a right for the common man. This course, at best, restricts enforcement to the aware and the literate for their own limited concerns. The common citizen has neither the means, nor the time and inclination to get into convoluted legal processes, and even public interest litigation is a tool which can reach only a few.

From Right to Vote to Right to Know the Antecedents of Election Candidates:

The issue whether people have the right to know the antecedents of their election candidates, although evidently emanates from their constitutional right to vote, has hitherto remained unexplored until very recently. Here, at this point in time, reference is to two recent decisions of the Supreme Court rendered in two successive cases—*Union of India v. Association for Democratic Reforms*²⁷ and *Peoples Union for Civil Liberties v. Union of India*,²⁸ when the issue of *right to vote* with *right to know* was considered for the first time in the constitutional history of electoral reform.

First and foremost, constitutional strategy is the one that empowers the Court to make the State responsive to people's *right to know* the antecedents of their election candidates. This was done quite ingeniously by linking the people's right to vote under Article 326 with the Fundamental Right to speech and expression contained under Article 19(1)(a) of the Constitution.²⁹ Article 326 provides for the elections to the House of the People and to the Legislative Assemblies of the states on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than 18 years of age on a stipulated date,³⁰ and is not otherwise disqualified under the Constitution or under any law made by the appropriate legislature on the grounds of non-resident, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to vote at any such election. However, mere recognition of the existence of the right to vote is not enough. Its true meaning lies in the manner in which it is exercised. In functional terms, this means that a corresponding duty lies on

27 AIR 2002 SC 2112, per M B Shah, Bisheshwar Prasad Singh and H K Sema JJ.

28 AIR 2003 SC 2363, per MB Shah, P VenkataramaReddi and DM Dharmadhikar JJ.

29 Virendra Kumar, *People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies*, Indian Law Institute, April-June 2005, p. 139.

30 Substituted by the Constitution [Sixty-first Amendment] Act, 1988, Section 2 for 'twenty-one years' [w.e.f. 28-3-1989].

the election candidates to reveal the relevant information about themselves to the voters. But how to enforce this duty was the crucial question?

The Delhi High Court in *Association for Democratic Reforms v. Union of India*,³¹ has emphasised that the right to receive information acquires great significance in the context of elections. The above case arose in the context of implementation of certain recommendations made by the Law Commission of India in its 170th Report that hitherto had remained dormant. The Commission made, *inter alia*, three related recommendations:³² First, debarring candidates from contesting elections if charges were framed against them by a Court in respect of certain offences; second, directing the election candidates to furnish details regarding criminal cases pending against them in the Courts, if any; and third, requiring the election candidate to file a true and correct statement of assets owned by them or their spouses and dependant relations.

Thus, directing the Election Commission to secure for the voters the following information, the Court held that a citizen has the right to know:

1. Whether the candidate is accused of any offence punishable with imprisonment.
2. Assets possessed by the candidate, his or her spouse and dependant children.
3. Facts denoting the candidate's competence and suitability for being a parliamentarian. This should include the candidate's educational qualification.
4. Any other relevant information regarding candidate's competence to be a member of Parliament or State Legislature.

As the Court has said, "... Since the future of the country depends upon the power of the ballot, the voters must be given an opportunity for making an informed decision."Exercise of the informed option to vote in favour or

31 AIR 2001 Del. 126.

32 At the behest of the Government of India, the Law Commission made a comprehensive study of the measures required to expedite hearing of election petitions. The Commission also intended to have a thorough review of the provisions of the Representation of the Peoples Act, 1951, for removing distortions and evils that had crept into the Indian electoral system, and recommend measures for its improvement.

against a candidate will strengthen democracy in the country and root out the evil of corruption and criminality at present extent in politics.

On appeal, the Supreme Court held that democracy cannot survive without free and fairly informed voters. The Court observed:

“...one-sided information, disinformation, misinformation and non-information will equally create an uninformed citizenry which makes democracy a farce...Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions.”³³

The Court has ruled that candidates for Lok Sabha or State Legislative Assemblies would have to disclose their antecedents, assets and educational qualifications to help the electorate make the right choice. The Court has said: “Votes cast by uninformed voters in favour of a candidate would be meaningless.” The common man may think twice before electing law-breakers as law-makers. Reiterating that law-makers are public servants and, therefore, the people of the country have a right to know about every public act by public functionaries, including MPs and MLAs, who are public functionaries. Rejecting the argument that the voters do not have a right to know about the ‘private’ affairs of public functionaries, the Court has observed:

“There are widespread allegations of corruption against persons holding post and power. In such a situation, the question is not of knowing personal affairs, but to have openness in democracy for attempting to cure the cancerous growth of corruption by a few rays of light.”

The Court has said that the Election Commission must make it mandatory for the candidates to give details on the following counts:

- Whether the candidate is convicted or acquitted or discharged of any criminal offence in the past? Whether he has been punished with imprisonment or fine?
- Prior to six months of filing of nomination, whether the candidate has been accused in any pending case, of any offence punishable with imprisonment for two years or more. Whether charge is framed or cognisance is taken by the Court of law? If so details thereof;

33 Union of India v. Association for Democratic Reforms, JT 2002 (4) SC 501.

- The assets [immovable, movable, bank balances etc.] of a candidate and of his/her spouse, and that of dependants;
- Liabilities, if any, particularly whether there are any overdue of any public financial institutional dues or government dues;
- The educational qualification of the candidate.³⁴

It will be appreciated that the judiciary has used its craftsmanship to harness the right to information to achieve an extremely laudable social objective, viz. that of preventing criminalisation of the Indian politics.³⁵

Based on the orders of the Court the Election Commission was directed to call for information on affidavit by issuing necessary order in exercise of its power under Article 324 of the Constitution from each candidate seeking election to Parliament or a State Legislature as a necessary part of his nomination paper. A perusal of these directions shows that, thenceforth, all the candidates seeking elections are obliged to file information regarding their criminal background, pending criminal cases against them, their assets and liabilities, and also their educational qualifications.

The Government instantly responded and reacted to this initiative of the Supreme Court by promulgating an ordinance - The Representation of the People [Amendment] Ordinance, 2002 on 23.10.2002. The legislative response or reaction is contained mainly in Sections 33-A and 33-B of the amended Act of 1951.

Sec 33-A, dealing with the right to information, provides³⁶

1. A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made there under, in his nomination paper delivered under sub-Section (1) of Section 33, also furnish the information as to whether-
 - i. he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the Court of competent jurisdiction,

³⁴ Jurisprudentially, it is invoking the right-duty relationship; that is, if the voter has the right to know the details about the contesting candidates, the corresponding duty lies upon them to furnish the same to the voter.

³⁵ Supra, note 5, p. 990.

³⁶ Inserted by Act 72 of 2002. Section 2.

- ii. he has been convicted of an offence and sentenced to imprisonment for one year or more.
2. The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-Section(1) of Section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified.
3. The returning officer shall, as soon as may be after the furnishing of information to him under sub-Section (1) display the aforesaid information by affixing a copy of the affidavit, delivered under sub-Section(2) at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.

The extent of this right to information is limited under Section 33-B which specifically requires a candidate to furnish information only as provided under the Act and Rules.³⁷ It opens with a *non-obstante* clause:

Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order of any Court or any instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.³⁸

The parliamentarians have to be like Caesar's wife, above suspicion. They must voluntarily place themselves open to public scrutiny through a parliamentary ombudsman. Supplemented by a code of ethics which has been under discussion for a long time, it would place Parliament on the high pedestal of people's affection and regard. Right to information should be guaranteed and needs to be given real substance. The Prevention of Corruption Act, 1988 should be amended to provide for confiscation of the property of a public servant who is found to be in possession of property disproportionate to his/her known sources of income and is convicted for the said offence.³⁹

37 Ibid., Section 3.

38 Virendra Kumar, *ILI*, p. 153.

39 Amit Abhyankar, Review of the Indian Constitution: Need and Extent, available at <http://amitrahul.wordpress.com/2006/09/12/review-of-indian-constitution-the-need-extent/> (last accessed on May 10, 2016).

From Right to Environment to Right to Know Environmental Information

Improving the availability of information on the state of the environment and on activities which have adverse or damaging effects are well established objectives of international environmental law. Information is recognised as a prerequisite to effective national and international environmental management, protection and co-operation. The availability of, and access to information allows prevention and mitigation measures to be taken, ensures participation of citizens in national decision-making processes, and influences consumer behaviour. There are numerous reasons for involvement of the public in decision-making processes. From a human rights perspective, people have the right to be involved in decisions that affect them and their environment. Public participation seeks to ensure that members of the public have the opportunity to be notified, to express their opinions and ideally to influence the decisions regarding projects, programmes, policies and regulation that could affect them. Public participation is the privilege of citizens.

The Rajasthan High Court, in the matter of *L.K. Koolwal v. State of Rajasthan*⁴⁰ which challenged the negligence of the city administration for not ameliorating the unhygienic conditions prevailing in Jaipur city, said: “Citizen has a right to know about the activities of the State. The privilege of secrecy, which existed in the old times, that the State is not bound to disclose the facts to the citizens or that the State cannot be compelled by the citizens to disclose the facts, does not survive now to a great extent. Under Article 19(1)(a) of the Constitution, there exists the right of freedom of speech. Freedom of speech is based on the foundation of the freedom of the right to know. The State can impose and should impose reasonable restriction in the right where it affects the national security or any other matter affecting the nation’s integrity. But that right is limited and particularly in the matter of sanitation and other allied matters, every citizen has a right to know how the State is functioning and why the State is withholding such information in such matters”.⁴¹

Moreover, the Ministry of Environment & Forests of the Government of India itself published a booklet in 1993 advocating the citizens’ right to

40 AIR 1988, RAJ 2.

41 P M Bakshi, *The Constitution of India* (Universal Law Publishing Co, 2004) at p. 41.

know based on a public interest litigation involving urban zoning plans in Pune Cantonment area. In an appeal concerning the case, *Bombay Environmental Action Group and others v. Pune Cantonment Board*,⁴² decided by the Bombay High Court, the Supreme Court ruled:

We would also direct that any person residing within the area of a local authority or any social action group or interest group of pressure group shall be entitled to take inspection of any sanction granted or plan approved by such local authority in construction of buildings along with the related papers and documents if such individual or social action group or interest group or pressure group wishes to take such inspection, except of course in cases where in the interests of security of such inspection cannot be granted.

Finally, in *M.C. Mehta v. Union of India*⁴³ wherein the noted environmental lawyer sought directions propagating education on environmental pollution to the people through the Government-controlled mass media, the Apex Court ruled: “We are a democratic polity where dissemination of information is the foundation of the system. Keeping the citizens informed is an obligation of the Government.”⁴⁴

From Right to Privacy to Right to Information: Balancing the two rights under Article 21

Right to privacy is a fundamental right read into Article 21 of the Indian Constitution. The Supreme Court observed, “A citizen has a right to safeguard the privacy of his/her own, family, marriage, procreation, motherhood, childbearing and education among other matters. No one can publish anything concerning the above matters without his consent-whether truthful or otherwise, and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and could be liable in an action for damages.”⁴⁵ However, the Court admitted that the position was different when a person is a Public Officer or has himself thrustured into a controversy of public gaze.

42 Unreported case-Ref. Armin Rosencranz and Shyam Divan, *Environmental Law and Policy in India*, (Oxford University Press) p. 143.

43 AIR 1992 SC 382.

44 Supra note 22.

45 Auto Shankar case. AIR 1995 SC 264 at p. 276 para 29(1) per Jeevan Reddy J.

In *R. Rajagopal v. State of Tamil Nadu*⁴⁶ [Auto Shankar Case], the conflict between right to know over the right to privacy was substantiated by the Supreme Court. The question involved whether Government or public officials could impose prior restraint upon the press to prevent publication which may be defamatory. Making a clear distinction between right to know on private person and that of a criminal in public interest, the Court held that right to information in public matters has substantial, legitimate and overriding interest.⁴⁸ Thus, the extent of right to know determines the parameters of right to privacy. However, it is submitted, it is essential that with the same token of right to know and right to communicate, the right to privacy of affected party should also be recognised.⁴⁸

On the aspects of medical confidentiality, the Supreme Court has held that if a prospective spouse has an apprehension that the other [prospective] spouse is suffering from AIDS, the former has a right to seek information about the latter's disease from the hospital where blood reports of the latter are available. This right is part of the right to life.⁴⁹

Another jewel in the crown is a ruling given by the Apex Court that confirmed the right of an individual to know the HIV status of his/her prospective spouse. In *'X' v. Hospital 'Z'*,⁵⁰ the SC went a long way to safeguard the life of innocent brides.

The issue was whether a would-be wife of an HIV-positive man had the right to know his HIV-positive status. For the first time, the Supreme Court of India held that the HIV status of an individual can be disclosed to any person who is at risk of being infected by the said disease. The SC observed that Ms. 'Y', with whom the marriage of the HIV-positive person was settled, was saved in time by the disclosure of the vital information that the person was HIV-positive. The disease which was communicable would have been positively communicated to Ms. 'Y' immediately on the consummation of marriage. As a human being, Ms. 'Y' was entitled to all the human rights available to any other human being. This is apart from, and in addition to, the fundamental rights available to her under Article 21, which

46 Ibid.

47 Dr. P Ishwara Bhat, *Fundamental Rights: A Study of their Interrelationship* (Eastern Law House, New Delhi, 2004) at p. 375.

48 Also see Right to Privacy in *Govind v. State of M. P* AIR 1975 SC 1378.

49 *TokughaYephthomo [Dr.] v. Apollo Hospital JT* (1998) 7 SC 626.

50 Civil Appeal No. 4641 of 1998, decided on September 21, 1998.

guarantees 'right to life' to every person in this country. This right would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease which was sexually communicable. Since 'right to life' included right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition, the healthcare provider, by his disclosure that the person was HIV-positive, cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy.

The Apex Court further held that where there was a clash of two fundamental rights, as in the said case, namely, the HIV-positive person's right to privacy as part of right to life and Ms. Y's right to lead a healthy life which is her fundamental right under Article 21 of the Constitution, the right which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral considerations cannot be kept at bay in the court room, but have to be sensitive, in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day.⁵¹

Reasonable Restriction to the Right to Know

The Constitution is, no doubt, the primary document from which all other laws derive their legal sanction. As a document, it sets out the general legal parameters within which the country's legal system must function. If one probes the reasons why access to information is being denied, one is inevitably presented with the argument that the restriction is in the interests of the defence of the country. As it stands, this is a defence that has constitutional support. The provisions of Article 19(2) of the Constitution of India clearly states that the right to freedom of speech and expression must be subject to reasonable restrictions on a variety of grounds, one among which is in the interests of the sovereignty and integrity of India and the security of the State. The Government or any department of the Government could, on the basis of this provision, validly deny any citizen right to access this information if it is deemed that if such information were to be disclosed, such disclosure may compromise the security and integrity of the State.

51 Dr. Gopinath Shenoy, *Medical Law: Three Jewels in the Crown*, available at <http://www.expresshealthcare.in/200801/coverstory18.shtml> (last accessed on May 10, 2016).

No citizen has the power to question why or on what grounds any information that he/she has sought was denied. One would have to be satisfied with the decision of any government official who claims that the information sought is being denied in the interests of the security of the State. However, the Courts do have the power, for the limited purpose of determining whether or not the executive has exercised its discretion appropriately, to examine the nature of the information withheld as well as the grounds for so withholding the information.⁵²

However, there are various statutes that discuss with in more detail, specific areas of governance and regulation. Several such statutes impose restrictions on the free access to information. It may be useful to examine some of these statutes to understand the extent to which freedom of information is provided under the legal system of this country.

The most maligned statute in this context is the Official Secrets Act, 1923 which the government functionaries often lean upon to justify their decisions to deny information. However, a brief review of the provisions of this Act indicates that it deals largely with issues such as espionage, entry into prohibited places, use or control of secret official codes or other acts that result in the communication of information to enemy agents or enemy States. This hardly appears to be the catch-all statute that is brandished as the sole reason for denial of information. However, a closer look at the provisions of the statute indicates that the mischief lies in the manner in which the law has been drafted. In many places, the language used in the statute allows the widest interpretation of provisions, thereby permitting its misuse by government officials who could use the wide letter of the law to subvert its relatively narrow spirit.

While there are various such statutes that impose such restrictions on the freedom of access to information, perhaps one enactment whose provisions merit discussion is the Atomic Energy Act, 1962. Though this statute does not deal with geographical data, it does impose restrictions on the utilisation and dissemination of information relating to atomic energy or atomic power plants, and the reason why it calls for discussion is the exclusion clause that is spelt out in Section 18(3)(ii). Under that Section, the Act clearly excludes from the purview of the restrictions set out in the rest

52 Rahul Matthan, *The Right to Information regarding the Geographic Data*, available at <http://www.gisdevelopment.net/policy/india/technology/intech013.htm> (last accessed on May 10, 2016).

of the enactment, those items of information which have already been made available to the general public otherwise than as a result of a contravention of the provisions of the Atomic Energy Act. This is a statutory affirmation of the principle that finds its way into most contracts – the exclusion of public domain information from the restrictions on confidentiality.⁵³

A reasonable restriction on the exercise of the right is always permissible in the interest of the security of the State. The operation and functioning of a nuclear plant is, of course, sensitive in nature. Any information relating to the training features, processes or technology cannot be disclosed as it may be vulnerable to sabotage. Knowledge of specific data may enable the enemies of the nation to estimate and monitor strategic activities. As fissile materials are used in fuels, though the nuclear plants are engaged in commercial activities, the contents of the fuel discharged or any other details must be held to be matters of sensitive character. If a reasonable restriction is imposed in the interests of the State by reason of a valid piece of legislation, the Court normally would respect the legislative policy behind the same.⁵⁴

Section 18 of the Atomic Energy Act, 1962 empowers the Central Government to restrict disclosure of certain information to the public and the constitutionality of the said provision was challenged in *People's Union of Civil Liberties v. Union of India*.⁵⁵ The Apex Court, having regard to the purport and object of the Act, held that the provisions of Section 18 cannot be said to have bestowed unguided and unchanneled powers on the Central Government. Sections 3 and 18 of the Atomic Energy Act had to be enacted by the Parliament as the information in the wrong hands can pose a danger not only to the security of the State but to the public at large. The statutory scheme contained in the provisions of the Act, the rules framed thereunder, and the composition of the Atomic Energy Commission and Atomic Energy Regulatory Board (AERB) leave no manner of doubt that the effective functions of the nuclear power plants are sensitive in nature. The functions of the Board are varied and wide. Out of certain functions of the Board, some have been marked as 'Secret' which fulfilled the statutory criteria laid down under Section 18 of the Act.

53 Ibid.

54 D J De, *The Constitution of India* (Asia Law House, 2nd Ed.) p. 704.

55 AIR 2004 SC 1442.

Restrictions, as regards the disclosure of information as mentioned in Section 18, are not vague or wide in nature. It specifies the areas where such disclosures are prohibited. The Court further observed that every right-legal or moral - carries with it a corresponding objection. It is subject to several exemptions/exceptions indicated in broad terms. Generally, the exemptions/exceptions under those laws entitle the Government to withhold information relating to the following matters:

- i. International relations;⁵⁶
- ii. National Security [including defence] and public safety;⁵⁷
- iii. Investigation, detection and prevention of crime;⁵⁸
- iv. Information received in confidence from a source outside the Government;⁵⁹
- v. Internal deliberations of the Government;⁶⁰
- vi. Information which, if disclosed, would violate the privacy of individuals;⁶¹
- vii. Information of an economic nature [including trade secrets] which, if disclosed, would confer an unfair advantage on some person or concern, or, subject some person or Government to an unfair disadvantage;⁶²
- viii. Information which is subject to a claim of legal or professional privilege, e.g., communication between a legal adviser and the client, between a physician and the patient;⁶³
- ix. Information about scientific discoveries.⁶⁴

The restriction on the disclosure of information as provided under the Act was held reasonable.⁶⁵

56 A similar restriction is found in the Right to Information Act, 2005, Section 8(1)(a).

57 Ibid., Section 8(1)(a).

58 Ibid., Section 8(1)(h).

59 Ibid., Section 8(1)(f).

60 Ibid., Section 8(1)(i).

61 Ibid., Section 8(1)(j).

62 Ibid., Section 8(1)(d).

63 Ibid., Section 8(1)(e).

64 Ibid., Section 8(1)(d).

65 Union of Civil Liberties v. Union of India AIR 2004 SC 1442.

Advocacy on this issue using the legal process has become more focused with citizens' petitions for directly enforcing the right to information being filed more and more frequently. Environmental groups have sought the right to know from the Government, crucial facts concerning the environmental details of development projects.

These developments have won half the battle for the right to information, as the basic principle that the right to information is a fundamental right has been so firmly entrenched, that the likelihood of its complete subversion by the Government is today practically nil. Advocates for the right in India, have therefore concentrated their energies towards the practical operationalising of the right, the main thrust of which has been to mobilise people to use this right and to get a legislation which gives it a workable shape.⁶⁶ The legal developments also indicate how the right to information can be merged with other issues to get accountability and transparency for a variety of governmental actions.

The right to know is not simply the right of any individual victim or closely related persons to know what happened, but a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume in order to guard against the perversions of history that go under the name of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.⁶⁷

International Comparative Analysis

Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people - it is an essential part of good government. In 1946, in its first Session, the UN General Assembly adopted Resolution 59(1) which stated: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to

66 The MKSS movement in Rajasthan is an example of implementing RTI practically in the functioning of Panchayats.

67 K G Kannabiran, *Impunity impairs Indian Constitution*, COMBAT LAW, Vol 6, Issue 4, August 2007.

which the UN is consecrated.” This UN General Assembly Resolution declared people’s right to access official information. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) which guarantees freedom of opinion and expression: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” The International Covenant on Civil and Political Rights (ICCPR) was adopted by the General Assembly in 1966. This guaranteed: “a) Everyone shall have the right to freedom of opinion; b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice; and c) The exercise of the rights ...carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.”⁶⁸

The USA passed its Freedom of Information Act in 1966. The concept of a right to know can be traced at least as far back as March 1962 when President Kennedy sent Congress “A Special Message on Protecting the Consumer Interest”, declaring four basic consumer rights - the right to safety, the right to be informed, the right to choose and the right to be heard. Since that time, the right to know has become a cornerstone both in U.S. legislation and the American psyche. In the mid-1970s, during the Watergate scandal, the right to know became associated with freedom of the press and citizen access to information about government activities. In the 1980s, the phrase was utilised by the labor movement, with proponents claiming that employees had a right to know about hazardous substances in the workplace. Responding to such concerns, local governments passed community right to know laws designed to protect both workers and residents. In October 1986, prompted by the Union Carbide chemical disaster in Bhopal, India, the Government passed the Emergency Planning and Community Right-to-Know Act. California's Proposition 65, another landmark right to know law passed in the 1980s, was enacted to alert citizens to the presence of carcinogens, including those found in consumer products.⁶⁹

68 Refer Article 19 of the Convention.

69 Steve Keane, *Can a consumer's right to know survive the WTO? The case of food labelling*, UNIVERSITY OF IOWA, TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS, 2006.

After the USA, nearly 56 countries have already enacted laws giving their citizens Right to Information.⁷⁰ In Asia, Philippines recognised the right to access information held by the State relatively early, passing a Code of Conduct and Ethical Standards for Public Officials and Employees in 1987. A Code on Access to Information was adopted in Hong Kong in March 1995, and in Thailand, the Official Information Act came into effect in December 1997. In South Korea, the Act on Disclosure of Information by Public Agencies came into effect in 1998, and in Japan, the Law Concerning Access to Information held by Administrative Organs was enacted in April 2001.

Conclusion

Right to know strengthens participatory democracy. Also, as armed with information on Government programmes, citizens may influence decision-making through representation, lobbying and public debate.⁷¹ Public access to Government information enables citizens to exercise their political options purposefully. A Government that conceals its actions and policies from the people who are affected by such actions and policies cannot be properly judged by the people and cannot be held accountable for its misdeeds. Moreover, government in modern welfare states exercise vast power that affects economic interests and impinges on a citizen's liberty. These powers are susceptible to misuse by the executive for private gains. Thus, the right to be informed of public acts can help check the abuse of executive power. Likewise, access to Government records, can better equip a public-spirited litigant, particularly environmental groups to fight cases of environmental degradation and clearly establish where does public interest lie.⁷²

Francis Bacon pointed out not so long ago, "Knowledge itself is power".⁷³ The new era shall be defined by our process of governance, and it will be an era of performance and efficiency, an era which will ensure that benefits

70 Most these countries are in North America, most countries of Europe, U.K, Australia, Columbia, Peru and Japan.

71 Supra note 19.

72 G.S. Tiwari, *Conservation of Biodiversity and Techniques of People's Activism*, JOURNAL OF THE INDIAN LAW INSTITUTE, April-June 2001 Vol 43(2) at P 216.

73 Joseph E Stiglitz, *Globalizing Rights; The Oxford Amnesty Lectures On Liberty, the Right to Know and Public Disclosure: The Role of Transparency in Public Life* (Oxford University Press, 1999).

and growth reach all sections of our populace, an era which will eliminate that scourge of corruption, an era which will bring the common man's concern to the heart of all processes of governance and a will to truly fulfil the hopes of the Founding Fathers of our Republic. The Indian Right to Information Act, 2005 is an important piece of legislation to bring in changes in the Constitution as well as the society at large. It is hoped that this legislation will change the facet of constitutionalism of the Indian democracy in the coming years. In a democracy, people are the masters. Government exists to serve them, people have a right to know how they are being governed. Recently in India, people wanted to intensify the process of paradigm shift from State-centric to citizen-centric model of developing the Right to Information Movement in India.⁷⁴ In 2005, the Parliament of India passed the Right to Information Act which empowers all the citizens with the right to access information held by public authorities. This right can be exercised on the payment of fees, and in case of deliberate failure to provide the information, the Public Servant can be penalised with a fine upto Rs.25,000/-. The country hopes and aspires that the *right to know* will change manner, method and mode of public accountability, transparency and responsibility in the Government of India.

* * * * *

74 Available at www.parivartan.com/rti.asp (last accessed on May 10, 2016).

AMBIT AND SCOPE OF THE RTI ACT

A COMPARATIVE PERSPECTIVE

Trinadb Kumar Potina* & Shivam Jaiswal**

Abstract

The Right to Information Act, 2005 is widely hailed to be one of the best enactments concerning the Freedom of Information Acts passed the world over with an excellent implementation record. The soul of the RTI Act can best be understood by a glimpse of its Preamble- "Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed". Keeping this goal in mind this paper would strive to describe the ambit and scope of the RTI Act by categorizing the relevant provisions of the Act under 4 distinct blocks. The first block includes all those provisions that talk about the Right to Access which includes all the relevant provisions that talk about the 'information', 'public authority', 'record', 'right to information' under Sections 2 and 3. The last decade of the implementation of RTI Act has seen a deluge of judgments both by the State Information Commissions, the Central Information Commission and the various High Courts and the Supreme Court delving deep into what constitutes information, public authority, record, and which information the citizens have their right over for disclosure. The second block includes those provisions that deal with the Procedural Guarantees that ensure that an application to the PIO seeking information that can be disclosed under this Act is efficiently and effectively disposed of. We want to throw some light on the elaborate procedures and guidelines that have been listed out on the duties and responsibilities of each and every authority responsible for handling and disclosing information. The third block deals with provisions related to exceptions from disclosing the information which are primarily listed out in Sections 8, 9, 10, 11 and 24. However, a distinct feature of the RTI Act is that all these exceptions come with some provisos under which the information exempted can be disclosed under certain circumstances. Our paper would throw some light on some of the case laws related to one of the prime reason for overruling the exemption clause viz., 'The Larger Public Interest'. The fourth block deals with the provisions related to Appeals, Sanctions and Protections. Section 19 of the RTI Act gives statutory guarantee that grievances that arise out of non-disclosure of information have been adequately taken care of by suitable appellate authorities that extend to the Central Information Commission and further, under various writ petitions, to the High Courts and the Supreme Court. It also lists the sanctions in the form of penalties and disciplinary proceedings on erring officials as enlisted in Section 20 and also the protections against prosecution to officials who acted in good faith. Our paper wants to substantiate with

* L.L.B candidate (Class of 2017) at the Campus Law Centre, Faculty of Law, University of Delhi.

** L.L.B candidate (Class of 2018) at the Law Centre-II, Faculty of Law, University of Delhi.

relevant case laws regarding where the RTI Act has indeed helped citizens realize the principles enshrined in the Preamble listed above. We also want to give a glimpse into the challenges confronting the RTI Act and also suggest ways to move forward.

Introduction

Freedom of information has its roots in the Freedom of speech, Freedom of press and Freedom of expression. To understand the concept of freedom of information precisely, one has to delve at-least peripherally into the difference between all the freedoms.

Difference between Freedom of Speech, Freedom of the Press, Freedom of Expression and Freedom of Information

Though the four freedoms enunciated above are often used interchangeably, Martin¹ says that it is essential to understand them as separate entities since they are not identical. In his words, Freedom of speech addresses the ability of individuals to communicate ideas and information without interference from the state. Freedom of press includes the absence of prior restraint on the voice of the press. While freedom of speech and freedom of press may often be synonymous, there can be instances where there is a contradiction between the two. Freedom of expression though similar to freedom of speech, is a much broader and expansive notion. It includes the freedom to speak, write, print and publish. It may also protect the communication of ideas or opinions through purely physical acts. Freedom of information is a completely different notion from the above three stated kinds of freedom viz., freedom of speech, press and expression. It means the ability of individuals to gain access to information held by or in the possession of the state.

In short, access to information means the ability of individuals to seek and receive information and their right to be informed on the past, present and future activities of their State.

History of the Freedom of Information Laws the World over

The history of the Freedom of Information laws dates back to almost 250

1 Kailash Kumar, A Brief Overview of the Right to Information in India and its Judicial Aspects, INTERNATIONAL MULTIDISCIPLINARY RESEARCH JOURNAL, Vol III Issue IX March 2014 at 1; quoting Martin, 'Media Law', as cited in Rodney D. Ryder, Right to Information: Law-Policy Practice (2006) at p 6.

years when Sweden enacted the law in 1766² (Freedom of Press Act) essentially to enable the parliament have access to information held by the King. Colombia's 1888 Code of Political and Municipal Organization gave its citizens the right to request documents held by government agencies in government archives. Finland was the next to enact a legislation in 1951, followed by the USA (1967), Denmark (1970), Norway (1970), France (1978), the Netherlands (1978), Australia (1982), Canada (1982), New Zealand (1982), Greece (1986), Austria(1987), Italy(1990) etc. India enacted the RTI Act in 2005 which gave its citizens a statutory right to access information which is held by or under the control of any Public Authority. By 2013, over 95 countries including countries with conservative regimes like Jordan (Guarantee of Access to Information, 2005), China (Regulations of the People's Republic of China on Open Government Information, 2007) and Nepal (Right to Information Act, 2007) have enacted some form of Freedom of Information legislations.

Since the dawn of the new millennium most countries have embraced the use of the phrase Right to Information (hereinafter referred to as RTI) instead of Freedom of Information (hereinafter referred to as FOI) and the term RTI has become the common parlance these days. Numerous international bodies such as the United Nations, the Commonwealth, regional human rights bodies and mechanisms at the Organization of American States, the Council of Europe and the African Union have recognized authoritatively this fundamental human right to access information as well as the need for effective domestic legislations to secure compliance for that right in practice. Even intergovernmental organizations like the United Nations Development Programme (UNDP) and the World Bank have brought out policies on FOI and are pioneering the cause of promoting this right among similar organizations.³

Central to all the RTI legislations is the principle that the information held by the public bodies is not for themselves but for the public and if the vast amount of information held by these bodies is kept secret it would seriously undermine the fundamental right to freedom of expression (which includes

2 Dr Hans Born, Ms Marina Caparini (Ed), *Democratic Control of Intelligence Services* (Ashgate Publishing Limited, 2007), at p 218.

3 Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (UNESCO Press, 2008, Second Edition) at p 2.

the right to seek, receive and impart information and ideas) guaranteed under international law as well as most constitutions.⁴

RTI In India

The genesis of Right to Information in India

The genesis of Freedom of Information in India can be traced to the freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution which was adopted from Article 19 of the Universal Declaration of Human Rights (UDHR), 1948. The Apex Court by dint of numerous judicial pronouncements unanimously upheld the Right to Information as a Fundamental Right. In *S.P Gupta v. Union of India*,⁵ the Hon'ble Supreme Court (hereinafter referred to as SC) through generous interpretation of the Right to Freedom of Speech and Expression elevated the 'Right to know' and the 'Right to Information' to the status of a fundamental right on the principle that certain unarticulated rights are imminent and implicit in the enumerated guarantees. The SC also held that, "open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception." In *People's Union for Civil Liberties v. Union of India*,⁶ a division bench of the SC held that "Right to information is a facet of the Freedom of 'Speech and Expression' as contained in Article 19(1)(a) of the Constitution and thus is an indisputable Fundamental Right". In *Secretary, Ministry of Information and Broadcasting, Govt. of India v. The Cricket Association of Bengal*,⁷ the SC held that "Freedom of Speech and Expression includes the right to acquire information and disseminate it". In *Bennet Coleman and Co. v. Union of India*,⁸ it was held that the Constitutional guarantees for the Freedom of Speech is for the benefit of the people and it includes within its ambit the right of all citizens to read and be informed. This concept was later elaborated by the SC in *State of U.P v. Raj Narain*⁹ wherein it was held that people must be kept informed of the important decisions taken by the government to ensure their continued participation in the democratic process.

4 Ibid.

5 (1981) Supp SCC 87.

6 AIR 2004 SC 1442.

7 (1995) 2 SCC 161.

8 AIR 1973 SC 60.

9 (1975) 4 SCC 428.

In spite of the numerous precedents from the SC, an individual outside the litigation still has no right to ask for information from any public authority. Though India had ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979 which mandates that everyone shall have the right to receive information, it could not enact a law in this regard until when in the early 1990, the Mazdoor Kisaan Shakti Sangathan (MKSS) of Rajasthan pioneered the fight for the RTI in India based on two main demands; the first being the demand for the amendment of the draconian Official Secrets Act, 1923 and the second being the demand for an effective piece of legislation for the RTI.

The steps towards a national level enactment for RTI

National Campaign on Peoples' Right to Information (NCPRI) spearheaded the demand for a national law for RTI which resulted in the passing of the Freedom of Information (FOI) Bill, 2000 in the Parliament in 2002. The bill was not notified and hence it never came into effect. There was a change of government at the centre in 2004 with the UPA at the helm. The National Advisory Council which was set up to oversee the implementation of the Common Minimum Programme (CMP) of the UPA Government took a close interest in RTI. The pressure from the civil society groups and many other factors ultimately led to the enactment of the Right to Information Act in India, which came into effect from 12th October, 2005.

The Right To Information Act, 2005

The Preamble

The heart and soul of the RTI Act lies in its Preamble wherein the objectives and the goals of the Act have been neatly summarized. The Preamble says that it is an Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities and that its aim is to promote transparency and accountability in the working of every public authority. It extends to say that democracy requires informed citizenry and transparency of information which are vital to its functioning and sets the goals of the Act as to contain corruption and to hold Governments and their instrumentalities accountable to the governed. The Preamble also sets out as one of the goal, the necessity to harmonize the interests that are in conflict with the revelation of the information such as efficient operations of the Government, optimum use of the limited fiscal resources and the

preservation of sensitive confidential information while preserving the significance of the democratic ideal.

It appears from a bare reading of the Preamble that the Act aims at setting up an efficient and expedient regime for furnishing information to the citizens who desire to have it. This, the Preamble says, is for preserving the significance of the democratic ideal that the information held by the public bodies is not for themselves but for the public and that empowering the citizens to be informed by having access to all possible information held by public authorities (barring disclosure of such information that would conflict with legitimate interests) ensures the transparency in the running of the State and its machinery.

The Provisions of the RTI Act, 2005

The RTI Act, 2005 (as amended in 2014) contains 31 sections with two schedules. Together with The Central Information Commission (Management) Regulations, 2007 and The Right to Information Rules, 2012, it is one of the most comprehensive FOI enactments with well laid out provisions for disclosure of information to the people. It has a duality in its organizational structure both for the disclosure of information like the appointment of Central and State Public Information officers and for the redressal of grievances like the establishment of Central and State Information Commissions which are independent and autonomous in their functioning. It mandates all public authorities to develop and implement a regime of proactive publication of documents, incorporates strong promotional measures for effective disclosure of information and has a much narrower spectrum of exceptions that deal with non-disclosure of information. In the ten years of its existence, the RTI Act, 2005 has an excellent implementation record and is considered to be one of the most progressive and empowering legislations in independent India. The provisions of the RTI Act, 2005 can broadly be classified into four blocks namely

- a) The Right to Access;
- b) The Procedural Guarantees;
- c) The Exceptions; and
- d) The Appeals, Sanctions and Protections.

This paper will delve into some of the most important provisions under each block substantiated by some of the landmark judgments delivered by

the CIC, various High Courts and the Apex Court.

Provisions related to the Right to Access to Information

Section 3 of the RTI Act says that subject to provisions of the Act, all citizens of India shall have a right to information. Two points to be noted from this section is that this section entitles only citizens to have RTI and as is the common parlance in other statutes of the land, the word **'shall'** signifies that the Act provides **statutory guarantee** in the form of a right to the citizens to have access to information.

Section 2(j) describes in detail as to what information the Citizens can have their right over for disclosure. It says that under this Act, only information **held by or under the control of any public authority** can be disclosed and it includes the right to inspection of work, documents, records; taking notes, extracts or certified copies of documents or records; taking certified samples of material; obtaining information as diskettes, floppies, tapes, video cassettes or in any other electronic mode etc. The inclusion of a right to inspect works and take notes, extracts, or certified copies of documents and samples is one of the unique and innovative provisions of the Indian RTI law, perhaps motivated to address issues of substandard levels of work and unaccountability in public works and projects. The issue of 'held by' or 'under the control of any public authority' has been authoritatively determined by various judicial forums. In *Khanapuram Gandaiah v. Administrative Officer & Ors*,¹⁰ the Hon'ble Supreme Court held that an applicant is entitled to get only such information which can be accessed by the Public Authority under any other law for the time being in force. In *Poorna Prajna Public School v. Central Information Commission*,¹¹ the Hon'ble Delhi High Court held that the term held by or under the control of any public authority under Section 2(j) of the RTI Act has to be read in a manner that it effectuates and is in harmony with the definition of the term 'information' as defined in Section 2(f).

In *Dr. Ishan Ghosh v. PIO Eastern Railway*,¹² the Full Bench of the CIC held that the Act only applies to such information that is 'held by' or 'under the control of any public authority' but not to information that the public

10 AIR 2010 SC 615.

11 Manu/DE/2577/2009, Writ Petition (Civil) No. 7265 of 2007, decided on 25 September, 2009 (Delhi High Court).

12 CIC/AD/A/2011/001501.

authority through relevant statutory mechanism or procedures is willing to part with. In essence it says that if a statutory mechanism is in place for obtaining the information, then the RTI route cannot be taken without exhausting the former route.

Section 2(f) defines 'information' and it deals with one of the most contentious issues under the Act. It states that information means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. The definition covers a wide gamut of documents including electronic records within the meaning of information under the Act and it extends to information in similar format existing under any other Law for the time being in force.

The content of the information which can or cannot be sought under the Act was authoritatively determined by the CIC in *Shri Vibhor Dileep Barla v. Central Excise & Customs*.¹³ It was further held that the definition of 'Information' under Section 2(f) has to be read in conjunction with definition of 'record' in Section 2(i). Important guidelines were laid as to the kind of information that can be sought.

- a. Only Information in existence can be sought. Information not in existence can't be sought.
- b. Information held or which can be accessed by a Public Authority can be sought. Information 'non-exist' can't be sought.
- c. Act doesn't mandate to create information for disclosure.
- d. Opinion or advice on record can be sought but one cannot ask the PIO for an opinion or advice.
- e. Existing report is Information. Preparing a report after an enquiry is not Information.
- f. Analysis, Inferences, Conclusions based on data doesn't fall under 'Information'.
- g. Factual Information can be sought. No answers to hypothetical questions under the RTI Act.

13 CIC/AT/A/2006/00588.

In *Shri Manohar Parrikar & Ors v. Accountant General of Goa, Orissa and Punjab*,¹⁴ it was held that audit observations, marginal notes, audit notes and audit memos that go into the making of audit reports are information within the meaning of Section 2(f). In *Shri Manish Khanna v. High Court of Delhi*,¹⁵ it was held by the CIC that a copy of daily causelist on which the court master indicated the dates of hearing of the cases and which was signed by the presiding judge comes within the meaning of information under Section 2(f).

Another land mark judgment is regarding the disclosure of file notings. In *Satyapal v. CPIO TCIL*,¹⁶ it was held by the Full Bench of the CIC that:

No file would be complete without the note sheets having file notings. In other words, note sheets containing “file notings” are an integral part of a file. In terms of Section 2(i), a record includes a file and in terms of Section 2(j) right to information extends to accessibility to a record. A combined reading of Sections 2(f), 2(i) and 2(j) would indicate that a citizen has the right of access to a file of which the file notings are an integral part. Therefore under the existing provisions of the RTI Act, a citizen has the right to seek information contained in file notings.

This decision was reaffirmed by the CIC in various other decisions¹⁷ and all of them categorically held that file notings cannot be excluded unless they come in conflict with public interest or are excluded under any of the provisions of the RTI Act.

However, the most important requirement under Section 2(f) is that information sought by the applicant should be clearly specified and not in vague and ambiguous terms. In *S.K.Ranga v. Container Corporation of India Ltd.*,¹⁸ in an appeal pertaining to the inspection of the Dak registers of the corporation from 1/1/2003 corresponding to various departments of the corporation, the CIC held that information asked by the appellant from the

14 CIC/AT/A/2007/00274, CIC/AT/A/2008/00726, CIC/AT/A/2009/000732.

15 CIC/WB/A/2006/00839 & 00900 and CIC/WB/A/2007/01118.

16 Appeal No.IC(PB)/A-1/CIC/2006 available at http://cic.gov.in/CIC-Orders/CIC_Order_Dtd_310106.htm

17 Shri Pyare Lal Verma v. Ministry of Railways & Ministry of Personnel Public Grievances & Pensions (CIC/OK/A/2006/00154), Suchi Pandey v. Ministry of Urban Development (CIC/WB/A/2006/00133).

18 CIC/OK/A/2006/00260.

public authority was vague and held that an applicant under the RTI Act should clearly specify the information sought in terms of Section 2(f) of the RTI Act.

Section 2(h) defines a Public Authority to be any authority or body or institution of self- government established or constituted by or under the Constitution of India; by any law made by the Parliament or the State legislature; all those bodies owned, controlled or substantially financed including NGOs substantially financed directly or indirectly by funds provided by the appropriate Government. Some of the landmark judgments are discussed below.

In *Delhi Stock Exchange v. K.C.Sharma*,¹⁹ the Hon'ble Delhi HC held that a stock exchange performs functions of Public Character. Hence it falls within the definition of 'State' under Art.12 of the Constitution. This decision was upheld by the SC in a later judgment.²⁰ The above two ratios were quoted in *Smt. Raj Kumar Agrawal and Ors v. Jaipur Stock Exchange Ltd, NSEIL, SEBI and MOF*,²¹ wherein the CIC held that Stock Exchanges are Public Authorities within the meaning of Section 2(h) of the RTI Act.

The issue of substantial funding received from the Government so as to bring any organization within the meaning of 'Public Authority' under Section 2(h) was decided by the Supreme Court in *Thalappalam Ser. Coop. Bank Ltd. & Ors. v. State of Kerala & Ors*,²² wherein the Hon'ble SC held 'Substantial Funding' as that funding by which a body practically runs and but for such funding it would struggle to exist. In *Lt. Gen. S.S. Dabiya (Retd.) v. CPIO, Ministry of Defence & Ors*,²³ it was held that an organization which uses the land given by the Government for its functioning and without which the organization cannot exist comes within the meaning of a Public Authority under Section 2(h). However, in *Shri Shanmuga Patro v. Rajiv Gandhi Foundation*,²⁴ it was held that an NGO receiving funds amounting to 4% of its income doesn't come within the meaning of 'Public Authority' in Section 2(h) of RTI Act.

19 2002 VIIAD Delhi 432, 98 (2002) DLT 234.

20 AIR 2005 SC 2884, K.C Sharma v. Delhi Stock Exchange.

21 CIC/AT/A/2006/00684 & CIC/AT/A/2007/00106.

22 SLP (C) No.24290 of 2012.

23 CIC/LS/C/2011/001107 & CIC/LS/A/2011/001848.

24 CIC/WB/C/2009/000424.

Sometimes regulatory, functional or administrative control along with financial control by the Government over the organization brings it within the meaning of Public Authority under Section 2(h).²⁵

One of the landmark judgments regarding 'Public Authority' is the case of *Sbri Subhash Chandra Agrawal & Anr v. Indian National Congress & Ors.*²⁶ The CIC on 03.06.2013 held that the 6 national parties (Indian National Congress, BJP, CPI, CPM, BSP and NCP) are Public Authorities under S. 2(h) of RTI Act, 2005 relying on the following grounds namely:

- a. The fact of registration of political parties by the Election Commission of India (ECI) is akin to the establishment or constitution of a body or institution by an appropriate government.
- b. Political parties are substantially financed by the central government which includes allotment of land and houses on rental bases at hugely concessional rates, total exemption from payment of income tax from their incomes, free airtime on All India Radio and Doordarshan.
- c. Performance of public duty by the political parties.
- d. Constitutional and legal provisions vesting political parties with rights and liabilities. Examples include the supervision of political parties by the ECI under Article 324 and the disqualification of members of the House in certain circumstances under the Tenth Schedule of the Constitution.

The said order directs the national parties to designate CPIOs (Central Public Information Officers) and AAs (Appellate Authorities) and also to comply with the provisions of Section 4(1)(b) of the RTI Act. This was an unusual case where the national parties wilfully abstained from appearing before the Commission for the hearings and also did not depute CPIOs and AAs as per the Commission's directive. On an appeal, the Commission vide its order dated 16.03.2015 stated that the previous order dated 03.06.2013 declaring that political parties are public authorities under RTI Act is final and binding.²⁷ However, the Commission lamented that despite having declared the respondents to be public authorities, it is unable to get them to function so. Since the Commission can only penalize CPIOs or PIOs under

25 Lt. Col.(Retd.) R. Bansal v. Army Welfare Housing Organisation (AWHO) (CIC/LS/A/2013/000543 & CIC/LS/A/2013/000543).

26 CIC/SM/C/2011/001386 and 000838.

27 CIC/CC/C/2015/000182.

Section 20(1) and not Public Authorities themselves, this was a clear case of a legal gap and lacunae in the implementation mechanism. The Commission says that it is bereft of tools to get its order complied with and prays the Department of Personnel and Training (DoPT), Govt of India for addressing the legal gaps. The appellant has now filed a special leave in the Supreme Court²⁸ to get the Commission's order implemented and the matter was decided by the Supreme Court on August 21, 2015, wherein the Supreme Court held that political parties cannot be interpreted to be public authorities under the RTI Act.

In *Shri Subhash Chandra Agrawal v. Supreme Court of India*,²⁹ on a question whether the Supreme Court and the CJI are both Public Authorities and if they are the same, the Full Bench of the CIC relying on the strength of Article 124 held that the Supreme Court and the Chief Justice of India are both Constitutional bodies and hence Public Authorities and they are both one and the same. However, in another landmark judgment, the FB of the CIC held that the Attorney General of India is not a Public Authority³⁰ as the office of the Attorney General of India doesn't fall under any of the criteria given in Section 2(h). It is quite surprising to observe that while the CJI and the SC were declared to be Public Authorities on the strength of express constitutional provision (Art. 124), the same principle was not applied in the case of the office of the Attorney General which derives the strength of its appointment from Article 76 of the Constitution. This decision was however challenged³¹ in the High Court of Delhi in which the Hon'ble High Court assailed the judgment of the CIC. The Court after scrutinizing Articles 76, 88, 143, 309 of the Constitution which are related to the appointment and the functions of the Attorney General held that the office of the Attorney General of India is a public authority. The Court expressly stated that, "merely because the bulk of the duties of the AGI are advisory, the same would not render the office of the AGI any less authoritative than other constitutional functionaries".

28 Writ Petition (Civil) No. 333 of 2015.

29 CIC/WB/A/2008/00426.

30 Subhash Chandra Agarwal & Ors v. Attorney General of India
CIC/SM/C/2011/001542, CIC/SM/C/2012/000609, CIC/SM/C/2011/001322.

31 Subhash Chandra Agrawal v. Office of the Attorney General of India W.P.(C) 1041/2013.

In another recent landmark judgment,³² responding to an appeal from a person who filed an RTI application to seek an appointment from the Law Minister, Central Information Commissioner Sridhar Acharyulu held Ministers of Central and State governments as public authorities under Section 2(h) of the Act. The CIC directed that 'oath of secrecy' of ministers be replaced with 'oath of transparency' so that the minister will respect the right to information of the citizen, which was passed by the Parliament and considered as fundamental right intrinsic in Article 19(1)(a) of the Constitution, and be answerable to the citizens.

Section 2(I) mentions about what a 'record' is and it includes any document or manuscript, microfilm or facsimile, reproduction or any material produced by a computer. On closer scrutiny it appears that the definition of a record is distinctly narrower than the definition of information. However, in *Shri Pyare Lal Verma v. Ministry of Railways & Ministry of Personnel Public Grievances & Pensions*,³³ it was held by the CIC that the definitions of both the words "information" and "record" are inclusive definitions.

Provisions related to Procedural Guarantees

Section 4 talks about the obligations of public authorities which include the Duty to Publish. Section 4(1) of the RTI Act imposes on the Public Authority broad obligations of proactive and routine publication to facilitate the right to information. The Act mandates that every public authority shall maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act.³⁴ In *Paramveer Singh v. Panjab University*,³⁵ the CIC held that every public authority in furtherance of the mandate under the RTI Act, must take all measures in pursuance of Section 4(1)(a), to implement efficient record management systems in their offices so that the requests for information can be dealt with promptly and accurately.

The Act also mandates that within 120 days of it being enacted and coming into force, every public body should publish a range of information concerning that public body which includes details and particulars of the

32 Hemant Dhage, *Ahmednagar v. Department of Legal Affairs, GOI* CIC/SA/A/2015/000435.

33 CIC/OK/A/2006/00154 decided on 13th July, 2006.

34 Section 4(1)(a) of the Right to Information Act, 2005.

35 CIC/OK/A/2006/00016.

organization; their functions and duties; the duties of the employees and their powers; the due procedure followed in all decision making processes; all the norms the public body has adopted to undertake its functions; the rules, regulations, manuals and instructions; class of documents that it holds including those in the electronic form; description of all boards, councils, committees and other bodies and whether their meetings are open or not; public consultation arrangements relating to the formulation or implementation of policy; a directory of all employees and their wages; the budget allocated to each of its agencies and the details of all plans, proposed expenditures and reports on disbursements made; details about the execution of the subsidy programmes and their beneficiaries; particulars of the recipients of concessions, permits or other authorisations; particulars of facilities available to the citizens for obtaining information; the contact details of all the information officers etc.³⁶ The requirement of pro-active disclosure has been authoritatively upheld in an appeal³⁷ to the CIC in which it was held that:

Every public authority is required to make pro-active disclosures of all the information required to be given as per the provisions of Section 4(1) (b), unless the same is exempt under the provisions of Section 8(1). In fact, an information system should be created so that citizens would have easy access to information without making any formal request for it.

Further under Section 4, public bodies must also publish all relevant facts when formulating policies or announcing decisions which affect the public,³⁸ and provide reasons for administrative or quasi-judicial decisions.³⁹

Section 4(2) states that it shall be a constant endeavour of every public authority to take steps to provide information at regular intervals to the public *suo motu* through various means of communication including the internet, so that the public have minimum resort to the use of the RTI Act to obtain information. In *Seema Bhattacharya v. Deputy Commissioner, Shabdara, MCD*,⁴⁰ the applicant sought from the public authority details of sanctioned

36 Section 4(1)(b) of the Right to Information Act, 2005.

37 Appeal No. 24/IC (A)/2006 dated 16-04-2016.

38 Section 4(1)(c) of the Right to Information Act, 2005.

39 Section 4(1)(d) of the Right to Information Act, 2005.

40 CIC/WB/A/2006/00377.

posts of engineers and other related information which the public authority in any case was required to compulsorily declare under Section 4 of the RTI Act. On an appeal, the CIC held that the nature of information sought by the appellant was such that it was required to be furnished as suo moto information by a public authority, under pro-active disclosure requirements of Section 4(2) read with Section 4(1)(b) of the Act.

Section 4(3) mandates that information shall be disseminated in such form and manner so as to give easy accessibility to the public and Section 4(4) says that such dissemination should take into consideration criteria like cost effectiveness, local language and the most effective method of communication in that local area including availability of information with the CPIO or SPIO in electronic format and available free or at such cost as may be prescribed.

Together, these proactive publication rules under Section 4 are one of the most extensive and progressive obligations imposed on public authorities among all the FOI laws. With the advent of modern information and communication technologies, many public bodies are now able to make any information that is not barred by the exceptions available proactively.

Section 6 of the RTI Act gives the guidelines for obtaining information. It says that a person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi or in the official language of the area in which the application is made to the Central or State Public Information Officer (CPIO or SPIO) or the Central or State Assistant Public Information Officer as the case may be, specifying clearly the particulars of the information being sought. When an application cannot be made in writing by the applicant due to any reason, Section 6 mandates the Central or State Public Information Officer as the case may be, to render all reasonable assistance to the person making the request orally to reduce the same in writing. This is also the mandate under Section 5(3) and Section 7(4) of the Act. Another salient feature of the Act is that the application need not be in any particular format and the information seeker is not required to give any reason for requesting the information⁴¹ and these two aspects have been authoritatively clarified so by the CIC in *Madhu Badhuri v. Director, DDA*.⁴² Also, the information seeker

41 Section 6 (2) of the Right to Information Act, 2005.

42 CIC/C/1/2006.

need not give any other personal details except information that may be necessary for contacting him. The use of the word ‘may’ signifies that this information (contact details of the applicant) is also not mandatory as has been clarified in a recent judgment by the High Court of Kolkata.⁴³ The only requirement according to the Court is that the applicant needs to provide a post box number that would establish contact with him and the authority. The Court further clarified that, it is only when the authorities find any difficulty with the post box number, they may insist upon personal details, but even in such cases, it would be the solemn duty of the authority to hide such information particularly from the website so that people at large would not know of the details of the applicant. This is a remarkable provision in the RTI Act that would go a long way in the protection of whistle blowers. Also, in this regard, considering that even countries that pioneered the FOI laws, like Sweden,⁴⁴ US⁴⁵ and UK⁴⁶ require the personal details of the applicant along with the reasons for request for furnishing the information, the RTI Act of India has a unique stand among the other FOI laws of the world.

Another salient feature is the transfer of application made to a Public Authority to another Public Authority within 5 days when the information requested is held by another Public Authority or its subject matter is closely connected to another Public Authority.⁴⁷ In *Shyam Singh Thakur v. Dept of Science & Technology*,⁴⁸ the appellant had sought certain information on a number of issues from DST to which the PIO and the AA stated that the information sought by the applicant did not pertain to the activities of their department, and advised him to approach the concerned public authority. On appeal, the CIC held that DST was duty bound to transfer the application to the appropriate public authority within five days of the receipt of the application as per the provisions of Section 6 (3) of the RTI Act. However, in *Shri Ketan Kantilal Modi v. Central Board of Excise and*

43 Mr. Avishek Goenka v. Union of India (W.P. 33290(W) of 2013).

44 Chapter 2, Article 14, Freedom of The Press Act, 1766.

45 Please refer 5 U.S.C. §552a (b), 5 U.S.C. §552a (c)(1)(A), 5 U.S.C. §552a (c)(1)(B), 5 U.S.C. §552a (e)(3)(B) available at <https://www.law.cornell.edu/uscode/text/5/552a> (last accessed on March 13, 2016).

46 Section. 8(1) of the Freedom of Information Act, 2000 of United Kingdom (Chapter.36).

47 Section 6 (3) of the Right to Information Act, 2005.

48 CIC/WB/A/2006/00365.

Customs,⁴⁹ the CIC held that the when a petitioner is aware of the location of a given information vis-à-vis a public authority, it is not open to him to file his RTI- application before any other public authority in the expectation that this latter public authority would act under Section 6(3) to transfer his application to where the information was known to be held. The decision to transfer is to be made by the Public Authority given the circumstances and the conditions surrounding the petition and the case and the petitioner cannot claim this as a matter of right. In short an information seeker has to exercise due diligence about identifying the public authority where the requested information is known to be held.

Section 7 deals with the provisions related to disposal of an RTI application. Section.7(1) says that on payment of such fee as may be prescribed, a request for information must be responded as soon as possible and not later than 30 days of the receipt of the request either with the information sought or such request be rejected for any of the reasons specified in Sections 8 and 9 and when a request has been rejected under sub-section(1), the CPIO or SPIO, as the case may be shall communicate to the applicant reasons for rejecting the application and provide details for the applicant to file an appeal like the period within which the appeal lies and the details of the appellate authority.⁵⁰ A salient feature under this section is that when the information concerns the life or liberty of a person, the response shall be provided within 48 hours of the receipt of the request for information⁵¹. The imposition of a shorter timeline to address information requests pertaining to the life and liberty of an applicant is a positive measure found only in a very few FOI laws. However, in *Shekhar Singh and Others v. Prime Minister's Office*,⁵² it was held by the CIC that for an application to be treated as one concerning life and liberty under Section 7 (1), it must be accompanied with substantive evidence that a threat to life and liberty exists.

When the information sought concerns information of a third party (third party is defined under Section 2(n) as any person other than the person making a request for information and includes a public authority), the Act

49 CIC/AT/A/2008/01280.

50 Section 7(8) of the Right to Information Act, 2005.

51 Proviso to Section 7 (1) of the Right to Information Act, 2005.

52 CIC/WB/C/2006/00066.

mandates that guidelines under Section 11 should be followed before disclosing any information.⁵³

When an application under RTI is accepted, the applicant shall be informed of the details of the further fees representing the cost of providing the information together with the calculations made to arrive at the amount⁵⁴ in accordance with the fee prescribed under Section 7(1) of the RTI Act, 2005 and Rule 4 of The Right to Information Rules, 2012. Further Section 7(5) specifies that the fee prescribed shall be reasonable and that applicants below the poverty line (BPL) are exempted from paying the fee. However, in *Sharma Parveen v. National Human Rights Commission*,⁵⁵ CIC laid down an important condition that any public authority which provides information sought by a BPL applicant must ensure that such an applicant is a genuine seeker of information and is not working as a proxy for someone who merely wants to save money to obtain information. Section 27(2) clauses (b) and (c) of the Act states that the Government may also make rules regarding the fee payable under Sections 6(1), 7(1) and 7(5).

Section 7(6) says that when the Public Authority bound to give information fails to comply with the time limits prescribed for furnishing the information under sub-section(1), the same shall be furnished free of cost to the applicant. In *Gita Dewan Verma v. Urban Development Department, Delhi*,⁵⁶ the appellant was not provided information within the maximum time limit. It was held by the CIC that since there was a delay in replying to the information sought, the appellant should be provided information without costs as per the stipulation under Section 7 (6).

Section 7(9) says that information shall normally be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or be detrimental to the safety or preservation of the record in question.

Provisions related to Exceptions

Sections 8, 9, 10, 11 and 24 are the exceptions to disclosure of information under the RTI Act. The main exceptions are set out in Section 8. The most important of them are listed below:

53 Section 7(7) of the Right to Information Act, 2005.

54 Section 7(3) of the Right to Information Act, 2005.

55 CIC/OK/2006/00717.

56 CIC/WB/C/2006/00182.

Section 8(1)(a) exempts disclosure of information which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign state or lead to incitement of an offence. In *Shri Kamal Anand v. Central Board of Direct Taxes (CBDT)*,⁵⁷ CIC held that instructions, directions, clarifications relating to Scrutiny Policy of the Central Board of Direct Taxes (CBDT) could be held to be prejudicial to the economic interest of the State and hence could be denied under 8(1)(a) of the RTI Act. In this case the Commission held that when denial is based on an objective consideration of the Public Authority (in this case CBDT) and is not arrived at in a mechanical or arbitrary manner, the Commission cannot interfere in such issues. However, in *Shri Sandeep Unnithan v. Integrated HQ, Ministry of Defence (Navy)*,⁵⁸ upon the request for information from Indian Navy related to an incident that happened more than 20 years ago, the CPIO denied information claiming exemption under S.8(1)(a). However, the Full Bench of CIC held that armed forces of free, democratic nations should have a proper disclosure of vital information connected to war which will enhance the image and confidence of their capability in the eyes of the people of the country, and directed the Indian armed forces to bring themselves under the umbrella of RTI Act as mandated under Section 4(1) Act.

Section 8(1)(d) and Section 11 deal with exemption of information related to a third party. While Section 8(1)(d) talks about information including commercial confidence, trade secrets or intellectual property of a third party, Section 11 says that an opportunity should be given to the third party to explain his stand before a decision on the disclosure of information of the third party can be taken by the PIO. However, both the sections say that information related to third party may be disclosed if larger public interest warrants so.

Section 8(1)(e) is another oft quoted exemption clause that deals with information available to a person in a fiduciary relationship. In *Mr. A. L. Motwani v. ITI Limited*,⁵⁹ the CIC examined the definition of fiduciary relationship as a relationship of trust, which may also be between an individual and a juristic person such as Government, University or a Bank who has the power and obligation to act for another under the

57 CIC/AT/A/2007/00617.

58 CIC/WB/A/2007/01192.

59 CIC/MA/A/2008/1233/AD.

circumstances, which require total trust, good faith and honesty. In *Gopal Kumar v. Army HQs*⁶⁰ and *B.L. Sinha v. Company Affairs*,⁶¹ it was held that departmental promotion committee related information is not exempted under Section 8(1)(e) and has to be disclosed as it was held by the CIC that the transparency in the process through which a public authority or the government selects personnel to man its high offices, was not only desirable, it was essential in order to remove all doubts and apprehensions about the integrity of the processes. This decision was upheld in *Ms. V. Chamundeeswari v. Department of Revenue*.⁶² The most authoritative definition of fiduciary relationship has been given by Ravindra Bhat J, in *Supreme Court of India v. Subhash Chandra Agrawal*,⁶³ wherein the Hon'ble judge quoted the Advanced Law Lexicon, 3rd edition, 2005 to define it as a relationship that usually arises in one of the following four situations:

1. When one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first;
2. When one person assumes control and responsibility over another;
3. When one person has a duty to act or give advice to another on matters falling within the scope of the relationship; or
4. When there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer.

Based on the above, the Hon'ble judge held that the following relationships can be categorized as fiduciary

1. Trustee & beneficiary (Section 88, Indian Trusts Act, 1882).
2. Legal guardians & wards (Section 20, Guardians and wards Act, 1890).
3. Lawyer & Client.
4. Executors and administrators & legatees and heirs.
5. Board of directors & company.
6. Liquidator & company.
7. Receivers, trustees in bankruptcy and assignees in insolvency & creditors.

60 CIC/AT/A/2006/00069.

61 CIC/AT/A/2007/00256.

62 CIC/AT/A/2009/000277.

63 WP (C) 288/2009.

8. Doctor & Patient
9. Parent & Child.

In the present case,⁶⁴ deciding on a matter whether the CJI holds the asset declarations of his Brother Judges in fiduciary capacity, it was held that the CJI doesn't hold such declarations in a fiduciary capacity and hence such declarations are not exempted from disclosure under the RTI Act.

Sections 8(1)(g) and 8(1)(h) are the exemption clauses that most of the investigation agencies like Police, CBI etc., use for non-disclosure of information. They respectively say that information given in confidence for law enforcement or security purposes or information which would impede the process of investigation or apprehension or prosecution of offenders is exempted from disclosure. In *Ravinder Kumar v. B.S. Bassi, Jt. Commissioner of Police*,⁶⁵ the applicant had sought details regarding the progress of an investigation of a case by the police. On appeal, the CIC ruled that disclosure of information in cases under investigation by the police could hamper the investigation process and hence was exempted under Sections 8(1)(g) and 8(1)(h) of the RTI Act. However, there were many instances when the CIC ordered disclosure of information when the investigation or enquiry is complete. One such instance is the case of *Prakash Chandra v. Govt. NCT of Delhi*,⁶⁶ wherein the bench comprising Information Commissioner Shri Shailesh Gandhi directed that a copy of the SP's report prepared by CBI be furnished to the appellant.

Section 8(1)(j) says that personal information the disclosure of which has no relationship to any public activity or interest or causes unwarranted invasion of privacy of the individual is exempted unless a larger public interest justifies the disclosure of such information. In *Shri G.R. Rawal v. Director General of Income Tax*,⁶⁷ the CIC held personal information as, "the information that relates to a person which in ordinary circumstances would never be disclosed to anyone else; such information may acquire a public face due to circumstances specific to that information and thereby ceases to be personal. Public purpose is the touchstone which determines whether an information is personal or not."

64 Ibid.

65 CIC/AT/A/2006/00004.

66 CIC/SG/A/2009/00015/2695.

67 CIC/AT/A/2007/00490.

Section 8(2) lays down the ‘harm test’ and it has an overriding effect on all the exemption clauses and also provisions of the Official Secrets Act, 1923 wherein a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. In *Ch. Rama Krishna Rao v. Naval Ship Yard, Port Blair*,⁶⁸ the FB of CIC held public interest as, “a matter in which a class of community has a pecuniary interest or some interest by which their legal rights or liabilities are affected”. The CIC further held public interest to be, “the general welfare of the public that warrants recommendation and protection; something in which the public as a whole has a stake.” In *Mr. Manish Bhatnagar v. Mr. R. N. Mangla, SPIO, Dept of Women & Child Development*,⁶⁹ in an application for information related to the children rescued from bonded labor and information related to their guardians, the FB of CIC directed the information to be disclosed as public interest under Section 8(2) overrides the exemption under Sections 8(1)(e) and 8(1)(j). In *Ms. J.D. Sabay v. Ministry of Finance Department of Revenue, New Delhi*,⁷⁰ the CIC directed that the Annual Confidential Reports (ACRs) of the appellant to be disclosed to him under ‘public interest’ as it leads towards greater transparency and accountability in the working of a public authority. In essence, it appears to be clear that, should the applicant succeed in establishing that his case falls under the ‘larger public interest’ category, the RTI Act mandates disclosure of such information.

Section 8(3) provides an overriding clause for disclosure of information relating to any matter which took place 20 years prior to the request, except for exemptions under clauses (a), (c) and (i) of sub-section (1).

With regard to the exemptions under Section 8, one of the most authoritative cases was the case of *Bhagat Singh v. CIC*.⁷¹ In this case Hon’ble Ravindra Bhat, J. held that, “Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. The authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the

68 CIC/LS/A/2012/002430/RM.

69 CIC/SG/A/2010/001790.

70 CIC/AT/A/2008/00027 & 33.

71 W. P. (C) No. 3114/2007.

haven for dodging demands for information.” This decision was affirmed by the Hon’ble SC in *CPIO, Supreme Court of India v. SC Agarwal*.⁷² Further in *Nathi Devi v. Radha Devi Gupta*,⁷³ it was held by the SC that “an exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision.” The essence of these decisions is that the exemptions under Section 8 must be construed in a manner which would not render the right conferred to citizens under the RTI Act as completely redundant, or constrict it in a manner not stipulated in the Act.

Section 9 exempts the disclosure of information which would involve an infringement of a copyright subsisting in a person other than the State. However, in *Shri Sudbir Vohra v. Delhi Metro Rail Corporation*,⁷⁴ it was held that structural drawings, engineering calculations, soil tests and other details of DMRC though are copyrighted material of DMRC are not exempted under Section 9 because DMRC was declared a State.

Section 10(1) functions as a severability clause, and provides for severing that part of the information which is exempted from disclosure and disclosing the remaining part of the information.

Section 22 is an overriding clause which provides that the provisions of the RTI Act shall have effect notwithstanding anything inconsistent contained either in the Official Secrets Act, 1923 or any other law for the time being in force. In *Union of India v. Central Information Commissioner & Anr*,⁷⁵ Hon’ble Sanjiv Khanna, J. of the High Court of Delhi held that, “Section 22 of the RTI Act gives supremacy to the said Act and this non- obstante clause has to be given full effect to, in compliance with the legislative intent. Whenever there is a conflict between the provisions of the RTI Act and another enactment already in force, the provisions of the RTI Act will prevail.”

Section 24 shields a gamut of organizations like the CBI, IB, ED, BSF, CRPF, SPG etc., listed in the second schedule from disclosing information under the RTI Act. Such blanket exclusion of the premier intelligence, investigation and security agencies from the ambit of the RTI Act is both unfortunate and unwarranted. The only saving grace is that when the

72 W. P. (C) No. 188/2009.

73 2005 (2) SCC 201.

74 CIC/LS/A/2009/00098.

75 2009 (165) DLT 559.

information is pertaining to allegations of corruption and human rights violations, it shall not be excluded from disclosure under this section. One such example is the case of *Sbri V.R.Chandran v. Directorate of Enforcement*,⁷⁶ in which the CIC dealing with an appeal regarding denial of information by the Enforcement Directorate (which sought exemption under Section 24) relating to money stashed illegally in Swiss bank accounts by Indian citizens held that such information should be disclosed as the issue is serious and has larger public interest. It was also held that illegal money stashed abroad are resources the country has lost to the evil of money laundering and this brings the case under corruption and attracts the proviso of Section 24 and hence exemption under Section 24 is not applicable.

Provisions related to Appeals, Sanctions and Protections

Grievance redressal is an important aspect of any statute and the RTI Act provides for a two tier mechanism for appeals both at the Central and the State level.

Section 19 states that if any person who doesn't receive information within the time specified in sub-section(1) or clause (a) of sub-section(3) of Section 7, or is aggrieved by a decision of the CPIO or the SPIO, as the case may be, may within 30 days from the expiry of such period from the date of filing of the application or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the CPIO or the SPIO, as the case may be, in each public authority. Delay in filing an appeal may be excused if sufficient cause for the delay can be shown by the appellant.

A second appeal lies within 90 days against the decision under sub-section (1) with the Central Information Commission or the State Information Commission, as the case may be.

Section 19 also mandates the CPIO or SPIO to give an opportunity of being heard to the third party before disclosing the information.

Section 19(7) states that the decision of the Central Information Commission or the State Information Commission, as the case may be shall be binding.

76 CIC/AT/A/2009/000353.

Section 19(8) confers wide powers with the Central Information Commission and the State Information Commissions to direct the public authorities to take any such steps as may be necessary to secure compliance of this Act.

Section 19(8) along with Section 20 empowers the CIC and the SIC to impose penalties on the CPIO or the SPIO, as the case may be for refusing to accept an application, for not the furnishing of the information within the stipulated time, or for denying the request for information in a malafide manner or knowingly giving incorrect or misleading information which was the subject of request. These penalties can range from monetary compensation to the applicant or initiation of disciplinary proceedings against the erring CPIO or the SPIO.

Section 21 states that no suit, prosecution or other legal proceeding shall lie against any person for anything done or intended to be done under this Act by him in good faith.

Landmark Achievements of the RTI Act

Over the last decade, the RTI Act has transformed the functioning of the bureaucracy and the government machinery in a multitude of ways. It has made transparent the functioning of the government by putting people in public life under scrutiny. Since its implementation on October 12, 2005, there were many land mark achievements that people have achieved with the use of the RTI Act. The following achievements can be said to be some of the significant achievements of the RTI Act over the past decade.⁷⁷

Ministers' and Bureaucrats' Foreign Trips

An RTI-based investigation has in February, 2008 revealed that Union Ministers had made overseas trips equivalent to 256 rounds of the globe. This led the then PM, Manmohan Singh to ask all the Ministers to cut foreign travel. A similar investigation also unearthed unnecessary foreign trips of Bureaucrats. An Office Memorandum of DoPT⁷⁸ now mandates both the ministers and the bureaucrats to proactively disclose the details of

77 10 ways in which RTI has changed the functioning of govt, officials, INDIAN EXPRESS, p. 13 (New Delhi edn., October 28, 2015).

78 DoPT's OM No. 1/8/2012-IR available at http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02rti/1_8_2012-IR-11092012.pdf (last accessed on March 15, 2016).

the foreign trips *suo motu* in line with the proactive disclosure requirement of the RTI Act.

Ministers' Assets ⁷⁹

A cabinet resolution passed in 1964 required the Ministers to submit details of their own, spouse's and dependants assets and liabilities to the PMO. It was never been enforced until in 2009 after questions under RTI Act were put to the PMO and the Cabinet Secretariat and on directions from CIC that proper answers be given, all UPA 2 Ministers submitted details of their assets and liabilities on time. This has since become the norm.

Judges' Assets

A resolution passed in 1997 requiring the judges to declare their assets was not enforced until 2010. In 2010, RTI Activist Subhash Chandra Agrawal asked the Supreme Court about it through the RTI route. The information was denied and the appellant's appeal was upheld by both the CIC⁸⁰ and the Hon'ble High Court of Delhi.⁸¹

Bureaucrats' Assets ⁸²

After Ministers' and Judges' assets were put in public domain, RTI applications sought details of bureaucrat's assets. However they were denied by the DoPT. However, as a result of the pressures brought about by RTI Activists, the assets and liabilities of all Civil Servants are now made available in the public domain and are updated annually.

Exam Results

One of the standout achievements was the making public of previous year question papers, marksheets, answer keys⁸³ etc., of examinations conducted

79 *8 years on, RTI Act counts its milestones*, The Indian Express Archive, available at <http://archive.indianexpress.com/news/8-years-on-rti-act-counts-its-milestones/1181554/2> (last accessed on March 15, 2016).

80 *Shri Subhash Chandra Agrawal v. Supreme Court of India* (CICWB/A/2009/000529).

81 *The CPIO, Supreme Court of India v. Subhash Chandra Agrawal & Anr* (W.P.(C) 288/2009).

82 *Dr. Anil Krishna v. Krishna Prasad*, CIC/SG/A/2009/002343.

83 *Pramod Kumar Gupta v. Canara Bank*, P&D Wing (CIC/MA/A/2006/00308); *Ms. Shipra Sud v. UPSC* (CIC/SM/A/2012/000135). Also see *U.P.P.S.C. v. Subhash*

by public service commissions and examination bodies like UPSC, IIT, UGC; etc. The UPSC which was the most resistant organizations of all has due to the continuous agitation and efforts of RTI Activists been recently posting the details of the results, marksheets, answer keys etc. In another landmark judgment delivered recently⁸⁴, the Central Information Commission has directed all the Universities in India, including deemed Universities and all examining bodies to provide copies of a candidate's evaluated answer sheets of examinations only at a cost of Rs 2/- per page in line with the letter and spirit of the RTI Act.

Personal Staff of MP's and Ministers

An RTI based investigation led by The Indian Express in 2013⁸⁵ revealed that nearly 146 MP's had employed their close relatives as their 'Personal Assistants' in violation of DoPT norms to keep the money sanctioned for the purpose with them. This report prompted the Ethics Committee of the Rajya Sabha to intervene and this report also led the current NDA government to direct the Ministers to put an end to such policy of favouritism.

Accessible File Notings

Another landmark achievement by the RTI Activists was the order of the CIC in 2013 that held the file notings to be disclosed under the RTI Act. File notings were always exempted from disclosure and it took many years of struggle and the concerted efforts of many RTI Activists to disclose file notings under the RTI Act.⁸⁶

Chandra Dixit AIR 2004 SC 163; Sanjay Singh v. UPPSC AIR 2007 SC 950; and UPSC v. Shiv Shambu and Ors (LPA No. 313 of 2007 and CM APPL. No. 6468/2007).

84 Abne Ingty v. CPIO, Delhi University, Delhi (CIC/SA/C/2015/901116).

85 *It's all in the family: 146 MPs employ relatives as their personal assistants*, The Indian Express Archive available at <http://archive.indianexpress.com/news/its-all-in-the-family-146-mps-employ-relatives-as-their-personal-assistants/1115983/1> (last accessed on March 15, 2016).

86 Shri G.S. Sandhu v. Union Public Service Commission, CIC/SM/A/2011/001771, decided on 1st May, 2013 (CIC).

Scams Exposed

Several scams⁸⁷ like the Adarsh Housing scam, 2G scam, Coal Blocks allocation scam, Commonwealth Games scam were unearthed using the RTI Act in the past few years. RTI Activists have used the Act to unearth many scams at the state level as well.

Returns of the Parties

A 2008 CIC order⁸⁸ directed the public authorities (Income Tax Departments) to disclose the IT returns of the political parties to the appellant. The Commission in this order held that the information relates to various political parties and has been provided by them to a Public Authority in obedience to the provisions of law. The information asked for is available with the public authority, i.e. Income Tax Department and is asked for by a citizen and hence qualifies to be disclosed under the RTI Act. The Commission also rejected the exemption of disclosure of information under Sections 8 (1) (e) and 8 (1) (j) i.e. 'fiduciary relationship' and 'personal information' respectively. The Commission in this case held that **public interest warrants the disclosure of information.**

Challenges to the RTI Act and the Road Ahead

RTI Act is the landmark Citizen's Charter enacted in Independent India. It has brought accountability, transparency, responsibility in the functioning of the government machinery which has since the beginning of the colonial yoke been largely unresponsive to cries of openness. Considering the achievements made by the RTI Act in the past decade it seems that we have come a long way but there still are many gaping holes in the effective administration and the outreach of the RTI Act which are briefed below.

Capacity Building at the Grass Roots

The most serious problem confronting the effective implementation of the RTI Act is the lack of infrastructure, adequately trained manpower and efficient systems of voluntary disclosure of information that can be disclosed in accordance with the provisions of the RTI Act. Irrespective of

87 *8 years on, RTI Act counts its milestones*, The Indian Express Archive, October 12, 2013 available at <http://archive.indianexpress.com/news/8-years-on-rti-act-counts-its-milestones/1181554/3> (last accessed on March 15, 2016).

88 *Anumeha v. Central Board of Direct Taxes*, CIC/AT/A/2007/01029 &1263-1270

the simple procedure that is required to file an RTI application and the mandate for the CPIO or the SPIO to render all reasonable assistance to the information seeker, the system still requires an applicant to be reasonably well educated and informed about the information that he wants to ask, the place where he can get it and the process of getting it. There were numerous instances where information has been denied under the garb of 'not information' or when the information sought was not properly described. Though Section 6(3) of the Act mandates the transfer of an application to the public authority who holds the information, the expectation of due diligence by the information seeker is a harsher requirement considering the multitude of backgrounds of the information seekers among whom are the under privileged information seekers who are not well versed with the system. Creating RTI awareness among the general public is the urgent need of the hour and eliminating requirement of due-diligence for certain classes of people especially the under-privileged ones may be a way out.

Another issue of grave concern is the lack of uniform structure of information record management and maintenance system in the public offices in India. It needs to be emphasised that an efficient Single Window Multi Layered Institutional Grid with Uniform Standard Operating Procedures that covers and connects the information seeker, the information holder, the information provider and the appellate authorities both at the central and the state levels is the need of the hour. The system should be so streamlined so as to enable the people at the grass root level to request, track the progress of information sought and ultimately receive the information that they want with minimum logistical fuss. Effective use of the information and communication technologies in the form of Self Help RTI Kiosks, Mobile Apps, RTI through SMS, E-payment facility, Information Tracking Systems, Information Delivery Platforms etc., would ensure that an RTI applicant has a multitude of options before him for getting information.

It is also submitted that the duty to publish information under Section 4(1)(b) should be made an obligation than an endeavour as it currently is.

Another concern is regarding the severe shortage of manpower at all levels including the Public information officers, First Appellate Authorities, Central and State Information Commissioners etc., who form the backbone of the Information delivery and adjudication system under the RTI Act. Be it the lack of resources or the political will, this is the most significant

hamper for the effective administration of the RTI Act and needs to be addressed on war footing. One cannot expect a robust vehicle to run without wheels. A dedicated team of officers on the lines of the All India Services as part of a new service called the Indian Information Service to recruit young and efficient people for the effective administration and implementation of the RTI Act will be a welcome step should the government give serious consideration to it.

Addressing Misuse of the RTI Act

- a) **Misuse by the RTI Applicant :** The RTI Act being a no-frills, cost effective and efficient tool to obtain information, has off-late been used by many a petitioners to seek details that have less to do with genuine public interest and more to do with a crooked private interest. Issues of requests for disclosure of personal and private information of spouses, colleagues, superiors, investigating officers etc., and using it as a tool for extortion or to avenge a personal grudge or to harass people are on the rampant. There is another issue of habitual RTI applicants who keep clogging the information channels by frivolous, vexatious, repetitive RTI applications. Such actions are unfair on the system and unfair on the information provider as it puts an enormous burden and drain on the time, manpower, money and other resources of the system. There is the need of an effective system of checks and balances that ensures that information channels are not clogged by flippancy or frivolity and that the genuine information seeker should be able to get the information.
- b) **Misuse by the PIO/CPIO/FAA :** Another area of misuse is the misuse by the PIOs. The issues range from deliberate misplacing of the files, redundant answers of 'information not available' or 'file missing', denial of information collected on flimsy grounds like want of payment of meagre amounts of charges, deliberate disobedience of the orders of the appellate authorities, mundane quoting of exemption clauses for denial of disclosure of information, etc. An efficient and effective check on this misuse with imposition of compensations, departmental actions etc. on erring officials should be formulated so that information disclosure is taken up seriously without prejudice to the information seeker.

(i) Compliance of CIC's/SIC's orders:

One of the most important requirement that is needed is that of investing in the CIC/SIC, the power of getting their orders complied with. It is to be reiterated that under the current scheme of things under the RTI Act, 2005 the CIC/SIC does not have the power to punish the Public Authority for non-compliance of their orders as the power is restricted to punishing only the PIOs/CPIOs/SPIOs. Giving more teeth to the Information Commissions with the power to get their orders implemented on the lines of a Court of Law is the need of the hour. Non-Compliance should be treated as a serious offence with appropriate penalties both monetary and otherwise.

(ii) Protection for Whistle Blowers:

The success of any Citizens' Charter depends not on the provisions contained in it but by the effective utilization made of it by the people who ultimately have to use it. RTI Act's success can be largely attributed to the untiring efforts of scores of activists who not only have championed the cause of the formulation of the Act but also were responsible for its effective implementation and utilization. However, the last decade has seen some of the foremost RTI activists and whistle blowers being murdered in broad daylight for exposing corruption using the RTI Act. The Whistle Bowers Protection Act, 2011 lays down the mechanism to investigate allegations of corruption and misuse of power by public servants and also protect those who expose such acts of corruption. This Act would ensure that the champions and watchdogs of the transparency in this country receive protection from unscrupulous and erring officials and individuals. However, the Act currently deals with central government employees and excludes both state government and private sector employees. It doesn't provide for corporate whistleblowers, which is a serious omission especially in the wake of the 'Satyam' fraud. The Act also has a limited definition of disclosure and doesn't define victimisation and is silent on admission of anonymous complaints. There is also the requirement of addressing the delay in disposing off the cases effectively. All these issues call for attention urgently to make this Act more powerful.

Conclusion

The RTI Act is arguably one of the most powerful legislations enacted in independent India. It is also one of the most empowering and progressive and cost effective FOI laws currently operating in the world. What has been thought of as a manifestation of Freedom of Speech and Expression before 2005 has now been given a statutory backing with many salient features some of which are unique to the RTI Act, 2005 including the provisions that require pro-active disclosure by public authorities in the local language, provisions that don't require the applicant to give any reason and personal contact details for requesting the information, the requirement to attend to issues of life and liberty in 48 hours, the non-obstante clause that requires disclosure of information in larger public interest etc. In the past decade, this Act has been an effective weapon in the hands of the common man and the whistleblowers for ensuring transparency, for bringing down corruption, for effectuating good governance, for protecting civil liberties, for effective implementation of welfare schemes of the government and has also acted a powerful tool in making the people participate in the democratic process of the country. A number of landmark decisions from the CIC, the High Courts and the SC helped to bring a lot of authorities under the ambit of the RTI Act including the office of the CJI, the AG, the ministers at the central and state level, the political parties etc. The past decade also saw RTI led activism make the executive, the legislature and the judiciary more responsible and open with regard to proactive disclosure of a lot of information regarding their setup, their machinery and their functioning and these disclosures helped towards achieving the triple objectives contained in the preamble viz., to achieve transparency, to contain corruption and to hold government and their instrumentalities accountable to the governed. However, there are still some gaping holes in effective implementation of the Act which needs to be addressed. Foremost are the lack of proper infrastructure, poor capacity including lack of sufficient staff, lack of uniform standard operating procedures including one for tracking the applications that plague the information channels in our country. Coupled with the lackadaisical manner in which the PIOs respond to the RTI applications, this forms the most significant hurdle for the effective implementation of the RTI Act. This needs to be addressed on a war footing. Further, the Act still requires the applicant to be specific with regard to the information he wants, expects him to be diligent about the authority to which he has to send the application, constantly pursue the application in order to receive a proper response.

Such stringent requirements run contrary to the principles of the RTI Act and also to the interests of a large section of under privileged persons in this country who get marginalised further from their right to information. The most viable solution to address these lacunae is to **give the right to information the constitutional protection** perhaps even as a fundamental right in line with the guarantee given in some of the FOI laws in some countries.⁸⁹ And there is also an urgent requirement to address misuse of the Act; by not letting the information channels be clogged by flippant and frivolous complaints on one side and not allowing uncooperative and defiant officials who do not want to disclose the information to triumph on the other. And lastly, there is also an urgent need to bring in harmony among a lot of contrasting judgments delivered by the CIC, the High Courts and the SC. Addressing these issues would help in securing the inclusive participation of the public in this Act to achieve the goals aspired in the preamble of the RTI Act. Perhaps a good immediate starting point in this direction would be a consensus building effort based on widespread consultation from all quarters.

* * * * *

89 In Sweden, Slovenia, Serbia, the FOI laws have Constitutional protection.

RTI And Good Governance

RIGHT TO INFORMATION ACT - STAIRWAY TO GOOD GOVERNANCE IN INDIA

Dr. Isheeta Rutabhasini & Kapildeep Agarwal***

Abstract

The Right to Information Act, 2005 has been a path-breaking legislation which signals the march from the darkness of secrecy to the dawn of transparency. It lights up the mindset of public authorities, which is clouded by suspicion and secrecy. Openness in the exercise of public power is a culture which needs to be nurtured, with privacy and confidentiality being the exceptions. James Madison once said, "A people who mean to be their own governors must arm themselves with power that knowledge gives."¹ In India, the Official Secrets Act, 1923 was a convenient smokescreen to deny members of the public access to information. Public functioning had traditionally been shrouded in secrecy. But in a democracy in which people govern themselves, it is necessary to have more openness. In the maturing of our democracy, right to information is a major step forward; it enables citizens to participate fully in the decision-making process that affects their lives so profoundly.

Through this paper, we would like to analyse the effectiveness of the Right to Information Act in promoting transparency and accountability in the administration and its success in achieving the ultimate goal of providing good governance in India. Without good governance, no amount of developmental schemes can bring improvements in the quality of life of the citizens. Good governance has primarily four elements – transparency, accountability, predictability and participation. Transparency refers to availability of information to the citizens and clarity about functioning of governmental institutions. Right to information opens up government's records to public scrutiny, thereby arming citizens with a vital tool to inform them about the government's activities and effectiveness, thus making the government more accountable. Transparency in government organisations makes them function more objectively, thereby enhancing predictability. Information about functioning of government also enables citizens to participate in the governance process effectively. In a fundamental sense, right to information is a basic necessity of good governance.

Right to information has been seen as the key to strengthening participatory democracy and ushering in people-centric governance. Access to information can empower the poor and the weaker sections of society to demand and get information about public policies and actions, thereby leading to their welfare. The right to information has also been a powerful means for fighting corruption.

*Professor, Amity Law School, Delhi.

**Student, Amity Law School, Delhi.

1 S.L. Goel, Right to Information and Good Governance, (Deep & Deep Publications, 2007) p 2.

Through this paper, we also wish to bring into light the various significant achievements made through the Right to Information Act thus far and identify certain key challenges that still remain in the proper implementation of the Act, which require immediate attention and improvement. The effective implementation of the Right to Information Act will create an environment of vigilance which will help promote functioning of a more participatory democracy. The paper is an effort to put forward a roadmap for the times to come.

Introduction

“The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task, your task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed.”² - Kofi Annan

A democracy runs with the participation and development of the people of the country. In a democratic country each person has the right to freedom of opinion and expression. India being the world's largest democracy provides fundamental rights of speech and expression under Article 19(1)(a) of the Constitution of India. Though the Indian Constitution does not explicitly recognise the right to information, over the years, the Supreme Court has read the right to information into the fundamental rights part of the Constitution, under the right to free speech and expression³ and right to life.⁴

For the first time in 1975, the Supreme Court of India ruled that the people of India have a ‘right to know’, under the fundamental right of freedom of speech and expression. Though not expressly mentioned, the fundamental right of speech and expression cannot be exercised by a citizen until the person is informed. The court also held that India being a democratic state, the citizens are the real masters. The temporary government is there to serve the citizens of the country as public servants and as the citizens of

2 United Nations Press Release SG/SM/6268, 23 June 1997, available at <http://www.un.org/press/en/1997/19970623.sgsm6268.html> (last accessed on May 26, 2016).

3 S.P. Gupta v. Union of India AIR 1982 SC 149.

4 Essar Oil Ltd v. Halar Utkarsha Samiti AIR 2004 SC 1834.

the country pay tax to the government, therefore the citizens also have a right to seek ‘information’⁵ from government and public authorities.

The Preamble to the Constitution of India declares India to be a democratic country and seeks to achieve and provide justice, liberty, equality and fraternity to the people of India. A democratic country aims at the development of the individual citizens by ensuring their participation in the process of decision making. Also, Article 21 of the Constitution guarantees citizens the right to a life with dignity which promotes development of individual citizens. However, such development of individuals is not possible without the right and access to information as only an informed citizenry can make informed decisions, making effective participation in the democratic process of decision making. Article 14 guarantees the fundamental right to equality to all its citizens, therefore the right to information under Article 19(1)(a) must be available to all the citizens. However, since access to information regarding the functioning of public authorities remained confined in the hands of only few people under the Official Secrets Act (OSA), 1923, it prevented access to information regarding government functioning to all citizens equally. Article 32 of the Constitution provides citizens with the right to seek remedy from the Supreme Court in case of any violation of the fundamental rights of the citizens, so with right to information affecting Article 14, 19(1)(a) and 21 of the Constitution, any violation of these Articles with regard to right to information must also be subject to the remedies provided under Article 32. A combination of provisions laid down in the Preamble and Articles 14, 19(1)(a), 21 and 32 of the Constitution of India entitles the citizens constitutionally to the right to information but in the absence of enabling legislation, no statutory guarantee for this right existed in India. Therefore, the right to information always existed within the provisions of the Constitution but there was no proper legislative framework which could enable citizens to exercise this right.

The first step in the direction of laying down the procedure for the exercise of the right to Information was taken in the Election case in 2002 when the

5 Section 2(f) of the Right to Information Act, 2005: “information” means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

Supreme Court held that the citizens have a right to know about public functionaries and candidates for office, including their assets and criminal and educational background, which right is derived from the constitutional right to freedom of speech and expression and thus directed the Election Commission to secure to the voters, information pertaining to each candidate contesting election to Parliament and to the State legislatures.⁶

This decision raised a debate about which authorities could come under the definition of ‘public authority’⁷ from which the people could seek information and raised demand for a procedural legislation to bring into exercise the right to seek information. At the national level, Government of India passed the Freedom of Information Act, 2002. It had taken India, the world’s largest democracy, 52 years to transition from an opaque system of governance, legitimised by the colonial legislature of Official Secrets Act (OSA) of 1923, to one where citizens can demand access to information regarding the functioning of the government. Thus, an Act disseminating such power to the people for the first time was not able to meet the large expectations of people at once and hence “The National Advisory Committee” (NAC) suggested certain important amendments to be incorporated into the existing Act to ensure smoother and greater access to information. After examining the suggestions made by the NAC and others, the Government decided to make number of amendments to the law and the Right to Information Act, 2005 was enacted and the Freedom of Information Act, 2002 was repealed. The Right to Information Act, 2005 fully came into force since 12th October, 2005. The Right to Information Act, 2005 thus provided the people with a much needed effective procedural framework for the exercise of right to information.

6 Union of India v. Association for Democratic Reforms (2002) 5 SCC 294, at 302.

7 Section 2(h) of the Right to Information Act, 2005 “public authority” means any authority or body or institution of self-government established or constituted—

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by State Legislature;
- (d) by notification issued or order made by the appropriate Government, and includes any—
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;

Good Governance & Right to Information

“If liberty and equality, as is thought by some are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost”⁸. –Aristotle

The concept of governance dates back to the time when human civilisation came into existence. Governance means the process by which the decisions are made and implemented. Human civilisation has explored and tested various governance models during its development. After the wrath of the two World Wars, a vast majority of nations today have their foundation in the principle of ‘Welfare State’, i.e. a state which runs with the participation of its people in the process of decision making, to achieve the common good and in this process providing optimum opportunity for the growth of the individual. To achieve the ideals of a Welfare state, there was an evolution in the concept of governance to the concept of good governance.

“Good governance” means the effective and efficient administration in a democratic framework to achieve the goals of a welfare state. Good governance policies and practices vary according to the particular circumstances and needs of different societies and nations. Good governance promotes equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring. In translating these principles into practice, we see the holding of free, fair and frequent elections, representative legislatures that make laws and provide oversight, and an independent judiciary to interpret those laws.⁹

As per the United Nation’s Commission on Human Rights, the key elements of good governance include **transparency, responsibility, accountability, participation and responsiveness to the needs of the people.**¹⁰

8 Available at <https://en.wikiquote.org/wiki/Aristotle> (Section 1.14 Politics, Quote 18) (last accessed on October 2, 2015).

9 United Nations, Governance, para. 2, available at <http://www.un.org/en/global/issues/governance/> (last accessed on May 25, 2016).

10 The Role of Good Governance in the Promotion of Human Rights, The Office of the United Nations High Commissioner for Human Rights (OHCHR), 56th Sess., E/CN.4/RES/2000/64 (2000), available at <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> (last accessed on April 17, 2016).

The basic reasoning on which the right to information is based is that citizens pay taxes for the governance and development of the country and since they are the actual masters of the country, they entrust a temporary government for a provision of five years in their service, therefore the government should be open and accountable to the people. The people are very much in their right to know and to be kept informed about the working of the government whom they have entrusted on their behalf. The Right to Information Act provides a mechanism to the people to exercise their right to information and right to know the whereabouts of the functioning of the public authorities.

The concept of good governance is based on the principle of strengthening democracy by increasing the participation of people in the process of decision making and providing opportunities for individual growth during such process, this can only be brought about when the people are informed about the functioning of the government. As such the right to information is a natural corollary of good governance. Right to information helps citizens to be more informed about the working and administration of public authorities and thus helps in increased participation of people in decision making. The Right to Information Act also makes the public administration more transparent, accountable, responsible and responsive to the needs of the people. It empowers the poor and the weaker section of the society to ensure the inclusive growth and welfare of all and is also an effective tool to curb corruption in public administration. Right to information act thus helps in achieving the goals of the concept of “Good governance” and acts as an effective means to promote democratic ideology. Good governance is an ideal which is difficult to achieve in its totality. However, to ensure sustainable human development, action must be taken to work towards this ideal. The right to information is one of the key methods by which success may be achieved in good governance. Good governance and right to information are complimentary to each other. World Bank once rightly remarked? Right to information is an integral part of good governance.¹¹

11 Sri Keshabananda Borah, Right to Information Act: a key to good governance (2013) at p 17, para 2, available at [http://www.ijhssi.org/papers/v2\(3\)/version-1/B231122.pdf](http://www.ijhssi.org/papers/v2(3)/version-1/B231122.pdf) (last accessed on April 17, 2016).

Relation between RTI and Elements of Good Governance

(1) Transparency and Accessibility

To bring transparency in the working of the government and the instrumentalities of the government is the key element of good governance. Transparency can be described as the process of decision making and implementation should be done in a manner that follows rules and regulations. It also means that information is freely and directly accessible to the people of the country. Transparency and accountability is possible only when the public have access to information. Right to Information made it possible to easily access information from government documents, departments, services, records,¹² finances and policies to all sectors of the community.

With a view to ensure maximum transparency, the Act lays down various provisions under section 4 that deal with the obligations of public authorities in providing maximum disclosure and easy access to information regarding the functioning of public authorities, such as the obligation of public authorities to properly maintain the records,¹³ make pro-active disclosures through publication of relevant and prescribed documents, including web-based dissemination of information,¹⁴ regulations and reports

12 Section 2 (i) of the Act: “record includes—

- (a) any document, manuscript and file;
- (b) any microfilm, microfiche and facsimile copy of a document;
- (c) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and
- (d) any other material produced by a computer or any other device;

13 Section 4(1)(a) of the Right to Information Act, 2005: every public authority shall maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated.

14 Section 4(2) of the Act: It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information *suomotu* to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.

including decision making processes.¹⁵ Under section 2(j)¹⁶ the Act provides various provisions to facilitate the access of information to the people.

Thus, all public authorities have to duly place the information in public domain and a citizen has the right to inquire and observe as to what is going on inside an organisation. In the event that the information sought for is not provided within the stipulated period of 30 days or the information furnished is incomplete, misleading or incorrect, the person requesting the information is free to file a complaint or appeal before the Information Commission, for necessary directions to the parties as per the provisions of the RTI Act. The Commission, under section 20(1) of the RTI Act,¹⁷ has the power, *inter-alia*, to impose penalty and/or to recommend disciplinary action against the information providers, if held responsible for obstructing the free flow of information to the information seeker.

The RTI Act, 2005 with its arrival brought an end to the opaqueness of the system with respect to the citizens. The people were given the power to transparently observe, inspect and inquire about the functioning, the process of making the decision, the decision itself; thus were able to effectively participate in the governance of the country and control the effect of such decisions upon their lives. With such power of transparency at disposal of people, effective use of it was done to point out various irregularities in the government functioning such as:

-
- 15 Section 4(1)(d) of the Act: every public authority shall provide reasons for its administrative or quasi-judicial decisions to affected persons.
 - 16 Section 2(j) of the Act: “right to information” means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to –
 - (i) inspection of work, documents, records;
 - (ii) taking notes, extracts or certified copies of documents or records;
 - (iii) taking certified samples of material;
 - (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;
 - 17 Section 20(1) of the Act: Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of section 7 or mala-fidely denied the

- 1) Exposing big scams such as the 2G scam¹⁸, Coal scam¹⁹, etc. at the central level; Delhi's Commonwealth Games scam, Assam's public distribution system scam, Maharashtra irrigation scam, etc. at the state level²⁰ exposed the mutual corruption taking place in the country due to the nexus of politicians and corporates. Scams like Adarsh Housing Society Scam²¹ that exposed the nexus between Politicians and Defence personnel and led to the sacking of the chief minister of the state – a majority of all the documents that led to the unravelling of all these scams were obtained due to the effective utilisation of the tool of RTI Act by active and aware citizens.
- 2) Fighting day-to-day corruption faced by the citizens like demand for bribe for making ration cards, passports, etc. and leakages and misappropriation in the public distribution system for food security for the poor people, irregularities in the payment of wages and pensions to the poor people entitled to receive benefits under various financial safety schemes such as MNERGA, Grant of Food Security

request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or, obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees: Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him: Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

- 18 Betwa Sharma, 5 Scams The RTI Act Helped Bust In Its First 10 Years, HUFFINGTON POST, Oct. 12, 2015, available at http://www.huffingtonpost.in/2015/10/12/5-most-critical-scams-exp_n_8263302.html (last accessed on April 16, 2016)
- 19 Nestula Hebbar, Meet Hansraj Ahir, the man who unearthed coal scam, ECONOMIC TIMES, Sep. 25, 2014, available at http://articles.economictimes.indiatimes.com/2014-09-25/news/54317833_1_bjp-mp-hansraj-ahir-coal-blocks-coal-scam (last accessed on April 16, 2016).
- 20 Sanjoy Narayan, If we hobble Right to Information, then we hobble India's democracy, HINDUSTAN TIMES, Apr. 12, 2015, available at <http://www.hindustanimes.com/columns/if-we-hobble-right-to-information-then-we-hobble-india-s-democracy/story-ojTNA4uIa7p42Xvx9VzhRI.html> (last accessed on April 16, 2016).
- 21 Supra note 20.

and Pension for the Poor Senior Citizens Scheme, Integrated Child Development Scheme (ICDS), etc.²²

- 3) Ensuring environmental sustainability and clean environment are closely associated with issues of human rights. Citizens, NGOs and CSOs armed with information, have questioned particularly the regulatory bodies, the polluting units and sought to know whether they have adhered to specific norms and standards in carrying out their functions, so as to ensure sustainability of environment.²³ The closure of polluting units and projects having adverse impact on environment have been possible due to the constant pressure exerted by people and social activists by using RTI.²⁴
- 4) The information gathered through RTI on the utilisation of Member of Parliament/Member of Legislative Assembly local area development funds have kept the representatives on their toes and increase the benchmark of accountability and the level of transparency.
- 5) Seeking information regarding schemes such as the SarvaShikshaAbhiyan,²⁵ through which, the Government aims to

22 PricewaterhouseCoopers, Progress made so far, Final Understanding the “Key Issues and Constraints” in implementing the RTI Act (Page 30), available at http://rti.gov.in/rticorner/studybypwc/progress_made.pdf(last accessed on April 17, 2016).

23 Meena Menon, Political meddling proves toxic for pollution control boards, THE HINDU, July 22, 2013, available at <http://www.thehindu.com/news/national/political-meddling-proves-toxic-for-pollution-control-boards/article4937838.ece>; AparnaPallavi, Maharashtra’s largest thermal power plant spewing poison over Chandrapur, DOWN TO EARTH, Oct. 4, 2013, available at <http://www.downtoearth.org.in/news/maharashtras-largest-thermal-power-plant-spewing-poison-over-chandrapur--42371> (last accessed on April 16, 2016).

24 Mazhar Ali, CSTPS units 3, 4 running in violation of pollution norms, TIMES OF INDIA, Feb, 9, 2016, available at <http://timesofindia.indiatimes.com/city/nagpur/CSTPS-units-3-4-running-in-violation-of-pollution-norms/articleshow/50908376.cms>; (last accessed on April 16, 2016).

Asian Environmental Compliance and Enforcement Network (AECEN), Environmental Compliance and Enforcement in India: Rapid Assessment (2006), available at <http://www.oecd.org/env/outreach/37838061.pdf>(last accessed on April 16, 2016).

25 SarvaShikshaAbhiyan (SSA) is Government of India's flagship programme for achievement of Universalization of Elementary Education (UEE) in a time bound

provide at least the minimum basic essentials of school infrastructure for universalisation of elementary education. Under the provisions of the RTI, the citizens have raised issues pertaining to management of the schools, mainly the availability of infrastructure support, implementation of mid-day meal schemes, student's enrolment and performance, teacher's attendance, utilisation of funds and process of recruitment of teachers.²⁶ This has helped in improving the condition of education in government schools and making their functioning somewhat more responsive to the needs of the common man, who is duly aware of his rights.²⁷

- 6) Seeking information regarding healthcare schemes such as the National Rural Health Mission,²⁸ by effectively using the tool of RTI, the citizens have sought for details of primary health services.²⁹ The demand of disclosure of details such as procedure for procurement of medicines, stock of medicines and its distribution, attendance of medical staff and number of patients treated, etc., has resulted in better management of primary health centres. Thus, RTI Act has led to a considerable improvement in health care facilities and has created effective demand for improvement in quality of services provided by the hospitals.³⁰

manner, as mandated by 86th amendment to the Constitution of India making free and compulsory Education to the Children of 6-14 years age group, a Fundamental Right. More information available at <http://ssa.nic.in/> (last accessed on April 16, 2016).

- 26 M.M. Ansari, *Right to Information and its Relationship to Good Governance and Development* (2008) at p 16, available at <http://cic.gov.in/CIC-Events/IC-MA-LectureAtUNESCO-04122008.pdf> (last accessed on April 16, 2016).

- 27 Ibid.

- 28 The National Rural Health Mission (NRHM) was launched by the Hon'ble Prime Minister on 12th April 2005, to provide accessible, affordable and quality health care to the rural population, especially the vulnerable groups. The Union Cabinet vide its decision dated 1st May 2013, has approved the launch of National Urban Health Mission (NUHM) as a Sub-mission of an over-arching National Health Mission (NHM), with National Rural Health Mission (NRHM) being the other Sub-mission of National Health Mission. More information available at <http://nrhm.gov.in/> (last accessed on April 16, 2016).

- 29 Supra note 24.

- 30 M.M. Ansari, *Right to Information and its Relationship to Good Governance and Development* (2008) at pp16, 17, available at <http://cic.gov.in/CIC-Events/IC-MA-LectureAtUNESCO-04122008.pdf> (last accessed on April 16, 2016).

- 7) The culture of transparency brought about by the RTI Act in the past decade has now made it easier for citizens to access and track proceedings of parliament and of various other state legislatures including the Delhi Legislative Assembly.

However, the right to information is not absolute. Information can be denied under various exemption categories, under section 8(1) of the Act, on the grounds of national interest, personal or third party³¹ information or those pertaining to commercial confidence, the disclosure of which would possibly affect the competitiveness of public authorities but such information can also be sought if it is concerned with violation of human rights.³² Information can be sought even from a private authority only through the controlling authority and the controlling authority will send the notice to the concerned institution under section 11 of the Act.³³

(2) Accountability and Responsibility -

Accountability is another key element of good governance. The right to information empowers the people of the country to hold the government accountable and responsible for its acts, decisions and consequences of such decisions and seek information and explanation about the same. Information is power and Right to Information Act gives such power to the common people to bring accountability and transparency in the administration. However, accountability cannot be achieved without transparency and rule of law.

Under section 4(1)(d) of the RTI Act,³⁴ every public authority is required 'to provide reasons for its administrative or quasi-judicial decisions to the *'affected persons'*', which leaves no scope for any arbitrary decision. Until the implementation of the RTI Act, it was not possible for an ordinary citizen to seek the details of a decision making process. It was, therefore, impossible to hold a free and frank discussion on issues of common concern of the people or to fix the responsibility for any action. Such dark

31 Section 2(n) of the Act states that "third party" means a person other than the citizen making a request for information and includes a public authority.

32 Commonwealth Human Rights Initiative (CHRI), *Dealing With Third Parties: Applications & Appeals* (2006) accessible at http://www.humanrightsinitiative.org/publications/rti/third_parties_appl_appeals.pdf (last accessed on April 16, 2016).

33 Ibid.

34 Supra note 15.

era in the history of policy planning is over. The era of information has, in effect, created favourable conditions for everyone to have a better understanding of how the government works or how a particular decision was reached. Such a chance given to people empowers them to prevent the introduction of any such policy by the government that could adversely affect their interests or any other arbitrary policy or decision. In effect, it also helps people to make appropriate choice of leadership by making them more aware about them and their policies.

The schemes and policies introduced before the enactment of the right to information by the government for poverty alleviation and empowerment of the weaker sections of the society were never able to meet the expectation of the target benefit group, mainly because of the absence of the transparency and accountability in their implementation.³⁵ The absence of a legal right to know and to scrutinize the public action or to question the authority contributed to inefficiency, ineffectiveness and corruption resulting in lower outcomes of public activities. With empowered citizens and free flow of information, there is significant quantitative and qualitative improvement in the delivery of services. The disclosure of the list of beneficiaries for income support like wage employment and subsidized food grains and subsidized services like domestic gas has helped in weeding out fictitious names, resulting in better targeting of services to the poor, reduction in corruption due to checks on black-marketing of subsidized goods and services.³⁶ This has begun to happen with salutary effects on delivery of socioeconomic services, particularly for the poor.

As a result of increase in Government's accountability in delivery of services, there has been a decrease in the rate of rural to urban migration.³⁷ This is also corroborated by the findings of a national level survey³⁸ conducted by the Transparency International and the Centre for Media Studies. The survey has revealed that in the opinion of the 40 per cent of

35 M.M. Ansari, *Right to Information and its Relationship to Good Governance and Development* (2008) at p 9, available at <http://cic.gov.in/CIC-Events/IC-MA-LectureAtUNESCO-04122008.pdf>(last accessed on April 16, 2016).

36 *Ibid.*, at p 10.

37 *Ibid.*

38 Transparency International India and Centre for Media Studies (TII-CMS), *India Corruption Study 2008 report with Special Focus on BPL Households, 2008*, available at http://www.transparencyindia.org/resource/survey_study/India%20Corruptino%20Study%202008.pdf(last accessed on April 16, 2016).

respondents (all below the poverty line), corruption and malpractices in implementation of poverty alleviation programmes have declined due to RTI induced accountability of the Government and its functionaries at various levels.

(3) Participation -

Transparency and accountability in government functioning cannot be brought in without the participation of people. A nation cannot claim to be democratic in its governance unless it provides ample scope and opportunities for the individual development of its citizens; such development of individuals can only be done when information and knowledge is made accessible to them. A true democratic nation runs with the active participation of its aware citizenry in the transparent and accountable functioning of its government. By giving the people of India a proper mechanism and procedure to exercise the right to information, the RTI Act has helped India realise its primary objective of growth of individual citizens, as a democratic country.

India follows a representative model of democracy which gives its citizens the power to elect their governments once in every 5 years, but now as a step to move away from representative to participatory form of democracy, after a period of 58 years of its independence, it has provided to its people the right to seek information regarding the functioning of public authorities, encouraging and acknowledging the importance of regular participation of citizens in the governance of a democracy. But maximum participation through RTI is only possible when the citizens of the country are adequately aware about it and its usage. Initiatives have been taken by various aware and active sections of the society in order to spread mass awareness about the tool of RTI, such as:

- 1) Media, Non-Governmental Organisations (NGOs), Civil Society Organisations (CSOs) and social activists have played an important role in generating awareness at a mass scale.³⁹ While there have been very few major media campaigns for promoting the usage of RTI Act, nonetheless the awareness on the Act has been generated

39 PricewaterhouseCoopers, Progress made so far, Final Understanding the “Key Issues and Constraints” in implementing the RTI Act at p 27, accessible at http://rti.gov.in/rticorner/studybypwc/progress_made.pdf(last accessed on April 16, 2016).

through news articles based on RTI investigation. It is mostly with the support of the social activists, NGOs and Civil Society Organisations that a person in a village is able to use the RTI Act for ensuring his basic rights.

- 2) The Government of Assam has adopted a “Train the Trainers” concept, where the Government trains the CSOs/NGOs to impart training to citizens on RTI in order to maximize the reach of RTI and ensure that there is local ownership and sustainability.⁴⁰

RTI brings all sections of the society on the same platter; it gives equal right and power to each citizen ensuring equal opportunity in participation. This has much more significance for the weak and underprivileged sections of the society whose voice had never been able to reach or was ignored by those in power. RTI happens to not only strengthens their voice but also makes sure that any action by public authorities in violation of their rights is prevented, checked and punished.

- 1) Protection of the rights of the people working under the MNREGA, who were not being paid full wages as per the government rules under various excuses, when people started seeking information under RTI demanding disclosure of relevant details, such as muster rolls, the overreach of the responsible public authorities was checked and they were punished and the people’s rights were restored.⁴¹
- 2) Protection of rights of the poor people entitled to get the benefit of food security from the government under the Public Distribution System (PDS) which was being leaked and items were being sold to other people at higher prices, such corruption was checked when people started making use of RTI to seek such details as the stock of supplies and distribution, rate lists, list of beneficiaries - the disclosure of which ensures weeding out of fictitious names and the whereabouts of the items that they were entitled to get but have not received.⁴²
- 3) RTI has encouraged the weaker sections of the society to fight daily extortionist corruption such as demand of bribe for making ration

40 Ibid., at p 28.

41 Supra note 35 at pp 13, 14.

42 Supra note 35 at p 15.

cards, passports or for doing any other government works that is within the power of such public authority. RTI gives the power to these people to refrain from giving bribes and to get their rights enforced by making an RTI application seeking relevant information, questioning the pendency of their work, person responsible for such pendency, reasons for pendency and the current status of their work, these questions are enough to check and punish those who are responsible for this delay in their work. RTI has helped many people in enforcement of their rights without paying bribes.

Participation of people in the function of public authorities is not only necessary for keeping check but also for being a support to the public authorities and government for the development of the country. People make use of RTI to gather more information about government schemes and policies in order to make their maximum use, which in turn helps in the development and progress of the nation.

(4) Responsiveness

This feature of good governance deals with the efficiency and effectiveness of the government machinery in giving response to the demands of the people. The concept of efficiency in good governance covers doing work at a high speed with minimum wastage of resources and effectiveness implies doing things effectively in a result oriented manner. Various steps have been taken at the central level in order to increase the responsiveness of the government to meet the demands of the people, for example:

- 1) The Right to Information Act lays down provisions for effective and efficient record management techniques, Section 4(1)(b) of the Act requires Public Information Officers to suomotu disclose and publish within 120 days from the enactment of the Act as many as 17 manuals and to maintain a web-database of all the information for faster dissemination of information and to prevent unnecessary piling up of those applications which can be satisfied with information already made available in public domain.
- 2) Department of Personnel & Training has been instituted as the Nodal Department for the RTI implementation at the Central level.⁴³

43 National Level RTI, available at <http://www.humanrightsinitiative.org/content/national-level-rti> (last accessed on May 26, 2016).

- 3) The Central Information Commission (CIC) website has a feature for online submission of complaints and second appeals. The introduction of various alternate methods of filing RTI application such as the introduction of Online RTI applications has thus made it easier for people to seek Information under the Right to Information Act.⁴⁴

Many state governments have taken progressive steps to meet the demand of the people seeking information, for example:

- 1) The government of Bihar has set up Jaankari Call Centre, a six-seater call centre which facilitates the callers in the filing of RTI application, citizens can contact these call centres and tell them their name, address and as to what information they demand from the government, the voice of the citizens gets recorded in the form of an RTI application and the fee for this RTI application is collected through the phone bill. Requisite changes have been made in the rules for acceptance of the application through this channel. Similarly, the RTI Helpline in Bangalore is providing RTI information to citizens.
- 2) As per Section 15(7)⁴⁵ of the RTI Act, the State Information Commissions (SICs) can increase their geographical reach through establishing offices at other places. Maharashtra has created 5 new offices of the Information Commission in Pune, Mumbai, Aurangabad, Amravati and Nagpur to enable and facilitate citizens to approach the most convenient regional office.⁴⁶

All these steps have thus made the process of demanding information under RTI easier and have also made the process of meeting such demands in response more efficient and effective.

44 <http://cic.gov.in/> (last accessed on April 17, 2016).

45 Section 15(7) of Act states that “The headquarters of the State Information Commission shall be at such place in the State as the States Government may, by notification in the Official Gazette, specify and the State Information Commission may, with the previous approval of the State Government, establish offices at other places in the State”.

46 The list and contact details of the regional offices is available at <https://sic.maharashtra.gov.in/site/Common/contactUS.aspx#> (last accessed on April 17, 2016).

Problems Faced in the Implementation of RTI

Issues faced by Citizens

1) Low Public awareness

The RTI Act was enacted and administered in 2005 but even after a decade it remains under-utilised due to low level of awareness, as less than 1% Indians use the right to information. A study⁴⁷ showed only 0.5% citizens of age 18 years and above used the right to information. It is important to highlight that the quality of awareness in common public regarding RTI is significantly low. Section 26 of the Act states that ‘the appropriate Government may develop and organize educational programmes to advance the understanding of the public, especially disadvantaged communities, regarding how to exercise the rights contemplated under the Act’. Even though the Act has very clearly explained the responsibility of the ‘appropriate Government’,⁴⁸ with respect to creating awareness on the Act there has been much lack of initiative from the side of Government. The scant efforts have thus resulted in the low level of awareness about the RTI Act among the masses. In 2013, a study⁴⁹ reviewed its impact from 2011-2013 and found that women applicants, for instance, were insignificant in number, constituting just 8 per cent of the total applicants. Equally shocking was the fact that although two-thirds of

47 Commonwealth Human Rights Initiative (CHRI), *The Use of Right to Information Laws in India: A Rapid Study Based on the Annual Reports of Information Commissions 2011-12* (published 2013), available at <http://www.humanrightsinitiative.org/postoftheday/2013/CHRIrapidStudy-RTIUseinIndia-2011-2012-Oct13.pdf> (last accessed May 26, 2016).

48 Section 2 (a) of the Right to Information Act, 2005 states that “appropriate Government” means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly-

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government;

49 Right to Information Assessment and Analysis Group and Centre for Equity Studies (Raag/CES), *People’s Monitoring of the RTI Regime in India 2011-13* (published 2014), available at <http://nebula.wsimg.com/93c4b1e26eb3fbd41782c6526475ed79?AccessKeyId=52EBDBA4FE710433B3D8&disposition=0&alloworigin=1> (last accessed on May 26, 2016).

India's population lives in villages, only 14 per cent of applicants were from rural parts of the country.

2) **Poor level of information provided**

The level of response provided directly depends on the condition of record management practices within the Public Authority, transparency in its processes, training provided to the concerned PIO and drafting of the RTI application itself. It would continue to be an issue unless these problems are addressed comprehensively by the 'appropriate Government' and Public Authorities.

3) **Whistleblower protection**

The biggest accomplishment of the RTI Act in the last decade has been that it has managed to let spread a silent citizen's movement for government accountability across the country. But this has not been without its repercussions. In 2011, Bihar police determined that Ram Vilas Singh⁵⁰ was shot dead in Lakhi Sarai town for asking police why an accused in a murder case was not arrested. He had also filed several other applications seeking information on corruption in the implementation of the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS), the world's largest job guarantee programme. A similar fate was witnessed in the cases of RTI activists such as Niyamat Ansari,⁵¹ who uncovered corruption in the MGNREGA in Jharkhand, Amit Jetwa,⁵² who solicited information on illegal mining in Gujarat's Gir forest, and Satish Shetty,⁵³ who attempted to emphasise land grabbing in Pune. All three were

50 Santosh Singh, RTI activist shot dead in Bihar, *INDIAN EXPRESS*, Dec. 9 2011, available at <http://archive.indianexpress.com/news/rti-activist-shot-dead-in-bihar/885698/0> (last accessed on April 17, 2016).

51 Ipsita Pati, MGNREGA activist who exposed many cases of corruption found dead, *THE HINDU*, March 4, 2011, accessible at <http://www.thehindu.com/news/national/other-states/article1505888.ece> (last accessed on April 17, 2016).

52 J. Balaji, Eight RTI activists killed in seven months, *THE HINDU*, August 14, 2011, available at <http://www.thehindu.com/news/national/eight-rti-activists-killed-in-seven-months/article532051.ece> (last accessed on April 17, 2016).

53 IANS, Whistleblower RTI activist Satish Shetty killed, *THE HINDU*, January 13, 2010, accessible at <http://www.thehindu.com/news/whistleblower-rti-activist-satish-shetty-killed/article80222.ece> (last accessed on April 17, 2016).

murdered. Since 2007, over 40 RTI activists who sought crucial information have been killed. Applicants from weaker segments are often intimidated, threatened and even physically assaulted. RTI activists uncovering incidents of bribery and corruption face numerous threats, including verbal threats, physical violence, and ostracism. Others encounter workplace retaliation. Confronted with these risks, many potential whistleblowers choose to remain silent.

Governmental apathy in putting together an effective protective regime for RTI activists can be elucidated by the fact that the government has informed the Parliament that it does not maintain any data on the killing of RTI activists.⁵⁴ The Whistleblowers Protection Act, 2011,⁵⁵ was passed in the year 2014 but the rules are yet to be formulated, so it has not been operationalised. Activists also contend that the RTI Act itself needs to be amended to ensure protection. In May 2010, the Bombay High Court ordered the state government to provide police protection to any person complaining of threats after filing an RTI application.⁵⁶

Issues faced by PIOs

1) Failure to provide information within 30 days

As per the Act, the information has to be provided within the definite time frame of 15-30 days. However, the PIOs face challenges in providing the information within the stipulated time frame due to inadequate record management procedures with the Public Authorities. It is a known fact that the record keeping process within

54 Government of India, Ministry of Home Affairs, Lok Sabha, Unstarred Question No. 1550, Answered On Aug. 9 2011, accessible at <http://164.100.47.192/Loksabha/Questions/QResult15.aspx?qref=105886&lsno=15> (last visited on April 17, 2016).

55 The Whistleblower Protection Bill, 2011 became an Act in 2014, it is called the Whistleblower Protection Act 2011 instead of 2014, and this was a patent error committed by the Law Ministry during the passage of the Whistleblower Protection Bill, 2011. Referred from the digital portal of the newspaper Indian Express, accessible at <http://indianexpress.com/article/india/india-others/centre-plans-to-amend-whistleblowers-protection-act/> (last accessed April 3, 2016).

56 Asian Centre for Human Rights, RTI activists: sitting ducks of India (2011) at pp 2, 11, available at <http://www.achrweb.org/ihrpq/issue3-4/India-Sitting-Ducks-2011.pdf> (last accessed on April 17, 2016).

the public authorities is a big challenge, lack of any electronic document management system in Departments leads to aggravation in the problem of record keeping. This situation is further aggravated due to non-availability of trained PIOs and the enabling infrastructure (computers, scanners, internet connectivity, photocopiers etc.) The role of the Information Commission assumes great importance in maintaining a process to continuously analyse and identify the Public authorities that do not possess adequate processes and infrastructure for compliance to the RTI Act and making them comply with the provisions laid down under section 19(8)(a) of the Act. Public authorities need to meet the requirements of the RTI Act to review their current record keeping procedures and other constraints and plan out the resources. An October 2014⁵⁷ report showed an estimated waiting period of up to 60 years in Madhya Pradesh and up to 18 years in West Bengal, calculated on the basis of current rates of pendency in Information Commissions. Also the report brought out that in less than 3 per cent of cases, penalties were imposed on government departments denying information sought.

2) Inadequate trained PIOs and First Appellate Authorities

The training of PIOs is a big challenge primarily due to the huge number of PIOs to be trained, the frequent transfers of PIOs to other posts, constraint with respect to the availability of training resources. It was also observed that in the current manner of providing training, there is a low involvement and cooperation of the Public Authorities and an inadequate urgency in getting their PIOs trained. Public authorities place significant dependence on the Advanced Training Institutes for training of the PIOs. However, at the same time a large number of non-profit organisations are also carrying out the trainings of PIOs in official/ un-official capacities – these resources are not being effectively utilized by the appropriate governments and training institutes.

3) Ineffective implementation of Section 4(1)(b)

There is inadequate mechanism within the public authorities to implement the provisions of the Act. Neither the state government

57 Supra note 49.

nor the information commissions have taken adequate steps to ensure compliance of this basic minimum requirement for filing RTI applications. About 50 per cent of the information sought under RTI should be available *suomotu* as per Section 4 of the RTI Act, according to a survey⁵⁸ conducted by RTI Assessment and Advocacy group (RaaG). This has led to the piling up of applications with the PIOs resulting in delay in the dissemination of information.

Issues faced at Structural level

1) Perception of being “lenient” towards PIOs

There is no centralized data base of RTI (at the State/Centre level) applicants. A centralized & web-based data of all RTI applicants with their information requests and responses from information providers would enable the Information Commission to publish more accurate numbers in the annual reports. The current situation is that, neither the state government nor the State Information Commission is in a position to determine the number of public authorities within a Department and therefore the details on the number of applications filed.

2) Lack of Monitoring and Review mechanism

One of the most important roles of the Information Commission is to monitor and review the public authority and initiate actions to make them comply with the spirit of the Act. However this has been one of the weakest links in the implementation of the Act. Monitoring the public authority for compliance of the Act is an important aspect of the role of the Information Commission. The Information Commission lacks a proper review, a monitoring mechanism in fixing responsibility in cases where the citizen has not got the information within the stipulated time and to track the failures of the public authorities in complying with the RTI Act.

3) Variation in assumption of role by SIC and State Governments

The Act is ambiguous in nature in terms of determining the

58 Ibid.

responsibilities of the ‘appropriate Government’ with respect to the Information Commissions (ICs). Therefore, the ground reality of the current situation is that the effectiveness of Information Commissions is completely dependent on the support (including financial and infrastructural) provided by the ‘appropriate Government’. According to a survey,⁵⁹ due to the dependency of the ICs over the government, the salaries of the employees get delayed, the ICs need to approach the government even for small expenses. Also, due to lack of availability of funds, the ICs are not able to carry out awareness programs among the citizens and thus this dependence becomes detrimental to the functioning of the ICs.

Conclusion and Suggestions

With a view to realizing the development goals, the followings suggestions are made to strengthen the RTI regime

Firstly, the government should develop the capacities of both the public authorities and the citizens for enhancing the access to information, for which a two-pronged strategy would be needed. A proper and unified mechanism should be framed for the training of PIOs, Non-profit organisations that are conducting training of POIs under official and unofficial capacity should be utilized to the maximum. Low awareness level among citizens regarding right to information and its proper usage has been a major constraint in reaping the benefits of this Act. In order to properly manage the demand for information from the citizens, effort should be made to create mass awareness among the people to promote information literacy. Information literacy includes making people aware of the right to information that they possess and properly training them to use this right effectively under the RTI Act. They should be enabled to decide and select as to what information should be sought, from where and how. Besides, they should also be made aware as to how to make best use of the information for effective participation in economic and political processes. The efforts of the various NGOs can also be effectively utilized in this field.

59 Ibid., at pp 114, 115.

Secondly, there should be effective implementation of Section 4(1)(b) of the RTI act that requires the public authorities to *suomotu* disclose and publish information contained in various documents as laid down under the section. Effective implementation of this section would bring about a considerable reduction in the number of applications as according to a survey, information demanded under 50% of RTI applications can be provided just through the proper implementation of Section 4(1)(b). Thus, it will also avoid piling up of applications and delay in dissemination of information that can be provided under this Section.

Thirdly, a proper mechanism to provide financial and infrastructural resources to PIOs should be framed to avoid complete dependence of PIOs on the ‘appropriate government’ for the resources needed for their proper functioning as this weakens the purpose and spirit of the act. A proper legal framework also needs to be formulated for record keeping of the documents to ease the access of information to the people. Creation of a web-database of such information and usage of information technologies is also necessary as it not only facilitates faster dissemination of information but also reduces the costs of servicing and sharing information.

Fourthly, whistleblower protection is the biggest constraint in the proper implementation of the RTI Act as it threatens people from seeking information and making use of it. It hits at the spirit of the right to information. The government needs to comprehensively and seriously tackle this issue, The Whistleblower Protection Act must be enforced and necessary amendment to the RTI Act must also be made as soon as possible to ensure the protection of the information seekers. Whistleblowers in any society take on the severest of personal risks and often make unprecedented sacrifices while safeguarding the rights of their fellow citizens from corruption and other forms of maladministration in public institutions. Thus, it is the duty of a democratic government to safeguard the interests and to ensure the safety and protection of the whistleblowers.

Finally, democratisation of information and knowledge resources is extremely critical for empowerment of people and to increase opportunities for them to enhance the options for improving quality of life. The strengthening of the right to information is therefore *sine quo non* for

promoting democratic governance and development. In order to strengthen the RTI regime, the government should work towards finding solutions to the various issues faced by citizens and PIOs and the also those faced at the structural level to ensure the effective and efficient implementation of the existing provisions of the RTI Act. The government must also work forward towards the introduction and effective implementation of the necessary second generation laws, such as the Whistleblower Protection Act 2011, the Lokpal Act, the Grievance Redress Bill, and the Transparency of the Pre-legislative process, etc. The biggest lesson of the last 10 years since the Act came into force is that for Indian democracy, to remain meaningful, it is necessary to have an effective RTI regime that is equally owned by those who govern and those who are governed.

* * * * *

THE RIGHT TO INFORMATION AS A HUMAN RIGHT

Vaibhav Kumar*

Abstract

“...democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed”
– Source: RTI Act’ 2005

“An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of Public Authorities, in order to promote transparency and accountability in the working of every Public Authority.... ”

The ‘third wave of democracy’, to quote Huntington, coupled with the spread of ‘governance’ philosophy in the last decade of the twentieth century, ushered in a new era of democracy-strengthening along with emphasis on its essential attributes such as ‘openness’, ‘transparency’, and ‘accountability’. The RTI is, finally, a demand for an equal share of power. But it is also a fetter on the arbitrary exercise of power by anyone. Its legitimacy in a democratic set –up gives it the potential to keep widening the horizons of struggle for empowerment and change.

Introduction

“If liberty and equality, as is thought by some are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost”.¹ – Aristotle

The free flow of information is must for a democratic society as it helps the society to grow and to retain a continuous debate and discussion among the people. But the access to information held by a public authority was not possible until 2005. Before that the common people did not have any legal right to know about the public policies and expenditures. It was quite ironical that people who voted for the persons responsible for policy formation to power and contributed towards the financing of huge costs of public activities were denied access to the relevant information. This is a

* Master of Public Policy Student, National Law School of India University, Bengaluru.

1 Aristotle, Politics, Book Four, Part IV (Written 350 B.C.E, Translated by Benjamin Jowett).

small study gauging the democratic need of Right to Information Act especially in a country like India which happens to be the largest democracy in the world. This paper draws on the collective experiences of the right to information movement - in particular those of the Mazdoor Kisan Shakti Sangathan in Rajasthan.

The following declarations/covenants/conventions deal with the right to information:

I. Universal Protection of Right to Information:

- (i) The Universal Declaration of Human Rights, 1948
- (ii) The International Covenant on Civil and Political Rights, 1966
- (iii) Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms, 1998.²

II. Regional Protection of Right to Information

- (i) The European Convention for the Protection of Human Rights, 1950
- (ii) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998³
- (iii) Charter of Fundamental Rights of the European Union, 2000
- (iv) Commonwealth Principles and Guidelines on the Right to Know

James Madison writing in 1822 gave eloquent expression to the urgent need for 'popular information' in a democracy. As he said, "A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Implicit in Madison's remark is the essence of democracy which is rule by the people. It is well known that reality is, however, very different, and actually 'ruling' is left to the bureaucracy functioning in tandem with the

2 Adopted by the UN GA Resolution No. A/RES/53/144 dated 9th December, 1998.

3 Adopted the Convention on Access to information, public participation in decision-making and access to justice in Environmental matters, 1998, vide No. 38ILM 517 (1999), UNTS 447 dated 25th June, 1998 and came into force on 30th October, 2001.

political group in power. The tradition in the Third World countries has been worse. During colonial rule, the administrative culture had been basically inward – looking, people – avoiding and secrecy- practicing. Even after formal ‘Independence’, the phenomenon of bureaucratic domination persisted for a variety of reasons – poverty and lack of ‘real’ citizenship being a major causative factor. Thus, democracy has, in most countries, remained a ‘procedural’ façade. As it has been rightly said:

“The right to information is a product of both institutions and culture. Institutions are shaped by laws and the structure of government. Culture is rooted in the history and practice of government as well as in the broader traditional understandings of the accountability of leaders, and of what constitutes representation. Culture is often more powerful than formal arrangements, particularly in societies that are undergoing a process of democratic transition and/or whose political systems still reflect traditional social methods of interaction.”⁴

To intensify the process of paradigm shift from state centric to citizen centric model of development, the Right to Information Movement in India came into existence in 1990s by resolving a major contradiction between the colonial Acts, which prevents access to information and the post-independent Indian Constitution, which recognizes the seeking of information as a fundamental right to promote transparent, accountable, responsible, participatory and decentralized democracy. As a result of grassroots movement for the Right to Information to combat corruption and to promote the good governance and to have aware citizens, the state has responded in the form of Right to Information Act – 2005. With the introduction of the Right to Information Act – 2005, the colonial Acts such as the Official Secrets Act, 1923, Indian Evidence Act, 1872 and the Civil Service Code of Conduct Rules, which contain provisions that restrict the Fundamental Right to Information as ensured to the citizens in the Constitution has become irrelevant.

4 United Nations Development Programme, Bureau for Development Policy, Democratic Governance Group, A Guide to Measuring the Impact of Right to Information Programmes- Practical Guidance Note, available at https://webcache.googleusercontent.com/search?q=cache:_Tl_iQSy7oMJ:https://www.law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI-UNationsDevProg-July2004-English.pdf+&cd=2&hl=en&ct=clnk&gl=in (last accessed on April 23, 2016).

Colonial Acts and Denial of the Information

The battle for appropriate legislation for the right to information has been fought on two main planks. The first is a demand for amendment of the draconian colonial Official Secrets Act, 1923 and the second, campaign for an effective law on the right to information. The Official Secrets Act, 1923, is a replica of the erstwhile British Official Secrets Act and deals with espionage on the one hand, but has the damaging “catch all” Section 5 which makes it an offence to part with any information received in the course of official duty, to non-officials.

Constitution and Right to Information

As a result of the prolonged Indian national movement against the British imperialist colonial rule the liberal democratic political system with a written Constitution includes rule of law, social justice, development, adult franchise, periodic elections, multiparty system has come into existence⁵. For the transparent functioning of the democratic political system, the founding fathers of the Constitution included the provisions of the right to expression in part three of the Constitution in the fundamental rights.

While there is no specific right to information or even right to freedom of the press in the Constitution of India, the right to information has been read into the Constitutional guarantees which are a part of the Chapter on Fundamental Rights.

Relevance of Right to Information in Indian Constitution

The notion of right to information gained momentum when Article 19 of the Universal Declaration of Human Rights was adopted in 1948 ensuring “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive & impart information and ideas through any media and regardless of frontiers.”⁶ Also the International Covenant on Civil and Political rights

5 Dr. E. Venkatesu, Right to Information Movement in India, available at projects.cgg.gov.in/.../RTIMovementinIndia-DrEVenkatesuNIRD.pdf (last accessed on April 22, 2016).

6 Article 19, The Universal Declaration of Human Rights, Retrieved on 12th December 2010 from the Official Site of The Universal Declaration of Human Rights, available at <http://www.un.org/en/universal-declaration-human-rights/> (last accessed on April 23, 2016).

1966 provides that “Everyone shall have the right to freedom of expression, the freedom to seek and impart information and ideas of all kind, regardless of frontiers”.⁷ After several sustainable grassroots campaigns and political will on the part of the Government, the long awaited Right to Information Act, 2005 got the ratification of both the Houses of Parliament on 12th May, and came into force from 12th October, 2005. India can now proudly boost of being one of the 55 countries that have comprehensive laws to protect the citizens' right to information.

One of the major objectives of Indian Constitution according to the preamble is to secure liberty of thought and expressions to the citizens of India through Article 19(1) (a) of the Constitution. The freedom of speech and expression means the right to express one's convictions and opinions and also to seek, receive and impart information and ideas, either orally or by written, or printed matter or by legally operated visual and auditory devices, such as the radio, cinematograph, loudspeakers and the like. In short, it is the freedom to communicate one's ideas through any medium. Expression, probably, presupposes a second party to whom the ideas are expressed or communicated. It thus includes the freedom of propagation of ideas, their publication and circulation. The fundamental right to speech and expression can never be exercised until and unless the information regarding public matters is being circulated.

The right to information is an immutable part of freedom of speech and expression guaranteed by Article 19(1) (a) of Indian Constitution, as held in the respective cases of *Bennett Coleman v. UOI*,⁸ *SP Gupta v. UOI*,⁹ and *Secretary, Ministry of Information and Broadcasting v. Cricket Assn. of Bengal*.¹⁰ The Supreme Court of India in *Bennett Coleman* case while taking into account that via the News print control order, the allotment of newsprint to a newspaper was restricted, held that such restriction had not only infringed newspaper's right to freedom of speech but also limited the readers' right to read. And the reader's right to access the newspaper was his right to

7 Article 19(2), The International Covenant on Civil and Political rights 1966, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last accessed on April 23, 2016).

8 AIR1973 SC 106.

9 AIR1982 SC 149.

10 (1995) 2 SCC 161.

information which was implicit in the right to freedom of speech and expression. Similarly in SP Gupta case, the Supreme Court (SC) observed that “the people of this country have a right to know every public act, everything that is done in a public way, by those functionaries. They are entitled to know the very particulars of every public transaction.” Also in *Secretary, Ministry of Information & Broadcasting v. Cricket Assn. of Bengal*, the SC held that the airwaves were a public property and its distribution among the government media and the private channels should be done on equitable basis as the freedom of speech included the right to impart and receive information from electronic media.

Alongside Article 19(1) (a), the other Articles which secure right to information under Indian Constitution are Articles 311(2) and 22(1). Article 311(2) provides for a government servant to make out why he is being dismissed or removed or being demoted and representation can be made against the order. On the other hand, under Article 22(1) a person can know the grounds for his detention. In *Essar Oil Ltd v. Halar Utkarsha Samiti*, the SC held that right to information emerges from right to personal liberty guaranteed by Article 21 of Constitution.¹¹

Inevitability of Right to Information Act in India

Access to information held by a public authority was not possible until 2005. Lack of information barred a person to realize his socio – economic aspirations, because he had no basis to participate in the debate or question the decision making process even if it was harming him.

Official Secrets Act, 1923 acted as a relic of colonial rule covering everything in secrecy. The common people did not have any legal right to know about the public policies and expenditures. It was quite ironical that people who voted the persons responsible for policy formation to power and contributed towards the financing of huge costs of public activities were denied access to the relevant information.

The Indian Constitution has an impressive array of basic and inalienable rights contained in Chapter Three of the Constitution. These include the Right to Equal Protection of the Laws and the Right to Equality Before the Law (Article 14), the Right to Freedom of Speech and Expression (Article 19 (1)(a)) and the Right to Life and Personal Liberty (Article 21). The Right

11 AIR 2004 SC 1834.

to Constitutional Remedies in Article 32, backs these that is, the Right to approach the Supreme Court in case of infringement of any of these rights. These rights have received dynamic interpretation by the Supreme Court over the years and can truly said to be the basis for the development of the Rule of Law in India. As pointed out by H.M. Seervai, “Corruption, nepotism and favoritism have led to the gross abuse of power by the Executive, which abuse has increasingly come to light partly as a result of investigative journalism and partly as a result of litigation in the Courts.”¹²

The legal position with regard to the right to information has developed through several Supreme Court decisions given in the context of all above rights, but more specifically in the context of the Right to Freedom of Speech and Expression, which has been said to be the adverse side of the Right to Know, and one cannot be exercised without the other. The interesting aspect of these judicial pronouncements is that the scope of the right has gradually widened, taking into account the cultural shifts in the polity and in society.

The development of the right to information as a part of the Constitutional Law of the country started with petitions of the press to the Supreme Court for enforcement of certain logistical implications of the right to freedom of speech and expression such as challenging governmental orders for control of newsprint bans on distribution of papers, etc. It was through these cases that the concepts of the public’s right to know developed.

Supreme Court and Right to Information

For more than two decades, the Supreme Court of India has recognized the right to information as a constitutionally protected fundamental right, established under the Article 19 (right to freedom of speech and expression) and Article 21 (right to life) of the Constitution. The court has recognized the right to access information from government departments is fundamental to democracy.¹³ Therefore, Justice K. K. Mathew of Supreme Court of India said that ‘in a government.... where all the agents of the public must be responsible for their conduct, there can be but few secrets.

12 H.M. Seervai, *Constitutional Law of India* (4th Edn.Vol.2, Universal Law Publications: Delhi, 2013), at p 1096.

13 Deeksha, Prince and Sanya, *Right to Information*, available at <http://www.lawctopus.com/academike/right-information/> (last accessed on April 23, 2016).

The people.... have a right to know every public act, everything that is done in a public way, by their public functionaries.... The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.’¹⁴

As early as 1976, the Supreme Court said, in the case of *State of UP v. Raj Narain*,¹⁵ that people cannot speak or express themselves unless they know. Therefore, right to information is embedded in Article 19. In the same case, Supreme Court further said that India is a democracy. People are the masters. Therefore, the masters have a right to know how the governments, meant to serve them, are functioning. Further, every citizen pays taxes. Even a beggar on the street pays tax (in the form of sales tax, excise duty etc) when he buys a piece of soap from the market. The citizens therefore, have a right to know how their money was being spent. These three principles were laid down by the Supreme Court while saying that RTI is a part of our fundamental rights.

Progressive Politicians and Right to Information

For the first time, among the politicians of India, in 1990 Mr. V.P. Singh, the then Prime Minister of the Country headed by National Front Government stressed on the importance of Right to Information Act as a legislated right. Due to lack of political support and will, the right to Information Act was not materialized during V.P. Singh period.

The freedom movement, the Constitution of India, Supreme Court and some of the politicians supported for the right to information, but not materialized due to various reasons like policy support, institutional arrangements; etc. Therefore, to achieve the right to information act, the strong grassroots level movement was needed. The *Mazdoor Kisan Shakti Sanghatana*, *Parivarthan* fulfilled the gap of grassroots level movement and intellectual pressure and input was given by the National Campaign for People’s Right to Information and Common Wealth Human Rights Initiative.

Efforts of the MKSS towards Right to Information Act

The Mazdoor Kisan Shakthi Sanghatana (hereafter MKSS) has been active

14 Justice K.K. Mathew, Supreme Court of India, in the case of *State of UP v. Raj Narain*, AIR 1975 SC 865.

15 Ibid.

for the last 15 years in mobilizing the grassroots level people including peasants and workers for the issue-oriented campaigns in rural areas of Rajasthan. The MKSS is a peasant-farmer's collective that questions governance and policy making processes as they exist and attempts to influence them by mobilizing public opinion among its main constituents – peasants and rural workers.¹⁶

MKSS started its activities in 1987, but from 1990 onwards only somewhat structured initiatives at the grassroots level can be observed. Among the important issues taken up and succeeded to some extent are minimum wages, right to work, right to food, right to information etc. MKSS is also having experience in contesting the local body elections for two times (1999 and 2005) and part of election watch in Rajasthan.

Public Hearing is the genesis of Right to Information Movement

Public Hearing or Jan Sunwais is the origin point of the Right to Information Movement in India. The instrument of public hearing was initiated by the MKSS in some parts of rural areas of Rajasthan. In order to check the corruption with the involvement of the people, the mechanism of public hearing was adopted. The public hearing is nothing but an open and democratic debate about the public issues. In this type of public hearings elected representatives, government officials, people, local intelligentsia such as lawyers, media persons, Non- Governmental Organisations, Community Based Organisations, External Observers, etc. will participate. In public hearings generally, after identifying issues for example, corruption in developmental activities further deliberations take place. The Mazdoor Kissan Shakti Sanghathan identified corruption, misuse, and nepotism in the drought relief works, which were sanctioned for the rural poor. Therefore, MKSS initiated the series of public hearings over the rural developmental activities with the substantial evidence of data and documents by involving a cross section of the society. The public hearings are being conducted in Panchayati Raj Institutions, Government Offices and Non- Governmental Organisations, which are receiving the substantial

16 See for details, Study Report on Establishing Transparent, Accountable and Responsive Governance Through the Participation of Non-Party Political Organisations in Electoral Politics, Centre for Panchayati Raj, National Institute of Rural Development, Hyderabad, 2005, available at http://www.nird.org.in/research_highlights_2005-06.aspx#3 (last accessed on April 23, 2016).

financial support from the public authorities. In these public hearings in front of the public it is proved that a great deal of corruption and misuse is taking place. It has happened due to secrecy in the maintenance of records and registers and lack of accessibility to the public information for the citizens. Therefore, to combat the corruption in the developmental activities initiated either by the State Government or Central Government, there is a need to exercise the rights under various provisions of the Act to access the public information, which is national wealth generated by the citizens.

Public Agitations for the Right to Information

Along with the public hearings, the MKSS also launched the direct actions like Dharnas¹⁷ for the Right to Information in various parts of Rajasthan in 1995. The demand was to press for the issue of administrative orders to enforce the right to information of ordinary citizens regarding local development expenditure. Dharna witnessed an unprecedented upsurge of homespun idealism in the small town and the surrounding countryside.

Donations in cash and kind poured in daily from ordinary local people including vegetables and milk from small vendors, sacks of wheat from farmers in surrounding villages, tents, voluntary services of cooking, serving cold water, photography and so on, and cash donations from even the poorest.¹⁸

Even more significant was the daily assembly of over 500 people in the heat of the tent, listening to speeches and joining in for slogans, songs and relics. Active support cut across all class and political barriers. Rich shopkeepers and professionals to daily wage labourers, and the entire political spectrum from the right wing fringe to communist trade unions extended vocal and enthusiastic support. However, no assurance from government was forthcoming, and therefore after completion of polling on 2 May 1996, while the dharna continued, it spread also to state capital of Jaipur. In Jaipur, in an unprecedented gesture, over 70 people's organisations and

17 Dr Amit Kumar Upadhyay, Role Of Civil Society In The Promotion And Protection Of Right To Information For The Realization Of Good Governance, INTERNATIONAL JOURNAL IN MANAGEMENT AND SOCIAL SCIENCE, Vol.03 Issue-11 (November, 2015), p 108.

18 Mander Harsh & Joshi Abha, The movement for right to information in India: People's Power for the Control of Corruption, available at http://humanrightsinitiative.org/old/index.php?option=com_content&view=article&catid=34%3Aright-to-information&id=652%3Aworkshopshare&Itemid=83 (last accessed on April 23, 2016).

several respected citizens came forward to extend support to the MKSS demand. The mainstream press was also openly sympathetic.¹⁹

State Government Response to the Right to Information Movement

In response to the public hearings organised by MKSS evoked widespread hope among the underprivileged people locally, as well as among progressive elements within and outside government. In October 1995, the Lal Bahadur Shastri National Academy of Administration, Mussoorie took the unusual step of organizing a national workshop of officials and activists to focus attention on the right to information. Meanwhile, responding to the public opinion relating to the issue, the Chief Minister of Rajasthan on 5 April, 1995 announced in the state legislature that his government would be the first in the country to confer to every citizen, the right to obtain for a fee, photo-copies of all official documents related to local development works. However, until a year later, this assurance to the legislature was not followed up by any administrative order. In Jaipur on 14 May 1996, the Rajasthan state government, stated firstly that the state government had taken a decision on the issue not because of the pressure of people's organisations, but because of the government's own commitment to transparency and controlling corruption. It went on to announce the establishment of a committee which within two months would work out the logistics to give practical shape to the assurance made by Chief Minister to the legislature, regarding making available photo-copies of documents relating to local development works. Another year passed and despite repeated meetings with the Chief Minister and senior cabinet members and state officials, no order was issued and shared with the activists, although again there were repeated assurances. In the end, on a hot summer morning in May 1997 began another epic dharna, this time in the state capital of Jaipur, close to the State Secretariat. At the end of 52 days of the dharna, the Deputy Chief Minister made an astonishing announcement, that six months earlier, the state government had already notified the right to receive photo-copies of documents related to panchayat or village local government institutions.

Nevertheless, the order of the state government was welcomed as a major milestone, because for the first time, it recognized the legal entitlement of ordinary citizens to obtain copies of government held documents.

19 Ibid.

Pionering States in Introducing Right to Information Act

In response to the pressure of the grassroots movements as well as to satisfy the international money lending institutions to borrow the loans. Some of the State Governments such as Goa (1997), Tamil Nadu (1997), Rajasthan (2000), Karnataka, (2000), Delhi (2001), Assam (2002), Maharashtra (2003), Madhya Pradesh (2003) and Jammu, Kashmir (2003) introduced the Right to Information Act. Among all these Acts, Maharashtra Right to Information Act was considered as the model act in promoting Transparency, Accountability and Responsiveness in all the Institutes of the State as well as the private organisations, which are getting financial support from the Government. Tamil Nadu Act was considered as the most innovative one in how to refuse the information to the seekers. Due to lack of awareness about the Right to Information Act among the grassroots level people, lack of institutional arrangements for the implementation and lot of exemptions in the Right to Information Acts of some States, led to non-achievement of the objectives. Despite, all these lacunas in the Act, still the state level Right to Information Acts provided the culture of transparency, accountability, responsiveness, social audit, awareness among the people. These state Acts were the models for the preparation of national Right to Information Act. With the commencement of national Right to Information Act, 2005, few of the state governments for example, Madhya Pradesh, Maharashtra repelled the state Right to Information Act and started implementing the national Right to Information Act 2005.

Parivarthan in Delhi State

Parivarthan a NGO working in the urban slums of Delhi on awareness building on Right to Information Act and using RTI as the potential instrument for transparent delivery of services like Public Distribution System, infrastructure such as public roads and buildings and electoral reforms. The Parivarthan also used the right to information in conducting the social audit in the urban areas on spending of the public investment. Parivarthan being a part of the National Campaign for People's Right to Information put consistent effort for the National Right to Information.

Towards a National Right to Information Act

For the introduction of National Right to Information Act, there have been efforts since 1996 onwards. The National Campaign for People's Right to

Information (NCPRI) was founded in 1996. Its founding members included social activists, journalists, lawyers, professionals, retired civil servants and academics, and one of its primary objectives was to campaign for a national law facilitating the exercise of the fundamental right to information. The international organisations like Common Wealth Human Rights Initiative strongly advocates that the Right to Information (RTI) is fundamental to the realization of rights as well as effective democracy, which requires informed participation by all. CHRI educates the public about the value of RTI and advocates at policy level for guaranteed access to information. The contribution of Common Wealth Human Rights initiative for the enactment of the national Right to Information Act in India was through providing aid to discussions, analysis of the Freedom of Information of Act and recommendations to the National Advisory Council, to all the Cabinet Ministers and members of the Parliament.

In response to the pressure from the grassroots movements, national and international organisations, the press council of India, under the guidance of its Chairman Justice P.B. Sawant drafted a model bill that was later updated at a workshop organized by National Institute of Rural Development and sent to Government of India, which was one of the reference paper for the first draft bill prepared by Government of India. For some political and other reasons, the bill could not be taken up by the Parliament. Again, in 1997 the United Front Government appointed the working group under the chairmanship of Mr. H.D. Shourie, drafted a law called “The Freedom of Information Bill-1997”. This bill was also not enacted. In 1998, though the Prime Minister Mr. Vajpayee announced that a law on Right to Information should be enacted soon, it did not materialize. In the year, 2000 the Freedom of Information Bill – 2000 was tabled before the Parliament. After some debate it was referred to the Parliamentary Standing Committee on Home Affairs for review. The Freedom of Information Bill was passed by the Parliament as the Freedom of Information Act, 2002. However, it could not enter into force as the necessary notification was never issued by the then government. (Section 31 of the Right to Information Act 2005 repealed the Freedom of Information Act, 2002.)

The coalition Government at the Centre led by United Progressive Alliance formulated an agenda called, “Common Minimum Programme.”²⁰ One of

20 Consensus programme of the constituents of the UPA government at the centre.

the agenda of the CMP was the introduction of “Right to Information Act.” The CMP stated clearly, “the Right to Information Act will be made more progressive, participatory and meaningful. In order to look after the implementation of the Common Minimum Programme, the UPA constituted National Advisory Council. In the National Advisory Council some of the activists like Aruna Roy²¹ and Jean Drez²² who are associating with the National Campaign for Peoples’ Right to Information Act consistently put the pressure on the UPA Government to pass the bill and to enact a law. In response to these efforts the Parliament passed the bill and the President of India consented to the Act on 15th June, 2005 and implementation process of the Right to Information Act started since 12th October 2005.

Implications of the Right to Information Act 2005

The coverage of the Right to Information Act-2005 is wider. Several institutions build through the Constitution, Parliamentary Acts, State Legislative Assembly and Council Acts, Government Organisations, private organisations and NGOs, which are receiving substantial financial support from either state or central government come under the purview of the Right to Information Act. All these institutions are bound to give the required information to the citizens within a prescribed period of 30 days with respect to normal information, with respect to information relating to human rights within 48 hours and 45 days for the information from the third party. If the aforesaid time period has expired in giving the information to the concern citizens, then there will be a penalization of the Public Information Officer at the rate of Rs 250/- per day. The fine may be up to Rs 25,000/-. As a result of rigorousness in the Act, there is every possibility for the citizens to get the information of the State documents and records.

Emerging Scenario in the Post-Right to Information Act 2005

One important task of the State both at centre as well as at the state level is to appoint the Chief Information Commissioners and other Commissioners and it is clearly stated in the Act that those people who will be appointed for these positions should have the background of social service,

21 Resigned IAS officer, MKSS activist and winner of the Ramon Magsaysay Award.

22 Prominent pro-working-class economist.

journalism, academics, jurist etc. But when we look at the persons, who are appointed for the positions of the Chief Information Commissioners and other Information Commissioners, they have the background of bureaucracy, political affiliations; etc. The second important point is that across the country from Gram Panchayati level to national level, in all the offices an effective institutional arrangement is being made but there is a low level of awareness among the rural masses. Therefore, post one year experience from the implementation of the Right to Information Act, 2005, reveals that it has become a grievance redressal mechanism for the government employees.

Limitations under Indian Law on Right to Information

There are certain laws which are contrary to the right to information in India and need to be amended in order to safeguard the Right to Information Act. Sections 123, 124, and 162 of The Indian Evidence Act provide to hold the disclosure of documents. Section 123 provides that any head of department may refuse to provide information on affairs of state by stating that it is a state secret and hence is not entitled to disclose the information. In a similar manner, section 124 states that no public officer shall be compelled to disclose communications made to him in official confidence. Section 162 provides for the court not to inspect a document relating to matters of state. The Atomic Energy Act, 1912 provides that it shall be an offence to disclose information restricted by the Central Government. Similarly the Central Civil Services Act, 1965 provides a government servant not to communicate or part with any official documents except in accordance with a general or special order of government. The Official Secrets Act, 1923 as evident from its name, under section 5, provides that any government official can mark a document as confidential so as to prevent its publication.

Conclusion

India now can proudly proclaim that its citizens today have been bestowed with specific RTI, which will unquestionably lead them towards the path of development. Although there are still some shortcomings, yet the same can be overcome for the growth of a healthy democratic atmosphere- especially in a country which happens to be the largest democracy in the world. Information is power, and that the executive at all levels attempts to withhold information to increase its scope for control, patronage, and the arbitrary, corrupt and unaccountable exercise of power. Therefore,

demystification of rules and procedures, complete transparency and proactive dissemination of this relevant information amongst the public is potentially a very strong safeguard against corruption.²³ Fighting corruption which has been a major anxiety for our country for decades finds an answer potentially in the hands of RTI. This can be achieved by growth of a comprehensive information management system and by the promotion of information literacy among the citizens. This will positively lead to ultimate recognition of the objectives of RTI viz. transparency and accountability. It is therefore, rather safe to affirm that RTI is a means as well as end to attain democracy in its truest meaning.

Until the introduction of the Right to Information Act, information was the property of those people who are in the ruling side and secrecy was maintained. With the commencement of the Act, now the people have got right to take, see, check and inspect any information, which is not coming under the exemption list. But at the same time it require a lot of awareness campaign among the people in order to utilize the act to combat the corruption and get the services of the State, otherwise the present Right to Information Act, 2005 will also become just like any other Act.

* * * * *

23 Supra note 18.

RTI, FREEDOM OF INFORMATION AND DEMOCRATIC VALUES

Avnish Mishra and Pragyan Utsav Mishra***

Abstract

The Right to Information has been the sentinel of citizen's rights or more specifically, human rights since the Right to Information Act has come into implementation. RTI has been a tool for the general populace to not only know of their rights, but also has brought governance to the door steps for them.

The paper shall at length discuss the Human Rights approach of the RTI. The basic idea is not only to comprehend RTI and the advances it has made in the field of Human Rights but also tracking the State's obligations as part of it.

Firstly, the paper shall deal with how RTI has been significantly helpful in bringing Human Rights to the general populace which has always been touted as the victim of vagrants of democracy.

Secondly, the paper shall make inroads into how governance led by RTI has been a catalyst to different Human Rights issues.

Thirdly, the paper shall attempt at the State's obligations rising under RTI, both nationally and internationally.

Furthermore, the paper at length would discuss the evolution of the Jurisprudence of the courts not only in India but internationally too, which has made Right to Information an important aspect of Human Rights legislations.

In the International arena, RTI has also got its relevance from various human rights machineries which have been operating to promote the human rights, in order to uplift the standards of mankind. This is relevant from the Universal Declaration of Human Rights & International Covenant on Civil Political Rights which state "everyone shall have a right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers either orally or in writing or in print, in the form of art or through any other media of his choice". The right has also been inculcated in the form of Art 25(a) of ICCPR which states that, "every citizen shall have the right and opportunity to take a part in the conduct of public affairs directly or through freely chosen representatives."

* Student, Damodaram Sanjivayya National Law University

** Student, Damodaram Sanjivayya National Law University

Moreover, subsequent operating machineries have also increased their ambit by incorporating similar provisions like Article 10(1) of the European Covenant on Human Rights, African Covenant on Human and People's Right and various other resolutions.

Introduction

In India today, the state has spread its dominion to virtually every aspect of public life. The person on the street is condemned to adjust and live in a hopelessly pitiable condition with corruption in almost every aspect of daily work and living. The government offices are a nightmare, typically presenting a picture of the public, bewildered and harassed by opaque rules and procedures and inordinate delays, constantly vulnerable not only to the exploitation by employees but also to the emergence of new parasites or more precisely, touts. The problem of this secrecy and ineffective bureaucracy calls for a new quest, the quest for systemic answers to this chronic malaise, which again purports to identify the sources of corruption inherent within the character of the State machinery. These include a determined denial of transparency, accessibility and accountability, cumbersome and confusing procedures, proliferation of mindless controls, and poor commitment at all levels to real results of public welfare.

Information is the currency which every citizen requires, to participate in the life and governance of society. The greater the access of the citizen to information, the greater would be the responsiveness of government to community needs. Alternatively, the greater the restrictions that are placed on access, the greater the feelings of 'powerlessness' and 'alienation'. Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Neither the particular government of the day nor public officials create information for their own benefit. This information is generated for purposes related to the legitimate discharge of their duties of office, and for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of import or another) fund the institutions of government and the salaries of officials. It follows that government and officials are 'trustees' of this information for the people.

Article 19(1)(a) of the Constitution guarantees the fundamental rights to free speech and expression. The prerequisite for enjoying this right is knowledge and information. The absence of authentic information on matters of public interest will only encourage wild rumours and

speculations and avoidable allegations against individuals and institutions. Therefore, the Right to Information becomes a constitutional right, being an aspect of the right to free speech and expression which includes the right to receive and collect information. This will also help the citizens perform their fundamental duties as set out in Article 51A of the Constitution. A fully informed citizen will certainly be better equipped for the performance of these duties. Thus, access to information would assist citizens in fulfilling these obligations.¹

RTI and International Machineries Recognising it as a Human Right

Human rights have been defined as the rights that protect our interests in having “those resources and circumstances necessary for living a minimally good life”. These rights are those we have simply in virtue of being human, and are not tied to membership in any particular political society or state.

Article 19 of the UDHR, the key statement of the right to information in the Declaration, uses the language of liberty: “Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.”² These rights must be respected if people’s fundamental interests in information and knowledge are to be protected. Nevertheless, mere freedom to access information is an insufficient protection of the right to information

The importance of freedom of information as a fundamental right is beyond question. In its very first session in 1946, the UN General Assembly adopted Resolution 59(I),³ stating,

“Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”

This has been reiterated by the UN Special Rapporteur on Freedom of Opinion and Expression, “Freedom will be bereft of all effectiveness if the people

1 Abhinav Srivastava, Right to Information, available at <http://www.legalservicesindia.com/articles/rgti.htm> (last accessed on May 16, 2016).

2 Available at <http://www.un.org/en/universal-declaration-human-rights/> (last accessed on May 16, 2016).

3 Toby Mendel, Freedom of Information as an internationally protected human right, available at <https://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf> (last accessed on May 16, 2016).

*have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.”*⁴

These quotations highlight the importance of freedom of information at a number of different levels: in itself, for the fulfilment of all other rights and as an underpinning of democracy. It is perhaps as an underpinning of democracy that freedom of information is most important. Information held by public authorities is not acquired for the benefit of officials or politicians but for the public as a whole. Unless there are good reasons for withholding such information, everyone should be able to access it. More importantly, freedom of information is a key component of transparent and accountable government. The Right to Information not only establishes itself as a Human Right but as one of the most important ones.⁵

The European Court of Human Rights (ECHR) has held that Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁶ guaranteeing freedom of expression,

*“basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him”.*⁷

Furthermore it was opined, Article 10 did not *“embody an obligation on the Government to impart such information to the individual.”*⁸

It would appear that the ECHR was reluctant to introduce positive obligations, and in particular an obligation to provide access to information, in the context of Article 10, guaranteeing a freedom of expression. The

4 Ibid.

5 Ibid.

Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III), 10 December 1948 (Article 9).

6 “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”, available at <http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/1/chapter/9> (last accessed on May 26, 2016).

7 Leander v. Sweden, 9 EHRR 433, para. 74. See also, Gaskin v. United Kingdom, 12 EHRR 36.

8 Leander v. Sweden; para. 74.

reasons for this are unclear and could be many. It is possible the court, which has always been quite conservative in its approach, may be concerned about the implications of reading a general right to access information held by public authorities into Article 10, which may with its other implication, reign in an era of anarchism. It is also possible that the Court has failed fully to understand the implications of freedom of expression, and the need for full access to information, as underpinnings of democracy, an aspect which has become the guiding force behind effective democracies.⁹

In a similar approach, the Supreme Court of Sri Lanka has emphasised that a right to freedom of information, while not necessarily included within the guarantee of freedom of speech, for that “would be to equate reading to writing, and listening to speaking”,¹⁰ may well be part of the guarantee of freedom of thought and opinion.¹¹

The UN Bodies too, in one way or the other impart the ideas of Right to Information being a Human Right, UNESCO’s mandate as set out in its 1945 Constitution specifically calls on the Organization to “promote the free flow of ideas by word and image”.¹² This mission was reflected particularly in its strategic programme objective of enhancing universal access to information and knowledge.¹³

Freedom of information has also been central in the guiding principles and framework of the World Summit of the Information Society, which has reaffirmed freedom of expression and universal access to information as cornerstones of inclusive knowledge societies.

RTI under the Indian Constitution

The Supreme Court of India has, from time to time, interpreted Article 19 of the Constitution, which upholds the right to freedom of speech and expression, to implicitly include the right to receive and impart information. This has resulted in establishment of the fact that the citizens’ right to

9 Supra note 3.

10 *Fernando v. Sri Lanka Broadcasting Corporation and Others*, 30 May 1996, SC Application NO. 81/95, p. 16.

11 *Ibid.*, at p 17.

12 Available at <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/> (last accessed on May 16, 2016).

13 *Ibid.*

know is embedded in the Constitutional provisions guaranteeing fundamental rights.¹⁴

Part of Democratic Process

In the Brisbane Declaration,¹⁵ the discussion was initiated by quoting article 19 of ICCPR which states that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. The basic aim of the declaration is to emphasize on the need and significance of right to information, they defined Right to information as ‘right of everyone to access information held by public bodies’, the need of inclusion of this right as a fundamental right was advocated and it was stated that, this right not only ensures effective participation of people in a democratic society but also ensures good governance and eradication of poverty. Moreover, it was said that this right is critical for informed decision making, improving transparency and accountability of officials and is a very important tool for fighting corruption. It was also highlighted that this right will also prove to be instrumental in uplifting the status of indigenous people, especially women and will ensure equality of all groups in society. So, by highlighting all the relevant advantages of this right it was urged from the member states to make this right a fundamental right on the ground of principal of maximum disclosure. It was urged from the nation states that they should also make sure that it should be a simple and set procedure for enforcement of this right and on the demand of people, information should be made available in their regional languages as well. It was also advocated that this right will also ensure freedom of press which is the basic crux of every democracy. Hence, the member states were urged that every possible

14 Secretary, Ministry of Information and Broadcasting, *Government of India v. Cricket Association of Bengal* AIR 1995 SC. 1236, 1995. 2 SCC 161.

15 The participants at the UNESCO World Press Freedom Day conference in Brisbane, Australia, 3 May 2010 adopted the Brisbane Declaration which inter alia emphasized that the right to information is critical for informed decision-making, for participation in democratic life, for monitoring of public actions, and for enhancing transparency and accountability, and represents a powerful tool to fight corruption, <http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-press-freedom-day/previous-celebrations/2010/brisbane-declaration/> (last accessed on May 16, 2016).

machinery and human resource should be entailed in order to enforce this right.¹⁶

In many countries especially in India, where through a writ petition in *S.P. Gupta v. Union of India*,¹⁷ it was asked that the procedure and appointment of every judge of SC should be disclosed to the public, the state on the other hand contended that it is not possible as the state reserves this right to not disclose the procedure of appointment, however, the honourable SC rejected the following and stated that:

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 Japan also in the case of *Kaneko v. Japan*,¹⁸ where the Supreme Court of Japan contended that, right to information is protected by Article 21¹⁹ of the Constitution of Japan, as follows: “*In order that the contents of the reports of such mass media may be correct, the freedom to gather news for informational purposes, as well as the freedom to report must be accorded due respect in light of the spirit of Article 21 of the Constitution.*” Hence, the Supreme Court of Japan also stated that the right was implied in Article 21 of the Constitution of Japan.

Similarly, in Israel also the Supreme Court was petitioned to instruct Shimon Peres, then a candidate for the office of prime minister, to disclose a political agreement completed with another party prior to the expected establishment of a coalition government. The court stated that, “There is a third source [for the obligation to disclose] which is entrenched in the public’s right to know. It has been here that freedom of expression is one of the basic principles of our system of law. Freedom of expression is a

16 Ibid.

17 AIR 1982 SC 149.

18 Sup.Ct. 1969.11.26 Keishu 23-11-1490. In the aforesaid case, the Supreme Court considered the need for films as evidence in a fair trial to be more important than the freedom of the press.

19 Article 21 of the Constitution of Japan provides that “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.”

complex value, at the crux of which is the freedom “to express one’s thoughts and to hear what others have to say.” In order to realise this freedom, the law vests the holder thereof with additional rights derived from the freedom of expression.²⁰ Among these additional rights is the “right to receive information.” As against the individual’s right to receive information is the governing body’s study [sic] to provide that information.²¹

So, we can witness from the above that the right has not only evolved through interpretation in India only, but in other countries as well.

Judicial Approach

On refusal to provide information by a governmental department it was held that the legal entities by their nature do not have sensitive data that could affect their honour or privacy. Therefore, a Department’s refusal to provide information is contrary to the principle of good faith that underlies the administration: opposing manifestly inappropriate arguments as grounds to avoid the international obligation on states to increase transparency in the management of public funds (United Nations Convention against Corruption, Article 10; and Article III (6) and (11), Inter-American Convention against Corruption, para. 22). These same considerations apply to information regarding selection of the plans within the program, and amounts transferred, which do not affect the privacy of any person.²²

In another case, when the question was raised about the disclosure of information from European Unions’ documents, EU institutions may rely on a general presumption that disclosure of documents exchanged between the European Commission and undertakings in the course of merger control proceedings undermines both commercial interests and the objective of investigative activities. The applicant may nonetheless demonstrate overriding public interest in disclosure. The presumption does not apply to internal EU documents once the proceedings are closed.²³

The freedom to receive information embraces a general right of access to information. Article 10 of the European Covenant on Human Rights

20 Shalit v. Peres, 48(3) PD 353 [1990].

21 Ibid.

22 Cippec v. Federal Government, Department Of Public Welfare, Executive Order 1172 Of 2003, On Action For Protection Law , C. 830. Xlvi, National Supreme Court Of Justice Argentina.

23 European Commission v. Agrofert Holding, C-477/10 P, June 28 , 2012.

includes the right of access to data held by an intelligence agency. A public body cannot evade requests for information by simply declaring that it does not hold the information.²⁴

Calling for restrictions on certain trade related information, the European Court has opined that a certain level of discretion is justified when it comes to disclosure of information regarding the negotiation of international agreements such as the Anti-Counterfeiting Trade Agreement (ACTA), so as to allow mutual trust between negotiators and the development of a free and effective discussion. As, in the European Union, conducting such negotiations falls in the domain of the executive, public participation in the process is necessarily restricted.²⁵

In a case wherein information about a toxic pesticide was raised as a contention, we had the European Court of Human Rights rise to the occasion and deliver that the European Commission's refusal to grant access to documentation containing information about the pesticide glyphosate cannot be justified by reference to the commercial confidentiality or the intellectual property rights of a natural or legal person.²⁶

Decision of the Tyrol Real Property Transactions Commission to refuse information request of an NGO constitutes interference within right to receive and impart information. The complete refusal and commission's choice to hold a monopoly on information, made it impossible for the applicant to carry out its task and is thus not justified as being "necessary in a democratic society"²⁷

In a question pertaining to State's obligation when it failed to provide essential information regarding diving risks, the observation was that State's failure to ensure access to essential information regarding risks associated with use of decompression tables to divers, constituted violation of the applicants' right to respect for their private life.²⁸

24 Youth Initiatives For Human Rights v. Serbia, Application No. 48315/06, ECtHR.

25 T 301/10, 19 March 2013, EU General Court of Justice.

26 Stichting Greenpeace Nederland And Pesticide Action Network Europe v. Commission, Case T 545/11, 8 Oct 2013, EU Court of Justice.

27 Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, App No.39534/07 Ect HR.

28 Vilnes and others v. Norway, 52806/09 and 22703/10, ECtHR.

Information unrelated to maintaining national security and with no material link to protecting territorial integrity and defending democratic institutions or to the enjoyment of fundamental individual rights, including the right to privacy, may not be restricted.²⁹

While deciding the matters pertaining to refusal of Freedom of Information it was held that a refusal to disclose information about campaign contributions, including names, addresses and phone numbers of contributors, in electronic format was unreasonable given the importance of furthering the democratic process through public scrutiny and the minimal intrusion on privacy.³⁰

The Costa Rican Courts negated the view of the Costa Rican govt. that the reports of its dealings with the IMF were protected documents. Because information of public character is necessary to the formation of free and open public discourse guaranteed by the Constitution, the Central Bank of Costa Rica must disclose a report by the International Monetary Fund containing information on Costa Rica's economy.³¹

In another question of cabinet privileges the Nova Scotian Supreme Court ruled "The substance of Nova Scotia Provincial Cabinet deliberations with respect to government programs that are closed constitutes public information not protected by Cabinet privilege. However, programs that are not closed are protected by privilege, to the extent a decision on their continuity has not been implemented or made public and Cabinet has not waived such a privilege."³²

The Japanese Court has ruled that the business information exemption to Freedom Of Information Act only applies where there is objective evidence indicating that disclosure would result in injury to the "rights, competitive standing, or other legitimate interest" of a business entity or individual.³³

29 In re Articles 27 and 42 of Decree 1799 of 2000, C-872/03, Constitutional Court of Colombia.

30 *Phinjo Gombu v. Tom Mitchinson, Assistant Commissioner et al.*, Docket Nos. M28630 & 28684 // [2002] O.J. No. 3309, Supreme Court of Ontario.

31 *Navarro Gutierrez v. Lizano Fait*, Exp: 02-000808-0007-CO, Res: 2002-03074, Supreme Court of Costa Rica, Constitutional Chamber.

32 *O'Connor v. Nova Scotia*, 2001 NSSC 6, Supreme Court of Nova Scotia.

33 *Nagoya Citizen Ombudsmen v. Director of the Central Japan Economics and Industry Bureau of the Ministry of Economics and Industry*, Nagoya District Court, 1083 Hanrei Times 311.

In Hungary, the right to receive and impart information of public interest is a fundamental right and Act LXV of 1990 on local governments was held violative of this right by providing town councils with absolute discretion to close meetings and deny access to records of such meetings.³⁴

Restriction of access to information is unreasonable, in violation of a person's right to know, where the information has not been classified as confidential, disclosure does not implicate the invasion of another's privacy, and such person has a direct interest in the information.³⁵

Government agencies need to provide information upon request; if they do not want to disclose information, they carry the burden of proving that the information is not of public concern or, if it is of public concern, that the information has been specifically exempted by law. Moreover, a citizen does not need to show any legal or special interest in order to establish his or her right to information.³⁶

The Supreme Court of India in case of *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*³⁷ narrowly expanded its view on the provision of article 19(1)(a) towards the right to information. It held that the right to freedom of speech and expression includes the right to receive and impart information.

It was held in the case of *S. P Gupta v. Union of India*,³⁸ that right to know is implicit in right of free speech and expression and that disclosure of information regarding functioning of the government must be the rule.

Further, it was observed that freedom of speech and expression includes right of citizens to know every public act, everything that is done in a public way, by their public functionaries³⁹. In the year 1997, the Court also held

34 In re the Constitutionality of Act LXV of 1990 on Local Governments, 32/1992 (V.29) AB, Constitutional Court, Hungary.

35 Forests Survey Inspection Request Case Petitioner v. Supervisor of County of Ichon, [Korean Constitutional Court Report], 1 KCCR 176, 88Hun-Ma22.

36 Legaspi v. Civil Service Commission, G.R. No. 72119, Constitutional Court of Phillipines.

37 AIR 1995 SC. 1236.

38 1981 Supp SCC 87.

39 State of Uttar Pradesh v. Raj Narain, 1975 4 SCC 428.

that freedom of speech and expression includes right of the citizens to know about the affairs of the government.⁴⁰

The freedom of speech and expression, has been held repeatedly by the Supreme Court to be basic and indivisible from a democratic polity. It includes right to impart and receive information. The restrictions to the said could be only as provided in Article 19(2) of the Constitution of India. This Article provides that nothing in sub-clause (i) of clause (1) shall affect the operation of any existing law or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with the foreign states, public order, decency or morality. The grounds upon which reasonable restrictions can be placed upon the freedom of speech and expression are designed firstly to ensure that the said right is not exercised in such a manner as to threaten the sovereignty and integrity of India, security of state, friendly relations with the foreign state, public order, decency or morality. The existing laws providing such restrictions are saved and the state is free to make laws in the future, imposing such restrictions. The aforesaid grounds are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully and peacefully be exercised by the citizens of this country. Hence, the right to know or be informed is the foundation of democracy and is derived from the plenary provisions of Article 19(1)(a) of the Constitution of India.

True democracy cannot exist unless the citizens have a right to participate in the affairs of the policy of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of issues in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create uninformed citizens which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where 65% of the population is illiterate.⁴¹

40 Dinesh Tribedi v. Union of India, 1997 4 SCC 306.

41 Peoples Union for Civil Liberties v. Union of India, AIR 2003 SC 2363.

In a government of responsibility, 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. In furtherance of the aforesaid right to know, they are entitled to know the particulars of every public transaction as well in all its bearing.⁴²

The member of the democratic society should be sufficiently informed so that they may influence intelligently the decisions, which may affect them. Further the right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy.⁴³

The public interest in freedom of discussion stems from the requirement that members of a democratic society should be sufficiently informed.⁴⁴

Conclusion

On the Judgement day, it shall be down to two things whether one made the right choice and whether one was qualified enough to make a choice. The solution to both of these dilemmas would be one that is creation of the requisite knowledge, whether one was informed about the technicalities of the things at the helm of affairs, and when these shall be asked, RTI would hold its head high and iterate that Indeed I did. The Right to Information has created a sense of collective responsibility towards the working of a democracy. It has additionally created an environment which is free from ignorance because it has weeded out the very causes of them. The very reason for the spread of anarchy and hypocrisy in a democratically ruled society is that when the doings of the government fail to reach the citizens, they are kept in dark about the very process of nation building. Right to Information has ushered in a new regime wherein people actually get access to the information guiding them and ruling them, making them a much more informed and confident electorate.

One cannot challenge that Right to Information is a human right which can be legally enforceable. It transpires the very process of democratic institutions, making it the most effective way of bringing in governance to people. Human Rights are touted as rights with which an individual is born

42 Union of India v. J. Krishnan, W.P.(C) 2651/2012.

43 Union of India v. Association for Democratic Reform, AIR 2002 SC 2112.

44 Indian Express News Papers (Bombay) v. Union of India, AIR 1986 SC 515.

and not something which the legislature provides, similar to this is the fate of right to Information which started as an off shoot of freedom of expression but today commands a similar reputation as of its parent right.

The jurisprudence which has been an outcome of the processes of democracy and the able handling of various courts, national and international, clearly show that the Right to Information has been set on a embargo to make the citizens an active participant in the process of nation building, what more would be of a more fundamental aspect than this in a democracy?

Right to Information has shelved across the borders and created a very responsible intelligentsia not only in the developed nations but even in nations which are touted as developing or under developed.

The Right to Information Act indeed has been a sentinel of the core values of justice.

* * * * *

CONSUMERS' RIGHT TO INFORMATION: CONSUMER FORUM V. INFORMATION COMMISSIONS

*Dr. Sairam Bhat**

Abstract

Under the Consumer Protection Act, 1986, the creation of consumer forums has ensured quick, speedy and expert disposal of consumers' grievances. Similarly under the RTI Act, the government has established Information Commissions to deal with disputes arising out of the Act. There are numerous examples which demonstrate the overlap and conflict between the Consumer Forum and Information Commission. The current paper analyses in detail the clash of jurisdictions between the Information Commissions and other authorities established by certain legislations. The author adopts a middle path by determining that the effective exercise of the right to information requires the counter-balance of any such conflict. The author has made an attempt to raise the issues, arguments and the various legal remedies available in the event of such a jurisdictional conflict and to resolve claims of jurisdiction between the Consumer Forums and Information Commissions.

Introduction

The Right to be informed in consumer affairs and the right to be protected against fraudulent, deceitful or grossly misleading information, advertisement, labelling, or other practices and to be given the facts she/he needs to make an informed choice, are rights that are recognised under the Consumer Protection Act, 1986 [COPRA]. COPRA, coming 39 years after Independence, has acknowledged the rampant consumer abuses, including those of the government owned public utilities services like telephones, transport, power etc. These utilities, initially created as state monopolies ostensibly to protect consumers, later were guilty of lacklustre performance, resulting in deficient service to the consumers; hence, making Government held enterprises accountable and responsible was a step in the right direction. This resulted in consumer bodies demanding, and perhaps seeing in the future, independent Public Utility Regulatory Commissions in different sectors, like the Telecom Regulator, Electricity Regulator, and Insurance Regulator etc, to debate/adjudicate issues of costing/

* Associate Professor of Law, National Law School of India University, Bangalore.

pricing/tariff and promote fair competition.¹ Consumer Protection Act, 1986 strengthened the earlier legislations like the Sale of Goods Act, 1930 and the MRTP Act, 1969. Further COPRA has lot of relevance when read with some of the later legislations like the Food Safety Act, 2006; Competition Act, 2002 and the Right to Information Act, 2005 [RTI].

Although Indian consumers are aware of market conditions, the lack of organisation among them prevents them from taking action to check their systematic exploitation.² The concern of consumer protection is to ensure fair trade practices, and right to be informed about quality of goods and efficient services with information to the consumer with regard to quality, quantity, potency, composition and price for their choice of purchase.

The Right to Information Act, 2005, intends to provide transparency in governance, create accountability and eradicate the rampant corruption in the echelons of Government and public bodies. Sections 3 and 4 of the RTI Act entitle all citizens³ of India, a right to seek information from a 'Public Authority'.⁴ An applicant under this Act need not specify reasons⁵ for seeking the said 'information'⁶ as it is a subject of his fundamental

-
- 1 Consumer Rights and its Expansion; Rights and Responsibilities, available at <http://www.cuts-international.org/consumer-rights.htm> (last accessed on May 16, 2016).
 - 2 Suresh Misra and Sapna Chadah, *Introduction: The Consumer Movement and Consumer Protection in India*, in Suresh Misra and Sapna Chadah [ed], CONSUMER PROTECTION IN INDIA: ISSUES AND CONCERNS, Centre for Consumer Studies (Indian Institute of Public Administration, New Delhi, 2012), at p 2.
 - 3 For the definition of who is Citizen is the Information Commission have relied on the Citizenship Act of 1955. As per this, only natural person can be citizens and hence 'Juristic personalities' like Companies, Corporations, Societies are not citizens and cannot seek 'information' under the RTI Act, 2005.
 - 4 As per Section 2(h) of the RTI Act: Public Authority is one that is established by the Parliament or the State Legislature, include the legislature, Judiciary, Executive; All bodies owned, controlled by the Government, and NGOs substantially funded by the Government. Hence the private sector, even listed Public Ltd Companies [other than Government Public Sector Undertakings] are not answerable under the RTI Act, 2005.
 - 5 Section 6(2) of the RTI Act, 2005.
 - 6 Section 2(e): Information under the RTI Act includes, records, documents, papers, contracts, press releases, advises file noting, samples, models and data material held in electronic form.

right.⁷ Sec. 8 provides for the information which is to be exempted, which includes; various items requiring, national security, defence secrets, confidentiality or protected by privileges such as cabinet papers, investigation in process and personal information which is not connected with any public nexus.

The enactment of the RTI Act has opened up governance processes of our country to the common public and thus has far-reaching implications for consumer protection.⁸ Consumers are deprived of information relating to essential services provided by the Government, like food adulteration, unsafe food, genetically modified food and exaggeration of products through misleading advertisement. Due to non exercise of his right to information many a times, a consumer has been exploited and these unfair trade practices continue.⁹ Hence, it is imperative to use the law in business practices and RTI has become a weapon to ensure maximum fairness and transparency. Over the years, the difference that the RTI Act and the COPRA have made to the citizenry at large is undeniable and it has inspired similar legislation in other jurisdictions like the Public Service Guarantee to Citizen's Act.¹⁰

Yet there is a distinct disenchantment. Misuse of any right, consumer or information, has lead to disillusionment in the society which is seeking revolution in the legal system in India. Misuse also leads to misgiving and misinterpretations and the end result in the failure of the Good Governance¹¹ initiatives. With a legal environment where the ordinary courts are burdened with pending cases, the Government has mooted the idea of creating quasi judicial agencies so as to have quick redressal of

7 The Supreme Court in *State of U. P v. Raj Narain* AIR 1975 SC 865 has held that 'right to know' is a fundamental right under Art. 19(1)(a) of the Constitution.

8 Eleventh Five year Plan; p. 247; Consumer Protection and Competition Policy, Planning Commission of India, available at http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf (last accessed on May 16, 2016).

9 V. G. Ranganath, Consumer Protection and Right to Information, available at <http://www.lawyersclubindia.com/articles/Consumer-Protection-and-Right-to-Information-4343.asp> (last accessed on May 16, 2016).

10 Generally see The Karnataka Guarantee of Services to Citizens Act, 2010. Madhya Pradesh was the first State to enact a law on providing Citizen time bound Services in the year 2010.

11 Refer to the 2nd Administrative Reforms Commission First Report on Right to Information: Master Key to Good Governance.

grievances. Under COPRA, the creation of the Consumer Forums has ensured quick, speedy and expert disposal of consumer related grievances.¹² Similarly under the RTI Act, the Government has established the Information Commission's to deal with disputes arising out of the Act. Ordinarily each such quasi judicial body is expected to work in its own jurisdiction and not overreach into another domain. Ordinarily it is expected that as expert adjudicatory bodies they would not exceed their jurisdiction and interpret remedy in other law that has created another, similar adjudicator body. Unfortunately, the same separation of power and domain could not be maintained and that is the main reason for this article. In any legal system certain level of overlapping is expected. Thus, harmonious construction of powers on jurisdiction matter is attempted to be achieved. Unless the same is done it will return is serious miscarriage of the justice delivery system.

On the overlap and conflict between the Consumer Forum and Information Commission there have been some examples. The case that gave rise to these concerns is the judgment of the National Consumer Commission in *Dr. S P Thirumala Rao*,¹³ in which the National Commission held that a citizen can invoke the jurisdiction of the COPRA even when the fact and question of law has arisen in the RTI Act.

Recent face offs between two regulator/adjudicator bodies, i.e. the Consumer Forums and the Information Commissions on the issue whether the provisions of the RTI could be invoked by a citizen even if there is an existing specific mechanism prescribed by the any other authority established by any other Act, is legally analysed in this article with a hope that the same should stand as a principle on other bodies on issue of whether or not jurisdiction will lie. It is argued that there is a need to balance the conflict that may arise from the jurisdictional issue between two legislations and ensure an effective right to information for a consumer. An attempt is made to raise the issues, arguments and the legal remedy available in cases of such conflict and to resolving of claims of jurisdiction between the Consumer forums and Information Commissions.

12 A consumer can file complaint in the consumer court against any defective goods purchased or deficient service rendered including restrictive/ unfair trade practice adopted by any trader/person. Normally a complaint is to be filed within two years from the date on which cause of action arose.

13 Revision Petition No 1975 of 2005 Decided on 28th May 2009.

Consumerism in the Information Age

Citizens are using RTI to access a lot of consumer related information. Several enquiries are made about the food quality and standard. For instance in *Parveen Kumar Jindal v. Food & Supply Ministry, Tourism Ministry, Department of Consumer Affairs*¹⁴ the applicant sought Information regarding infrastructure of restaurant and hotels running on roadsides out of cities and information regarding officials responsible to issue license to these restaurants and hotels. Why there is dereliction in duty on part of responsible officer of concerned department, due to which the owners of these restaurants and hotels are working without any check from any official of Government.

Consumer related information about fair price shops and their functioning, over pricing and BPL status are also enquired through RTI.¹⁵ In the same case on the role of the Central and State Government in public distribution system the PIO to evade sharing of information vaguely replied that "It is pertinent to point out that Public Distribution System is jointly run by Central Government and State Government. Central Government is responsible for Recovery, Storage, Transportation and Bulk Supply. Its distribution under Public Distribution System is the responsibility of State Government. Distribution within State, Identifying persons below poverty line, issuing ration cards, Inspector and monitoring of Fair Price Shops and other related jobs is the responsibility of the State Government. To ensure supply and availability of essential commodities and its proper distribution Public Distribution System (Control) Order, 1991 was issued on 31.8.2001'. The Central Information Commission [CIC] show caused the PIO for not providing proper information.

Interestingly, RTI Act has also been used to enhance the efficiency of the working of the Consumer Forums. For examples in *S C Sharma v. Mrs. Jyothi Seth PIO Department of Food Supplies and Consumer Affairs*,¹⁶ the applicant sought information on how many vacancies are there in Consumer Courts of Preceding Officers, Members and Lower Staff as on 1st December 2010 as the same was causing hardship to the public and the action taken or

14 Complaint No.CIC/WB/C/2006/00279 dated 16.12.2006.

15 See *M.P. Choudhary v. Ministry of Consumer Affairs./Department of Food & Supplies, GNCT Delhi Appeal No.CIC/WB/A/2006/00891* dated 1.12.2006; *Mahipal Sahu v. Department of Food, Supplies & Consumer Affairs, Government of NCT of Delhi, New Delhi, File No. CIC/AD/A/2012/000664.*

16 *CIC/SG/A/2011/000800/12607.*

proposed to be taken to fill up these posts. Also the applicant sought information on how many cases; awards are pending of the Consumer Courts after final hearing for (a) more than 6 months, b) more than 2 years (c) more than 3 years. Further information regarding the steps taken by Government to expedite decisions by Consumer Court was also sought.

In another case, *Lakshya, A Relief Organization v. State Consumer Dispute Redressal Commission (SCDRC)*,¹⁷ an application was filed by Lakshya, an Non Government Organisation, which sought the following information from the Public Information Officer, Consumer Dispute Redressal Forum: “We want to take detail of all consumer cases in all consumer district redressal forums of Delhi (nine forums) with the name, address, phone & mobile number of the complainants.” The Consumer Forum rejected the said applicant on two grounds. First, the Forum suspected the genuineness of the organisation and second the Forum replied that “there are more than 10000 cases pending in 10 different District Forum situated in the jurisdiction of the respective Districts of Delhi, the nature of information being sought by the appellant is neither feasible nor available nor easily accessible under the law”. The Chief Information Commission held that an application by a Non Government Organisation cannot be said to be an application by a citizen. An Non Government Organisation is a legal person in the eye of law but not a citizen as per Sec. 3 of the RTI Act. Hence, the office bearer of the Non Government Organisation in their personal capacity can file and seek information but not the organisation itself. On the second ground the Chief Information Commission held that the concerned applicant has agreed to provide every assistance in accessing the information sought and it is open to that public authority to indicate to the applicant the cost of providing the information as determined by the Public Information Officer together with calculation made to arrive at that amount, requesting the applicant to deposit the fees.¹⁸ However, the information provided can only be that which is actually held by the public authority and applicant cannot demand the creation of information which is not already held by or under the control of the public authority.¹⁹ Finally in such cases where voluminous information is sought the Chief Information Commission stated that the public authority can justifiably argue that the information sought would disproportionately divert its resources.²⁰

17 Appeal No.CIC/WB/A/2006/00431 dated 11.7.2006.

18 See Section 7(3) RTI Act, 2005.

19 See Section 2 (j) RTI Act, 2005.

20 Under Section 7 (9) RTI Act, 2005.

This case demonstrate that the 'Consumer Forums' are 'public Authority' as per Sec 2(h) of the RTI Act and hence are liable to provide information to the citizens and hence denial of information from the Consumer Forums can lead to adjudication from the Information Commissions. The result also ensures the implementation of the rule of transparency and accountability of the Consumer redressal agencies through the lens of RTI Act.

Is 'providing information' a service under COPRA?

Buskirk and Rothe have defined consumerism as seeking of 'redress, restitution, and remedy of dissatisfaction in acquiring the means to maintain their standard of living'.²¹ Section 2(o) of COPRA defines 'service' to mean means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board, or lodging or both housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Courts have given the widest interpretation²² to the provisions of COPRA, so as to render justice to the consumers.²³ All these cases before the Supreme Court which have given the Consumer forums additional powers

21 Buskirk, Richard H and James T Rothe, Consumerism - An Interpretation, JOURNAL OF MARKETING, 34 October, 1970, pp 61-65.

22 In *Kishore Lal v Chairman, Employees' State Insurance Corporation*, 2007 (4) SCC 579, the Hon'ble Apex Court has observed:- "It has been held in numerous cases of this Court that jurisdiction of the Consumer Forum has to be construed liberally so as to bring many cases under it for their speedy disposal. The Act being a beneficial legislation, it should receive a liberal construction."

23 The Hon'ble Supreme Court of India in *Ghaziabad Development Authority v. Balbir Singh*, 2004 (2) CLT 628, has held that the Consumer Protection Act has a wide reach and the Commission has jurisdiction in case of services referred by the statutory and public authorities. The provisions of the Consumer Protection Act enable a consumer to claim and empower the Commission to redress any injustice done. The Hon'ble Supreme Court in the said authority further held that matters, which require immediate attention, should not be allowed to linger on. The consumer must not be

to provide remedies deal with contractual service matters between the Citizen and the Government. Hence it is important, that the ratio of these cases be specific to the facts presented. None of these judgements can be applicable to right of a citizen to seek information under RTI Act. Providing information under RTI is not a 'service' as per COPRA because it is neither 'hired' nor contractually agreed. The right to seek information is a legal right in the governance structure. Further, in *Neeraj Munjal v. Atul Grover*,²⁴ it has been held that the courts could not deprive the parties from a remedy, which is otherwise available to them in law. It has been further held that a court of law has no jurisdiction to direct a matter to be governed by one statute when provisions of another statute are available. The words 'in pursuance of a contract or otherwise in relation to any service' demonstrates that the application of the COPRA is wide enough to give a wide interpretation to the word deficiency of service. But the use of expressions 'consumer', 'service', 'hires', consumer disputes, 'defect', and 'deficiency' have to be understood in its commercial sense only. 'Information' under RTI does not raise any standard of living and hence not a 'business' dissatisfaction.

Consumer Forums or Information Commissions: Which is the appropriate forum to seek remedy?

The RTI Act was enacted, the intention of the legislature was very clear to bring about special forums for redressal of grievances related to denial of information. The establishment of the Information Commission meant that a special body will decide and resolve issues that arise from the implementation and enforcement of the RTI Act and hence expressly no other existing body, whether administrative or quasi judicial was given the task of enforcing the Act.²⁵ Hence if the legislature intended a existing administrative machinery²⁶ to exercise powers under the RTI Act, they would have explicitly mentioned the same.

made to run from pillar to post. Where there has been capricious or arbitrary or negligent exercise or non-exercise of power by an officer of the authority, the Commission/Forum has a statutory obligation to award compensation.

24 2005 (3) CLT 30.

25 During the bill stage of the RTI Act, there were suggestions that the adjudicative body under the Act should be the Consumer Forums. See the Shourie Draft bill on Freedom of Information.

26 T.R.S. Allan, 'The constitutional foundations of judicial review: conceptual conundrum or interpretative inquiry?' CAMBRIDGE LAW JOURNAL, 2002.

Hence the question that arises is can an applicant under RTI be treated as 'consumer', for the reason that he/she as an RTI applicant has paid a fee ranging from Rs.10-50 to get the information. If yes, by not providing information, would the same amount to 'deficiency in service' on the part of the public authority [Government body in most cases] and finally would the public authority be liable/answerable under the Consumer Protection Act; in addition to answering appeals and providing remedies that are specially available under the Right to Information Act?

These issues arose in *Dr. S P Thirumala Rao v. Municipal Commissioner, Mysore*.²⁷ The grievance of the complainant who was consultant physician, that some private telephone provider had dug up the footpath in front of his clinic, for laying telephone cables and after laying the PVC pipes, failed to restore the footpath in original condition. He therefore, filed two applications before the Mysore Municipal Corporation under Rule 4(1) of the Karnataka Right to Information Act, 2002²⁸ seeking information about the said private telephone provider. The said information was not furnished, which the Complainant in the present case argued and established that it amounted to 'deficiency of service'. Therefore the Complainant approached the District Forum claiming damages/compensation of Rs 30,000 and cost of Rs 1000.

In another similar case, a former employee of a Technical Institute had been terminated from service after an inquiry. He filed an RTI application seeking details about alleged out-of-round promotion of some of his colleagues in 2008. When he could not get the information, he filed an appeal before the First Appellate Authority who did not pass any order. On his second appeal, the State Information Commission ordered the Institute to provide the information to him free of cost. After which, the Complainant filed a case before the Consumer Forum and the District Consumer Disputes Redressal Forum, Pune, ordered the institution to pay compensation of Rs. 15,000/- to the applicant for delay in providing him information sought by him which he claimed would otherwise damage his case pending in the Bombay High Court. The Institute argued that an RTI applicant is not a 'consumer' as per the definition in the Consumer Protection Act. Relying on a National Consumer Rights Commission order,

27 Revision Petition No 1975 of 2005 Decided on 28th May 2009. National Consumer Disputes Redressal Commission. As Per Justice Shri R K Batta, Presiding Member.

28 Currently the Karnataka Right to Information Act, 2002 has been overridden by the Central law, RTI Act, 2005 Sec. 22 of the RTI for overriding effect.

the Forum panel of president of the Forum Ms. Anjali Deshmukh and member Mr. S K Kapse held that once the complainant had availed the remedy against which appeal was provided, he could still file a complaint under the Consumer Protection Act. The consumer court observed that although it cannot direct the institute to make the documents available to the applicant, it can order the Institute to pay a compensation for mental and physical agony faced by him. The court ordered the institute to pay Rs. 15,000/- as compensation and a further of Rs. 1,000/- as litigation cost.

The Consumer Forums have generally taken a broad view of the meaning of 'Consumer'. The Pune District Consumer Forum held that by paying a fee of Rs. 10/-, an applicant becomes a consumer of services and is liable to be provided with a minimum level of services. Therefore, an applicant can claim compensation both under the Consumer Protection Act as well as the RTI Act simultaneously.²⁹

Both these judgments from the Consumer Forums can be considered to be drawn from the dynamic interpretation³⁰ of the statute.³¹

These two judgments have opened up floodgates of cases, enquiries and also wide scale publicity on how denial of information under RTI can be redressed under COPRA. Websites, newspaper and NGO debates have all

29 Can the Consumer protection Act and RTI Act be invoked simultaneously? RTI Foundation of India, available at <http://www.rtifoundationofindia.com/case-law/can-consumer-protection-act-and-rti-act-be-invoked-658> (last accessed on May 11, 2016).

30 Randal N. Graham, *A Unified Theory of Statutory Interpretation*, STATUTE LAW REVIEW, 2002. Where the Originalist [Originalism refers to a school of thought concerning the interpretation of law, especially constitutional law, by a judge. The idea behind originalism is that a law must be interpreted from the viewpoints extant at the time of its inception and not those of the present day. Originalism is popular with United States conservatives in general and conservative U.S. judges in particular. This can be best observed in the push for originalist judges to be nominated to positions where constitutional law cases will most likely be heard.] sees the intention of the framers as the only legitimate goal of interpretation, proponents of dynamic interpretation (or 'dynamos') feel that a law should be interpreted by reference to contemporary ideals, with little or no attention paid to legislative intent. Also see Elmer Driedger, Driedger on the Construction of Statutes, ed. Ruth Sullivan (3rd ed) (Butterworths: Toronto 1994) 131.

31 Dynamic interpretation is resorted to whenever there is vagueness in the language used in the legislation and the same lack specific legislative intent. See *R. v. Butler* [1992] 1 SCR 452 Supreme Court of Canada.

praised the National Commission judgment and have urged citizens to go to the consumer forums.³² Hence it is imperative to settle the legal position and to answer whether the remedy provided by the Consumer Forum in the Thirumal Rao case is 'legally proper'?

Overriding of RTI over other enactment: *non-obstante* clauses

Both COPRA and RTI Act contain *non-obstante* clauses.³³ In *Maruti Udyog Ltd v. Ram Lal*³⁴ the Apex Court held that it is well-settled that when both statutes containing non-obstante clauses are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the latter shall prevail. Thus, in this case the Supreme Court gave effect to the provision of COPRA over the earlier enactments.

This case argues that when two enactments have non-obstante clauses, the enactment later in time which provides special remedy must prevail over an enactment earlier in time. That test is that the later enactment must prevail over the earlier one. The later act is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must succumb.³⁵ If therefore literal interpretation would produce such a result, and the language must be avoided.³⁶

Sec. 22 of the RTI Act 2005, states that the provisions of the RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. This is a overriding power vested in the RTI Act. The overriding effect of

32 See <http://www.rtiindia.org/forum/blogs/jps50/1217-notice-under-consumer-protection-act-rti-act.html>. See <http://archanafoundation.blogspot.in/2011/01/rti-under-consumer-protection-act.html>. See <http://www.lawyersclubindia.com/forum/Consumer-protection-act-rti-act-49867.asp>. See <http://www.rtifoundationofindia.com/case-law/can-consumer-protection-act-and-rti-act-be-invoked-658>.

33 Sec. 3 of COPRA and Sec. 22 of RTI.

34 2005-SCC-2-638.

35 *Sarwan Singh v. Kasturilal*, [1977-AIR (SC)-0-265 1977-SCC-1-750].

36 *Owen Thomas Mangin v. IRC*, [1971] 2 WLR 39, p. 42 [PC] [Lord Donovan]: [1971] 1 All ER 179, p. 182 referred in *Imperial Chemicals Industries v Colmer*, [1996] 2 All ER 23, p. 32.

RTI Act shall be only to extent of such and any inconsistency that may be found in the implementation of the objects of the legislation.

The issues in this section is whether the RTI Act overrides the Consumer protection Act?

RTI Act provides for the creation of separate structure of dispute resolution. Like under the Consumer Protection Act, District forum and State and National Commission were created, similarly under the RTI Act State and National Information Commission are established. Hence, if an application has sought information under the RTI Act and has been denied, refused or there is delay in furnishing the said information, the remedy for the citizen is the special remedy provided in the RTI Act; i.e. to approach to first appellate authority and then to the State or National Information Commission as the case may be.³⁷ If one seeks to establish his right to information under a special enactment, the remedy so sought must also necessarily be under the same, special enactment.

Under the Consumer Protection Act, 1986, a 'Consumer'³⁸ also has a right to information. The said procedure to seek information as a 'consumer' is different and so is the remedy in case the said right of a consumer to information is denied. Hence, a RTI applicant, not being a consumer, cannot seek remedy from a Consumer forum.

The domain of the Consumer Forums must necessarily be restricted to the COPRA. The Members of the Consumer Forum must bear in mind that once the legislature has enacted a special law and also created a grievance redressal mechanism for the same as the case of RTI Act, it would be completely a misplaced argument to make that the denial of RTI information would amount to 'deficiency of service'.

The RTI Act gives every citizen a fundamental right to information.³⁹ A citizen and a consumer are not one and the same person. A 'consumer' can be a juristic person, like University, Cooperative, society, partnership etc.

37 If the 'information' sought is from State Government or its entity, then the second appeal is to the State Information Commission. If the sought 'information' is from Central Government of its entity, the second appeal is to the Central Information Commission.

38 Section 2(d) of COPRA defines 'consumer' - any person who buys goods for a consideration or 'hires' or avails any service for a consideration.

39 Section 3 of the RTI Act, 2005.

plus a consumer buys goods or hires the service. A consumer in India can also be a non-citizen. Whereas, the 'citizen'⁴⁰ has been defined under the Citizenship Act of 1955, and is confined to 'natural persons' and not juristic personalities. The right to information also flows from the right of citizen to freedom of speech and expression enshrined under Art 19 of the Indian Constitution.⁴¹

The purpose and aim of the Consumer protection Act is independent to that of the RTI Act. Both must co-exist with mutual roles and domains. It is unnecessary to drag issue of determination of one legislation over the other.

Special Law overrides General Law

Lex specialis, in legal theory and practice, is a doctrine relating to the interpretation of laws, and can apply in both domestic and international law contexts. The doctrine states that where two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).

The general rule to be followed in the case of conflict between two statutes is that the latter abrogates the earlier one (*leges posteriores priores contrarias abrogant*). To this general rule there is well known exception, namely, *generalia specialibus non derogant* general things do not derogate from special things. The implication is that a prior special law would yield to a later general law, if either of the following conditions is satisfied i.e. first, the two are inconsistent with each other and second, there is some express reference in the later to the earlier enactment.⁴² If either of these conditions is fulfilled, the later even though general, will prevail.⁴³

Similarly in *Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council*⁴⁴ it was held that the National Commission has no jurisdiction to

40 Article 5 of the Constitution of India.

41 Unlike various fundamental rights enshrined in the Indian Constitution, the six 'freedom' under Art. 19 are available only to the citizens of India.

42 R.S. Raghunath v. State of Karnataka AIR 1992 SC 81.

43 Hon'ble Justice V R Krishna Iyer, Collective Bargaining Agreement Issues, in Mr. Sharath Babu and Ms. Rashmi Shetty, SOCIAL JUSTICE AND LABOUR JURISPRUDENCE (SAGE, 2007) at p. 213.

44 (1995) 2 SCC 479.

adjudicate upon claims for compensation arising out of motor vehicles accidents.

In *Chandra Prakash Twiwari v. Shakuntala Shukla*⁴⁵ the Apex Court had ruled that ‘a special enactment or Rule, therefore, cannot be held to be overridden by a later general enactment or simply because the latter open up with a non-obstante clause unless there is clear inconsistency between the two legislations—one which is later in order of time and the other which is a special enactment’.⁴⁶

RTI came later in time to the Consumer Protection Act. If the judgment in *Dr. Thirumala Rao case* is extended to the RTI Act 2005, the same will make the Consumer Protection Act inconsistent to the later-special law, i.e. RTI Act. It is then an elementary rule that an earlier Act must give place to a later, if the two cannot be reconciled.⁴⁷ Thus, the inconsistency is not such as to repeal by implication or by legislation. The two legislations and quasi judicial authorities must read their own jurisdiction and not create a situation for conflict of authorities and rules. The decision of the Consumer Forums must be restricted to consumer related disputes. Any citizen centric-service related matter must be address through those established legislation only and not brought within the ambit of consumer forums. To say the least this case has been decided on a jurisdiction error. The National Commission seemed to assumed jurisdiction on a fact where there was none. This is misuse of discretion and a writ of certiorari must have been placed.

A fact arising out of RTI Act has been decided by a forum created under the COPRA. Both, RTI Act and COPRA are special laws and do not operate in the same domain. COPRA takes care of commercial transaction that adversely affects consumer interest. RTI Act no direct or remote relevance to COPRA. Prior to RTI, ‘information’ was not available and hence to bring in transparency and accountability in public administration the RT Act was enacted. RTI ensure a legal right to seek information held by public authorities. Under RTI the duty to provide information is a ‘legal

45 AIR 2002 SC 2322.

46 For more see Srinivas Madha, Open Decisions, Centre for Good Governance, Government of India. www.rti.org.in.

47 See the maxim *Lex posterior derogate priori-non est novum ut priores leges ad posteriors trahantur*.

duty'. Withholding of any information shall as per the provision of the law and any grievance decided by forums created under the same law.

Does the 'Alternate remedy' provided under COPRA override the remedy under RTI Act?

The second contentious argument upheld in the *Dr Thirumala Rao case* is that the Consumer Protection Act provides additional remedy to the consumers, over and above other remedies generally provided by other statutes. The Supreme Court has sided with the Consumer forums to give additional remedies as per Sec. 3 of COPRA. Sec. 3 of the Act, states that the provisions of COPRA shall be in addition to and not in derogation, to any other provisions of any other law for the time being in force. Having due regard to the scheme of the Act and the purpose sought to be achieved; i.e. to protect the interest of the consumers, the provisions are to be interpreted broadly, positively and purposefully. This meaning to additional/extended jurisdiction, particularly under Sec. 3 seeks to provide remedy under the Act in addition to other remedies provided under other Acts, unless there is clear bar.⁴⁸ In *Srimathi v. Union of India*,⁴⁹ a question was raised regarding the Constitutional validity of Sec. 3 of the Consumer Protection Act, 1986. The petitioner stated that advocates are governed by the Advocates Act and they shall not be made to answer the claims under the COPRA. The Court rejected the said argument of the petitioner and upheld the validity of Sec. 3. The National Consumer Redressal Commission in several case like the *Fair Air Engineers Pvt Ltd v. N K Modi*⁵⁰ and *Skypack Couriers Ltd v. Tata Chemcials Ltd*,⁵¹ has held that despite the existence of an arbitration clause, the complaint by a consumer under Consumer Protection Act, 1986, was tenable, since the remedy provided under the said Act is in addition to the provisions of law for the time being in force.⁵²

The counter argument to the above judgments is that such a reading of the law must be restricted to laws enacted before the passing of COPRA like

48 See Secretary, Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha, 2004 (1) CLT 456.

49 Writ petition Nos. 21556 of 1994 Decided on March 6, 1996.

50 [1996] CPJ 1 [SC].

51 AIR 2000 SC 2008.

52 CP Act, 1986; Section 3: The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

the Contract Act, 1872, Sale of Goods Act, 1930, Standards Weights and Measures Act, Motor Vehicle Act, MRTP Act, 1969 or the available Civil remedies.⁵³ In Fair Air case and the Skypack case, the Arbitration Act was in existence prior to COPRA and in the Srimathi case the Advocates Act was in existence prior to COPRA and hence despite an arbitration clause in a consumer contract, a consumer was provided with the right to seek additional remedy under COPRA, as COPRA was later in time.

The current contention in the debate between RTI and COPRA is that RTI Act provides special remedies under the enactment and is also later in time. Further being a special law, it must override a general law like COPRA. An application under RTI is not resulting from a contract between the citizen and the Government, which is usually the feature of relations under COPRA. Further, a citizen seeking information under RTI Act is not a consumer, as to seek remedy under COPRA the proof of being a 'consumer' must be established. RTI is a matter of exercise of a legal right from a public authority.⁵⁴ RTI provides remedies for denial of information, which are specify to the RTI Act itself. Under Sec. 19(8)(b) of the RTI Act, a citizen can seek compensation for any loss or other detriment suffered during the exercise of such a 'right', hence invoking the provisions of COPRA does not arise. The power to award such compensation is vested in a specialised quasi judicial body i.e. the Information Commission. The Central and State Information Commission are quasi judicial authorities, similar, to the Consumer forums and have been vested with similar powers and duties. Hence, any decision of the Consumer forums on issues arising from the RTI Act will be without jurisdiction.

It is hereby argued that Section 3 of COPRA must not be modified to provide remedy that is already provided under RTI Act. Such a process of

53 The Supreme court in *Indian Photographic Co. v. H.D Shouries* (1999-SCC-6-428) remarked that the various enactments such as the Contract Act, the Standards of Weights and Measures Act, the Motor Vehicles Act, the Monopolies and Restrictive Trade Practices Act, Food Adulteration Act etc. were found to be inadequate in providing the relief to the consumers. In discharge of the international obligations and to protect the interest of the consumer in the country, the Consumer Protection Act, 1986 was enacted. The reference to the consumer movement and the international obligations for protection of the rights of the consumer, provision has been made herein with the object of interpreting the relevant law in a rational manner and for achieving the objective set forth in the Act. Rational approach and not a technical approach is the mandate of law.

54 RTI Act Section 2(h) defines Public Authority.

construction to modify the ordinary and natural meaning of the words of a statute, to produce an interpretation at some distance from what the words used by Parliament appear to be is inappropriate.⁵⁵ Venkatarama Aiyar J., has observed that 'where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a restriction must be imposed on its modification.'⁵⁶

When enacted in 1986, the intention of the Parliament to provide COPRA with additional remedy was to generalise the existing remedies under tort law or civil suit provisions, where a breach of contract might have arisen. Hence, the consumers were provided with additional rights and remedies that may not have been available under previous enactments. Essential the parliamentary intention was to protect 'Consumer contract' as they were with a special law as compared to the Sale of Goods Act which today may govern 'Commercial contracts'. This intention of the Parliament appears to be reflected with the terms 'buy' and 'hire' that specifically gets reflected in the definition of a 'consumer'. Hence the plea that COPRA provides an additional remedy to that of RTI is an incorrect conclusion. COPRA provides for better protection of the interest of the consumers and to provide for consumer redressal.

If one distinguish these cases to the Rao case, one must observe that the right emanating under RTI Act does not result in a consumer related dispute or service. The right is essential a 'citizen centric' one and is not a service 'hired' and hence the Rao case seems to have missed the central theme of interpretation of statutes. Secondly, in Rao case the National Commission states that 'not providing information amounts to 'deficiency of service'. As per Sec. 3 of COPRA, it justifiably gives additional remedy to the consumer to seek redressal for deficiency in services. But if the same section is used to provide remedy under the RTI Act, it would lead to absurdity. The object of the construction of this section in COPRA must be ascertained by the will of the legislature and it may safely be presumed

55 Philip Sales, *A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998*, (2009) 125 LAW QUARTERLY REVIEW, 598, 605.

56 Tirath Singh v. Bachittar Singh, AIR 1955 SC 830, p. 833 [passage from Maxwell, Interpretation of Statutes, 11th edition, p. 221].

that neither injustice nor absurdity was intended.⁵⁷ When a citizen applies under RTI Act, he has not hired the services in a public authority. He is only seeking information and the public authority is not rendering any 'consumer service' at all. Finally, if a citizen has suffered injury the RTI Act under Sec. 19(8)(b) he/she can seek compensation for any loss or other detriment suffered. It is complete wrong to interpret the word 'consumer' with that of the 'citizen'.

In *Shri Kali Ram v. State Public Information Officer-Cum-Deputy Excise and Taxation, Gurgaon [East], Haryana*⁵⁸ the National Commission seems to have clarified the misplaced position arrived in the *Dr. Thirumala* case. The National Commission held that "We do not locate substance in the arguments advanced by the petitioner. First of all, Sections 22 & 23 of the RTI Act, 2005 are crystal clear, giving overriding powers to the RTI Act." Further the Commission held that the complainant cannot be considered as a 'consumer' as defined under the Consumer Protection Act since there is a remedy available for the complainant to approach the appellate authority u/s 19 of the RTI Act, 2005.

Finally, in another case in *Public Information Officer, Urban Improvement Trust, Ajmer, Rajasthan v. Tarun Agarwal*⁵⁹ the key question decided was whether there lies a way for the Consumer fora to entertain cases pertaining to Right to Information Act, 2005. The National Commission held that the Consumer Forum below had erred in concluding the fora below have come to the conclusion that, although, they have no powers, yet they have granted Rs.1,000 as compensation to the complainant.

Conclusion

The conclusion in *Dr. Thirumala Rao case*⁶⁰ is flawed on many counts. Firstly, many State Governments, including Karnataka have now enactment and enforced the Guarantee of Public Services to Citizens Act. This is

57 *Grey v. Pearson* [1857] 6 HLC 61, p. 106; 10 ER 1216, p. 1234[HL]. Also see *Shamrao v. District Magistrate, Thane*, AIR 1965 2 SC 324, p. 327.

58 Revision Petition No. 3396 of 2013, decided on 9.10.2013 (National Consumer Disputes Redressal Commission).

59 Revision Petition No. 2846 of 2013, decided on 16.12.2013 (National Consumer Disputes Redressal Commission).

60 National Commission Judgment by Bench comprising of Justice R K Batta and Shri S K Naik decided on 28th May 2009.

statutory enactment and citizens are assured of services with a stipulated time frame. In cases where the Citizen is aggrieved under the Act, he can approach to the Competent Authority seeking compensatory cost to a maximum of Rs 500 in each case. For such new enactments, if citizen force the Government to be answerable in a consumer Court for all the listed services such as the Karnataka Guarantee of Services to Citizens Act, 2012, the administrative system will collapse and a welfare legislation will get entangled in legal tussle, till probably the Apex Court intervenes and draw a line of jurisdiction for each of these authorities to operate.

Similarly in the era of tribunalisation, many special enactments have created new adjudicatory bodies like the National Green Tribunal⁶¹ and the Competition Commission of India.⁶² Would the Consumer Forums continue to hold that the remedy under COPRA is still an additional remedy?

'Statutes are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislatures and drafters assume that the courts will continue to act in accordance with well-recognised rules....long standing principles of constitutional and administrative law, are likewise taken for granted or assumed by the courts to have been taken for granted, by Parliament.'⁶³

A fundamental/legal right to information must not be mischievously read so as to achieve consumerist goals. A citizen under the RTI Act has not 'hired' the service from a public authority. It a right created by a statute and pursued as a fundamental right by many judicial decision.

61 Under the National Green Tribunal Act, 2010.

62 Under the Competition Act, 2002.

63 Cross, *Statutory Interpretation*, 3rd edn (1995), Ch.7, "Presumptions", at p.165. Cf. P. Sales, "Pepper v. Hart: a Footnote to Professor Vogenauer's Reply to Lord Steyn" (2006) 26 O.J.L.S. 585 at 588. See also *Black-Clawson International Ltd v Papierwerke AG* [1975] A.C. 591 HL at 629-630 per Lord Wilberforce ("The saying that it is the function of the courts to ascertain the will or intention of Parliament is often enough repeated, so often indeed as to have become an incantation. If too often or unreflectingly stated, it leads to neglect of the important element of judicial construction; an element not confined to a mechanical analysis of today's words, but, if this task is to be properly done, related to such matters as intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect and, no doubt, in some contexts, to social needs.").

Will the Consumer forums entertain all cases when there is delay in such services, when a special law and a law later in time has been enacted? There is no bar on a person seeking additional remedy when it is so provided under different statutes. But it would not be right to construe the right availed in one statute and to provide remedy under another. It would not be sensible to avail the right and the remedy under different enactment, just because it provides for additional remedies. To say the least, such a conclusion will have disastrous consequences.

In the era of ‘Tribunalization’, India is fast creating quasi judicial bodies to handle specialised area of disputes and hence it is imperative that the role and functioning of these tribunal do not conflict with each other. The Apex Court must check the presumptive validity of administrative decision-making, especially where the special skills of the administrative tribunal or the special significance of context are of minimal importance; and dealing with allegations that the tribunal has acted with bias, bad faith, total irrationality, or are deciding beyond its competence’. Tribunals cannot claim not to have been accorded with wide discretion powers in the matters of statutory interpretation⁶⁴ and hence assumption of jurisdiction in matter not connected directly must be exercised with caution.

However the National Commission recently⁶⁵ in the case of *Shri Kali Ram v. State Public Information Officer-Cum Deputy Excise and Taxation*, Gurgaon [East, Haryana held that RTI applicant does not fall under the definition of consumer so as to raise a consumer dispute.

The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception to the subject-matter of the rule from the general Act.⁶⁶ When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion

64 See T.R.S. Allan, *The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?* (2002) CAMBRIDGE LAW JOURNAL Vol 61 (1) pp 87-105.

65 Revision Petition No. 3396 of 2013, decided on 9.10.2013 (National Consumer Disputes Redressal Commission).

66 Justice Gonthier in *Lalonde v. Sun Life*, [1992] 3 SCR 261 (Supreme Court of Canada).

of the more general one. The specific prevails over the general; it does not matter which was enacted first. This strategy for the resolution of conflict is usually referred to by the Latin name *generalia specialibus non derogant*. The English term "implied exception" is adopted ... for, in effect, the specific provision implicitly carves out an exception to the general one...."⁶⁷

* * * * *

⁶⁷ Sullivan and Driedger, *The Construction of Statutes* (4th Edition, Butterworths: London, 2002) at p 273.

DOES RIGHT TO PRIVACY EXEMPT RIGHT TO KNOW ?

Dr. Prem Kumar Agarwal & Sugato Mukherjee***

Abstract

As the Constitution of India guarantees our privacy, and similarly our right to life, is there any way out to secure our right to know? In the year 2005, an Act has been legislated in the form of the Right to Information Act. But is it enough to ensure our right to know? Another very controversial issue is understanding what is a 'private' information and what is 'public'. In between these two words, our right to know has been stuck. This write-up shall serve as a looking glass to give a clearer picture of the drawbacks of RTI Act, 2005.

Introduction

'Right to information' - from this phrase we can apprehend that there is something that empowers us to know what was previously not allowed to be known. When the Act came into force in the year 2005, it created an excitement in the collective minds of the Indian citizenry. But as time has passed, how far are 'we' satisfied with it? The word 'right' itself says 'you can ask for information from the authority', i.e. 'public authority'. But apart from the 'public', there is also some 'private' information that we need to know. Therein lies the conflict. Because why should anybody or any organization disclose its private information? And why should a person disclose what he/she has or doesn't have? The question arises - Is it not putting your nose in somebody's 'right to privacy'? To what extent information remains 'private' has to be explored. If these key areas of conflict are not discussed, it is difficult to solve the issue.

The 'public' and 'private' conflict has been the major area of discussion for the last three or four years. There are some major problems, while discussing these conflicting areas. First of all, we need to be very clear about whether the notion of a Constitutional right, is guaranteed by our Constitution? Then we need to peer into the areas of certain rights which are merely civil. A Constitutional right cannot be legally denied by the Government. On the other hand, civil rights are the protections and

*HOD & Assistant Professor of Law, Hooghly Mohsin College, Chinsurah, Hooghly, WB.

**Assistant Professor of Law, MATs University, Raipur, Chhattisgarh.

privileges of personal liberty given to all citizens by law. Examples of civil rights and liberties include the right to get redressed if injured by another, right to privacy, the right of peaceful protest, the right to a fair investigation and to a trial if suspected of a crime, and more general Constitutional rights such as the right to vote, the right to personal liberty, the right to life, the right to freedom of movement, the right to business and profession, the right to freedom of speech and expression. As civilisations started to emerge and grow, these rights were formalised through written Constitutions. Some of the more important civil rights were granted to citizens. When those grants were later found inadequate, civil rights movements emerged as a vehicle for claiming more equal protection of law and equality before law for all citizens and advocating new laws to restrict the effect of discrimination. Some civil rights are granted in written Constitution and some are implied by courts and decisions. If these two areas clash with each other, where should one stand?

Now we need to have a look also into the domain of right to privacy. In most of the Common Law constitutions, right to privacy is not given expressly to their citizens, but derived from judicial review and court decisions. The term ‘privacy’ has been described as the rightful claim of the individual to determine the extent to which he wishes to share himself with others and his control over the time, place and circumstances to communicate with others. It means the right to withdraw or to participate as he sees fit. It also means the individual’s right to control dissemination of information about him, it is his personal possession. Privacy has also been defined as a ‘Zero-relationship’ between two or more persons in the sense that there is no communication or interaction between them, if they so choose. Numerous legal and moral philosophers have suggested that privacy is valued because it satisfies a number of basic human needs. Information is also a kind of basic human need. So, where should we go if somebody denies providing information saying that it is just private information?

The Right to Privacy in the USA

In the USA, Common Law did not recognize any right to privacy. So courts in the United States did not consider privacy as a right to be protected until the eve of the twentieth century. The need for a law to protect privacy was articulated as early as 1890 when an article titled ‘The Right to Privacy’ was

published by Warren and Brandies in the Harvard Law Review.¹ This article laid the foundation of privacy right in the USA. Though hundreds of cases related to right to privacy came to the courts, the first higher American Court to deal with the right to privacy was a New York Appellate Court in 1902 in *Roberson v. Rochester Folding Box Co.*² Chief Justice Parker in that case said: "...in that defendants had invaded what is called a 'right of privacy'- in other words, the right to be let alone". Mention of such a right is not to be found in the works of Blackstone, Kent or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover. Nor does its existence seem to have been asserted prior to the year 1890 when it was presented with attractiveness and no inconsiderable ability in the Harvard Law Review (Vol. IV, page193) in an article entitled 'The Right of Privacy'. The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbours, whether the comment be favourable or otherwise. The most well-known American cases on privacy are *Griswold v. Connecticut*³ and *Roe v. Wade*.⁴ In *Griswold v. Connecticut*, the constitutionality of a law which prohibited the use of contraceptives was challenged. Upholding the notion of privacy, Justice Douglas held:

"... governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms (*NAACP v. Alabama*)⁵. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship".

1 Right of Privacy, West's Encyclopedia of American Law, available at http://www.encyclopedia.com/topic/right_of_privacy.aspx (last accessed on May 8, 2016).

2 171 N.Y. 538, 64 N.E. 442 (N.Y. 1902).

3 381 U.S. 479 (1965).

4 410 U.S. 113 (1973).

5 357U.S.449(1958).

Striking down the legislation as an unconstitutional invasion of the right to marital privacy, it was held that the right of freedom of speech and the press includes not only the right to utter or to print, but also to distribute, receive and read, and that without those peripheral rights, the specific right would be endangered. *Roe v. Wade* dealt with the right of an unmarried pregnant woman to an abortion. Upholding the woman's right to make that choice which affected her private life, the Supreme Court held that although the American Constitution did not explicitly mention any right of privacy, the Supreme Court itself recognized such a right as a guarantee of certain “zones or areas of privacy” and “that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights and in the concept of liberty guaranteed by the Fourteenth Amendment.” Also Restatement (Second) of Torts Section 652A (1977) laid down general principles and definition of ‘Invasion of Privacy’:

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by -
 - a) Unreasonable intrusion upon the seclusion of another, as stated in Section 652B; or
 - b) Appropriation of the other's name or likeness, as stated in Section 652C; or
 - c) Unreasonable publicity given to the other's private life, as stated in Section 652D; or
 - d) Publicity that unreasonably places the other in a false light before the public, as stated in Section 652E.

The Right to Privacy in India

The right to privacy in India has derived itself from essentially two sources: the Common Law of Torts and the constitutional law. In Common Law, a private action for damages for unlawful invasion of privacy is maintainable. The printer and publisher of a journal, magazine or book are liable in damages if they publish any matter concerning the private life of the individual without such person's consent. There are two exceptions to this rule: first, that the right to privacy does not survive once the publication is a matter of public record and, second, when the publication relates to the

discharge of the official duties of a public servant, an action is not maintainable unless the publication is proved to be false, malicious or is in reckless disregard for truth.

Now that we know what privacy is, we need to explore that which is not privacy even if it is interiorly private, and most importantly, what the Right to Information Act has to do with it. If a situation arises where keeping information just for the sake of that information being secret, someone denies disclosing the information; can our RTI Act compel him to make that information public? The line drawn between public and private is not so prominent right now. As long as the line remains faint, the question against RTI Act's powers will arise again and again.

Now, it is also necessary to emphasise some of the cases which have recently stormed the debate tables. To start with, we can have a look at the Singur issue. What happened there is history now. The TATA company (an Indian auto mobile company) was not allowed to set up a car factory in Singur (a place in Hooghly district, West Bengal, selected as an automobile hub). After that the TATA Company was asked to show how many acres of land were not used. They simply said, this is not going to happen. Because they said, it was a deal signed by the State Government and the company. Disclosing a trade secret to a 'third party' may harm their trade interests. RTI Act remained silent. Because within the Act there are some provisions which stops you from knowing certain things. Another very important issue which has come under the scanner is the issue of showing examination sheets, rather answer sheets to the candidates. What does our RTI Act say about it? - Although the Apex court has declared it to be a right under the Act in *CBSE v. Aditya Bandopadhyay*,⁶ there is no express provision in the Act which results in confusion in the absence of specific rules in certain cases.

In India, the Constitution does not expressly recognize the right to privacy. The concept of privacy as a fundamental right first evolved in 1964 in the case of *Kharak Singh v. State of Uttar Pradesh*.⁷ The Supreme Court of India, for the first time recognised that there is a right of privacy implicit in the Constitution under Article 21. The Court held that the right to privacy is an integral part of the right to life, but without any clear laws, it still remains in

6 (2011) 8 SCC 497.

7 1963 AIR 1295, 1964 SCR (1) 332.

the grey area. In that case the Indian Apex Court struck down the regulation which authorised domiciliary visits as being unconstitutional, but upheld the other provisions of surveillance under the regulation. The view was based on the conclusion that the infringement of a fundamental right must be both direct as well as tangible, that the freedom guaranteed under Article 19 (1)(a) i.e. the right to freedom of speech and expression was not infringed upon by a watch being kept over the movement of the suspect.

An encroachment upon one's privacy is only shielded if the offender is the State and not a private entity. If the offender is a private individual then there is no legal remedy, except in Tort law where one claims damages for intruding in his privacy and no more. In *R. Rajagopal v. State of TN (1994)*⁸ the Apex Court held that the right to privacy is a 'right to be let alone'. No one can publish anything concerning the above matters without his/her consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in the action of damages.

If we take into consideration the abovementioned landmark cases and the verdicts of the Apex Court of India, we can definitely sense the contradiction of the right to know and the ways in which one can keep his secrets within him. Are our laws not that tight which can protect our fundamental rights? Answering an RTI question, one can easily say 'this is my right to privacy, I am not liable to answer these questions', and we have just one way out.

Recently, in one of the most controversial cases, Ratan Tata, the head of a Rs. 320,000 Crore conglomerate, went to the Supreme Court contesting against the publication of intercepts of his conversation with a certain Neera Radia, who handles the corporate communication for the Tata Group. Mr. Tata held that as Ms. Radia's phones were tapped by the government agencies for investigating a particular possible offence, the recorded conversations should have been used for that purpose alone.

Ratan Tata has submitted his petition before the Supreme Court asking it to protect his right to privacy.⁹

8 1995 AIR 264, 1994 SCC (6) 632.

9 For this he requested the Hon'ble Court to —

- "direct the Ministry of Home, Finance, Director-General Income Tax and the CBI to immediately retrieve and recover, as far as possible, all recordings that have been removed from their custody" .

The Radia Tapes (as they came to be known) so far published public issues, but not personal life of Tata. These conversations would be available to every citizen under the RTI Act because the only objection that one could raise would be on the ground of Section 8(j) of the RTI Act which says - “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 public authority is satisfied, unless the Information Officer is satisfied that the larger public interest justifies the disclosure of such an information.”

In that case, a preliminary question that should be asked is whether Tata’s conversations would be revealed through an RTI, or whether his conversations would fall under the exemption found in Section 8(j). It is interesting to note the structure of this exemption. By the use of the word “or” the legislation, suggests that unwarranted invasion of individual privacy may trigger the exemption, even if the information has a relationship to public activity or interest. But the added caveat says that the larger public interest could justify the release of even purely private information. In addition, what constitutes “personal” information has not been defined in the legislation.

Fight between Civil Rights - Right of privacy is the right to be let alone. But no right is absolute. Every personal right has its own limitation for public safety and national security. There must be some check and balance. Since their appearance in Western Europe in the late fifteenth century, sexually

-
- “direct the Government through the CBI or any other authority a thorough enquiry into the manner in which these secret records were, contrary to the rules, made available and/or became available to those not authorised to so receive the recordings before this court”.
 - “direct the Government to ensure that no further publication of these recordings, either as audio files through the Internet or any print as transcripts appears in any media-print or electronic-and for that purpose take steps as may be necessary, ... under the Cable Television Networks Regulation Act, 1995, the Information Technology Act, 2000, the Information Technology Act, 2000, the Code of Criminal Procedure, 1973, read with the Indian Penal Code, 1860, and any other law as may be necessary.” Chief of Tata Group is begging for right to life, invoking Article 32 to secure Article 21. But given that freedom of information laws have at their core the purpose of disclosure, exemptions are strictly construed, and it has been said that the public right to know should prevail unless disclosure would publicise intimate details of a highly personal nature.

transmitted diseases (STDs) or venereal diseases, as they were once called, have been characterised by a remarkable paradox. Despite their endemic nature in Europe and North America, STDs were, and still are, a Secret Malady. Persons have endeavoured to keep their sexually transmitted infections hidden from the social world, from their sexual partners, families and communities. At the same time, prevailing social mores have kept STDs from the public consciousness and consequently have prevented STDs from receiving public action and effective intervention.

The most vulnerable position in the case of STDs is of the life partner of the infected person. From its origins in the practice to control the disease, partner notification has been motivated by the moral imperative to notify and to protect persons who are unaware of their risk of STD exposure. Infected persons (and, to a certain extent, public health authorities) questioned the theories of disclosure and protection that justified partner notification, because of its cost to individuals in loss of privacy and discrimination. Disclosure of such record can result in discrimination of their family and friends too.

Infected persons have right of privacy, but partners of infected persons too are at health risk. The partners of infected persons have an equally powerful claim of right to know or right to information. The right to know developed from the social movement of the early 1900s. It developed under Tort law which held that a person has a duty of care toward his sexual partner. Under the Tort concept, duty is a legal obligation to conform to a certain standard of conduct towards another person. This duty makes it an obligation to disclose the STD to a sexual partner or to protect the partner from avoidable health risks. Thus, the fight between Right to Know and Right to Privacy continues. Where the former ends and the latter begins is a very complex jurisprudence which is still evolving.

* * * * *

RTI AND RIGHT TO PRIVACY : DESIDERATUM FOR BALANCE

Prerana Saraf^{*}

Abstract

The Article introduces Right to Information and its interpretation under the Indian Constitution with the help of various case laws. It then introduces Right to Privacy under the Right to Information Act, establishes the connection between Right to Information and Right to Privacy, focuses on the conflict between the two rights under the Right to Information Act along with reasons for the same. It also examines the steps taken to bring harmony between them including the draft of Privacy Bill and establishes how there is still a long way to go for achieving the balance between the two rights and suggests the importance of bringing about a balance between the two rights in order to achieve Good Governance.

The Article explores the important sections of the Right to Information Act, 2005 including Section 8(1), Section 8(1)(j) and Section 11 that deal with exemptions and privacy from disclosure of certain information. The Article, further, discusses the challenges under the Act such as ambiguous definitions with the help of various case laws that have interpreted terms like 'personal information,' 'public interest,' etc. It underlines the challenges faced after the enactment of the Act and throws light on the need felt for Privacy Bill to tackle with the issue of disharmony between the two rights and examines the success of the same in bringing about efficient results. The Article further compares the RTI Act with its counterparts in United States and United Kingdom and underlines the Act's plus points and minus points. As conclusion, the Article highlights the need to have definite definitions, guidelines and institutional structures that help in bringing about a balance between the two rights. It establishes the need to have a coherent test to understand what information fulfills public interest in order to have a more systematic law that assists in achieving Good Governance.

Introduction

All human beings have three lives: public, private, secret - Gabriel García Márquez

The rights guaranteed by a country's Constitution is called constitutional right. In India, they are right to equality, right to personal liberty, right to life, right to freedom of movement, right to business or profession, right to

* Advocate, Bengaluru.

1 N.R. Madhava Menon; The Beauty of the Indian Constitution lies in its flexibility; (<http://marketime.blogspot.com/2006/05/beauty-of-indian-constitution-lies-in.html>).

freedom of speech and expression. However there are some rights that are not guaranteed under the Constitution but are implied either by customs or court decisions.

The Constitution of India does not explicitly guarantee Right to Information. It is by means of Honorable Supreme Court cases that right to information has been read into Article 14¹, Article 19² and Article 21³, which guarantee right to equality, right to freedom of speech and expression and right to life and liberty. The right to freedom of opinion and expression under Article 19 also includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.⁴ This right has been guaranteed under the International Convention of Civil and Political Rights as well, which was ratified by India in 1979.⁵

Right to Information was upheld in various cases such as *Bennett Coleman v. Union of India*,⁶ *State of U.P. v. Raj Narain*,⁷ *Tata Press Ltd. v. Maharashtra Telephone Nigam Limited*.⁸ *State of U.P. v. Raj Narain* was one of the first Supreme Court rulings on Right to Information where it was held that government documents could be revealed if public interest through disclosure outweighs that of secrecy.⁹ This was the first time that Supreme Court established that the right of citizens' to know arises from the fundamental right of freedom of expression guaranteed under Article 19 of the Indian Constitution.

While there were no immediate steps taken by the Central or State Governments to implement an effective regime for access to information,

1 Constitution of India, 1950, Article 14.

2 Ibid., Article 19.

3 Ibid., Article 21.

4 Legal Parley, Right to Information and Right to Privacy: Need for harmony, available at <http://legalparley.com/right-to-information-and-right-to-privacy-need-for-harmony/> (last accessed on April 28, 2016).

5 The International Convention of Civil and Political Rights, 1966, Art.19(2).

6 1973 SCR (2) 757.

7 1975 SCR (3) 333.

8 1995 SCC (5) 139.

9 Y.K.Sabharwal, Chief Justice of India, Right of Information, Issues of Administrative Efficiency, Public Accountability and Constitutional Governance, www.supremecourt.ofindia.nic.in/speeches/speeches_2005/rti.doc.

there were plenty of campaigns held for freedom of information by civil societies. The Mazdoor Kisan Shakti Sangathan is one of the most well known campaigns for freedom of information held in Rajasthan in 1990s. It is with this that the need for right to information law gained impetus.¹⁰

Therefore, the Indian Freedom of Information Act was passed in 2002 but after much criticism, it was replaced by Right to Information Act, 2005. It is said that RTI is a requisite for the very exercise of democracy. However, this right also brings about issues of privacy.¹¹

Privacy under RTI Act, 2005

Just like Right to Information, Right to Privacy is not explicitly mentioned under the Constitution but it has been recognized as being implicit in the Indian Constitution under Article 21.¹²

Often, government stores a myriad of information concerning individuals such as their licenses, income tax returns or census data. Naturally, when there is an application for disclosure of information concerning an identifiable individual, it gives rise to a clash between right to information and right to privacy. To make matters worse, right to information and right to privacy are two of the most ambiguous areas of law. Journalists, corporates, social activists or even common man would want to collect certain information collected by the government for various reasons such as marketing, research or for personal use. However, the information can be denied if it interferes with one's privacy. This is an exemption in every RTI statute.¹³

The main issue in the current paper is to figure what information is considered to be private. If names and other details of officials are private

10 Neelabh Mishra, *People's Right to Information Movement: Lessons from Rajasthan*, United Nations Development Programme, 2003 available at http://www.undp.org/content/dam/india/docs/people_right_information_movement_lessons_from_rajasthan.pdf (last accessed on April 28, 2016).

11 David Banisar, *The Right to Information and Privacy: Balancing Rights and Managing Conflicts*, World Bank Institute, 2011, available at <http://www.africafoicentre.org/index.php/resources-afic/31-right-to-information-and-privacy/file> (last accessed on May 27, 2016).

12 *Kharak Singh v. State of Uttar Pradesh*, 1964 SCR (1) 332.

13 Prashant Iyengar, *Limits to Privacy*, The Centre for Internet and Society, available at <http://cis-india.org/internet-governance/blog/privacy/limits-to-privacy> (last accessed on May 27, 2016).

or if criminal records of people are private; etc. Therefore, there needs to be a concrete law that describes exactly what information is considered as private and what can be divulged to the public.

Section 8(1) of RTI Act

In India, Section 8(1) of the Right to Information Act deals with privacy. According to this Section, if the information is personal causing unwarranted invasion of privacy and serves no public interest, then the information cannot be disclosed unless the Central Public Information Officer (CPIO) or State Public Information Officer (SPIO) or the appellate authority is of the opinion that the disclosure of information serves a larger public interest.¹⁴

When this Section is read as a whole, it is lucid that ‘personal information’ refers to information regarding ‘third party.’ It does not apply if the information seeker wants information about himself or his case, as the question of privacy does not arise in such cases.¹⁵ Therefore, information can be denied only if the information seeker is seeking information about a third party and such information invades the privacy of the individual. It is also to be noted that the Public Information Officer (PIO) and not the individual whose information is asked to be disclosed can deny information. Also, this section is specifically concerned with individual privacy and does not consider any other body.¹⁶

Other exceptions under Section 8 are information that affects the sovereignty, integrity, security of the country, information that has been forbidden from being disclosed by a court of law or tribunal, information that would cause breach of privilege of Parliament, information including commercial confidence or trade secrets, information available to a person because of fiduciary relationship, information received in confidence by a foreign government, information which would endanger the life and safety of a person if disclosed, information that would impede the procedure of investigation, record of deliberation of Council of Ministers, Secretaries and other officials.

14 Right to Information Act, 2005, Sec. 8(1)(j).

15 Shri Rakesh Kumar Singh v. Lok Sabha Secretariat, Appeal No. CIC/WB/A/2006/00469; & 00394.

16 Supra note 10.

Section 11 of RTI Act

Another important Section with respect to privacy under RTI is Section 11. Three conditions have to be fulfilled for the application of this Section. They are:

- (i) If PIO is considering disclosing the information;
- (ii) If the information relates to a third party or was given by a third party in confidence;
- (iii) Third party considers the information to be confidential.

In order to fulfill the third part, the PIO has to send a notice to the third party within 5 days of the request made to him requesting the third party to reply within ten days as to whether the information should be disclosed or not.¹⁷ Section 11 has to be read keeping in mind the exceptions mentioned in Section 8 of the RTI Act.

Section 8(1)(j) of RTI Act

An interesting point about Section 8(1)(j) is that this exception itself has an exception in the form of a proviso. According to the proviso, any information that cannot be denied to the central and state legislature shall not be denied to any person as well. The question that arose in everyone's mind regarding this proviso is whether it applies to entire Section 8(1) or just Section 8(1)(j). The Bombay High Court put this doubt to rest when it held that since the proviso was mentioned only after Section 8(1)(j) and not after every clause, it applies only to Section 8(1)(j).¹⁸ The opinion on this proviso has been ambiguous and contrary.

While the Bombay High Court is in favour of the proviso,¹⁹ the Delhi High Court is of the opinion that Section 8(1)(j) still has some effect and not all information like the private information of the officials can be subject to the proviso because in that case, there would be nothing left of right to privacy which is elevated to the level of a constitutional right.²⁰

The privacy exception also faces some level of obscurity, as the RTI Act

17 The Registrar General v. A.Kanagaraj, W.P.No.28202 of 2012.

18 Surup Singh Hyra Naik v. State of Maharashtra, AIR 2007 Bom 121.

19 Ibid.

20 Vijay Prakash v. Union of India, 2009 (82) AIC 583 (Del).

does not define ‘personal information’ or ‘larger public interest.’ These terms have been interpreted through various case laws.

Case Laws

Personal Information:

Union Public Service Commission v. R.K. Jain, Delhi High Court ²¹

The applicant invoked the provisions of RTI Act and sought from the Public Information Officer for inspection of all records, note sheet, manuscripts, etc; on the disciplinary action taken against Shri G.S.Narang, IRS, Central Excise and Custom Service Officer along with final decision taken regarding imposition of penalty/disciplinary action and the decision of UPSC.

The Delhi High Court has tried to distinguish private information and personal information by saying that personal information is a wider term covering all private information like family, marriage, motherhood, procreation etc. but not vice versa. Information regarding performance of an employee is primarily a matter of employer-employee relationship known as ‘personal information’ that is governed by service rules.

Vijay Prakash v. Union of India ²²

Petitioner, a former officer of Indian Air Force sought for information about his wife, who was inducted into Defence Research Development Organisation (DRDO) including her service records, leave application, attested copy of nomination and other such documents. The court dealt with whether the information sought was exempted u/s 8(1)(j) or falls under the definition of information under Section 2(f) of RTI Act.

Personal Information has also been interpreted to mean identity details of public servants like date of birth, identification numbers etc. The court also established certain considerations to be followed in order to have a balance between information and privacy rights when personal information of public officials submitted to public agencies is requested.

21 W.P.(C) 1243/2011 & C.M. No. 2618/2011.

22 Supra note 20.

They are as follows:

- i) Whether the information is deemed to comprise the individual's private information unrelated to the person's position in the organization;
- ii) Whether the disclosure of personal information is with the aim to check the proper performance of the duties and tasks assigned to him as an officer of the organization; and
- iii) Whether the disclosure will furnish information required to establish accountability and transparency in the use of public resource.

*Secretary General, Supreme Court of India v. Subhash Chandra*²³

This appeal is filed against the judgment passed on 2nd Sept 2009 in the writ petition filed by the CIC questioning the correctness and legality of an order passed whereby request was made by the respondent, a public person, for supply of information concerning declaration of personal assets by the judges of the Supreme Court. The issue was about balancing individual's right and bringing about transparency and accountability.

The court dismissed the appeal observing that personal information has also been held to include information like medical records, tax returns etc., as these documents do not have any relation with public activity or interest. However, the same can be disclosed if the applicant can show sufficient public interest in disclosure. The court also clearly states that the Act makes no distinction between an ordinary individual and a public servant. Section 8(1)(j) ensures that all information furnished to public authorities is not given blanket access. Even when information regarding a public servant or official is asked for, a distinction must be made between personal data inherent to the person and those that are not.

Public Interest

*Babu Ram Verma v. State of Uttar Pradesh*²⁴

The petitioner challenged the Order passed by Uttar Pradesh Food and Civil Supplies Department directing that the petitioner is to retire from

23 LPA No.501/2009, 12-01-2010.

24 (1971) 2 Serv. L.R.659.

immediate effect in public interest. The petitioner challenged the order as being malafide, arbitrary, and having no material to hold it in public interest.

The Supreme Court in its judgment has interpreted the expression ‘public interest’ to mean an act beneficial to general public and an action taken for public purpose. However, it stated that it is impossible to define what ‘public purpose’ is as it differs from case to case. In each case, all facts and circumstances would have to be examined in order to determine whether the information fulfills public interest or public purpose.

*Union Public Service Commission v. R.K. Jain*²⁵

The applicant invoked the provisions of RTI Act and sought from the Public Information Officer for inspection of all records on the disciplinary action taken against Shri G.S.Narang, IRS, Central Excise and Custom Service Officer along with the final decision.

Public interest is a flexible word that takes different meanings under various statutes. However, it does not merely mean something that satisfies curiosity, love or admiration of information. It is information in which a class of people is interested and affects their rights and liabilities. Also, larger public interest does not refer to the number of people it would save or affect. Even if disclosing the information would protect 5 people, it would be considered as serving larger public interest.

Degree of Protection of Privacy

*Secretary General, Supreme Court of India v. Subhash Chandra Agarwal*²⁶

Appeal was passed against the order of the learned CIC allowing disclosure of information pertaining to declaration of personal assets by judges of the Supreme Court.

The court decided that nature of restriction on right to privacy. In case of individuals, the degree of protection afforded is greater. In case of public servants, the degree of protection is less, depending on what is at stake. This is because public servant is expected to act for the public good in the discharge of his duties and is accountable to them.

25 Supra note 21.

26 Supra note 23.

Challenges

Apart from ambivalent definitions, a few years after the RTI Act was passed, the PIO faced a multitude of frivolous applications, which led to vexatious use of RTI. When this was voiced out, the then Prime Minister Manmohan Singh stated that ‘Sometimes information covering a long time-span or a large number of cases is sought in omnibus manner with the objective of discovering an inconsistency or mistake which can be criticized.’²⁷

He also mentioned that if RTI is given a blanket effect then private enterprises would hesitate to enter into partnership with public sector. However, the blanket exclusion would harm accountability and transparency of the bodies. Therefore, in order to balance the rights of information and privacy, a separate legislation for privacy was being considered by an expert group under Justice A.P.Shah, former Chief Justice of Delhi High Court.

Privacy Bill

In order to deal with the challenge of balancing the conflicting rights, the Privacy Bill was drafted in 2011 according to which, ‘every individual shall have a right to privacy which are as follows:

- (a) Confidentiality of communication made to, or, by him including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication;
- (b) Confidentiality of his private or his family life;
- (c) Protection of his honour and good name;
- (d) Protection from search, detention or exposure of lawful communication between and among individuals;
- (e) Privacy from surveillance;
- (f) Confidentiality of his banking and financial transactions,
- (g) Confidentiality of medical and legal information
- (h) Protection from identity theft.

27 RTI should be circumscribed if it encroaches on privacy: PM Manmohan Singh, Times of India, available at <http://timesofindia.indiatimes.com/india/RTI-should-be-circumscribed-if-it-encroaches-on-privacy-PM-Manmohan-Singh/articleshow/16779929.cms> (last accessed on April 28, 2016).

- (i) Privacy of health information
- (j) Protection of data relating to individual.²⁸

The Bill sanctions the establishment of Data Protection Authority of India, which shall monitor the development of data processing, examination and evaluation of law relating to data protection and shall also exercise supervision over private parties which will engage in the collection and storage of personal data.²⁹ Certain changes were made and Privacy Bill, 2014 was drafted and at present, the Centre has revealed that it is giving final touches to the bill.³⁰

The advantage of having this Privacy law is that when a country has both information as well as data protection laws, data protection laws is applied to the individual's requests for personal information and right to information Act is applied to individual's request for information about other parties.³¹

However, the Privacy Bill, 2014 suffers with a number of deficiencies as according to the National Security Advisor Recommendations, the government is looking to exempt intelligence agencies from the ambit of the Act and limit the protection of the Act to Indian citizens. However, a competent court can put the action of the intelligence agencies under scrutiny. If this is allowed, it would allow the government to continue with uninhibited surveillance and allow intelligence agencies to have unrestrained access to personal data. This would defeat the purpose of the bill itself as it was drafted in order to curb the uncontrolled surveillance and to introduce legal mechanism that would protect individual privacy and safety.³²

28 The Privacy Bill, 2011, Sec. 3(2).

29 The Privacy Bill, 2011, Sec. 49.

30 Yatish Yadav, Centre Giving Final Touches to Right to Privacy Bill, Indian Express, <http://www.newindianexpress.com/nation/Centre-Giving-Final-Touches-to-Right-to-Privacy-Bill/2015/03/17/article2717271.ece> (last accessed on May 16, 2016).

31 Shreyasakar, RTI ACT IN INDIA: FUTURE AND IMPLICATIONS, Tata McGraw-Hill Education, 2013.

32 Centre for Internet and Society, An Analysis of the New Draft Privacy Bill – CIS India, Medianama, Available at <http://www.medianama.com/2014/03/223-an-analysis-of-the-new-draft-privacy-bill-cis-india/> (last accessed on April 28, 2016).

RTI in other countries

Law in United States

The Freedom of Information Act in the United States of America has allowed public the right to request access to records from any federal agency. The Act that was enacted in 1967 was actually extracted from Section 3 of Administrative Procedure Act, 1946. Apart from providing definitions, laying down procedures, it has nine exceptions to disclosure.³³

Very similar to the Privacy Bill being worked upon in India, United States enacted Privacy Act of 1974 in order to safeguard the invasion of personal privacy through misuse of records by the federal agencies. It restricts disclosure of information unless there is consent of the person or if it falls under one of the twelve statutory exceptions.³⁴

Freedom of Information Act places suo moto obligation on the government agencies to disclose information about their organisation, functions, procedure, officials from whom information can be collected; etc. Whereas, Section 4 of the RTI Act provides for suo moto disclosure of information from public bodies however, it lacks efficiency due to its vagueness as there are no rules as to the method and mode of disclosure so that it is easily accessible and available to an extent in electronic format. Framing of rules for suo moto disclosure is essential in India considering the high levels of poverty and illiteracy.³⁵ Moreover, the Act places, cabinet papers, file notings and records of council of ministers and other officials under the exemption, hence, shielding the entire decision making process.³⁶

Law in United Kingdom

Freedom of Information Act, 2000 was enacted at about the same time that India enacted Right to Information Act. Act was followed by a White Paper made in 1998. The Act created statutory right to access information held by

33 Freedom of Information Act, 1967, available at <https://foia.state.gov/Learn/FOIA.aspx> (last accessed on April 28, 2016).

34 Electronic Privacy Information Center, The Privacy Act, 1974, Available at <https://epic.org/privacy/1974act/> (Last visited on April 28, 2016)

35 Sec 4, Right to Information Act, 2005.

36 Section 8(1)(i), Right to Information Act, 2005.

public bodies categorised into three: public authorities, publicly owned companies and designated bodies performing public functions.³⁷

Even though the Act made only 7 exceptions to the disclosure of information, there are 24 exceptions in the Act categorised into absolute exemptions that is information that serves no public purpose and qualified exemptions in which case public interest test has to be conducted.³⁸

Therefore, it is said that Right to Information Act, 2005 in India is a better Act when compared to its counterpart in UK as it gives several reasons to refuse information.³⁹ Unlike UK, private companies also come under the purview of RTI in India as long as the company reports to a Government body.⁴⁰

Conclusion

It now remains to be seen how Privacy law would affect the Right to Information Act, 2005. However, Privacy law alone is not enough. It is very clear from the language of RTI Act with reference to Section 8 and 11 that even though certain information is excluded from disclosure including privacy reasons, the same can be disregarded if greater public interest is served on disclosure.

However, the exceptions mentioned in the RTI Act, 2005 are so wide that often Central Information Commissions have taken opposing stands with the final decision taken by the court. For instance, in *Union of India v. Hardev Singh*⁴¹, the Central Information Commissions gave conflicting decisions on whether passport details of a private individual can be disclosed with Delhi

37 Richard Forrester, CiCS, FOI Implementation Manager, Freedom of Information Act, 2000, Available at http://www.shef.ac.uk/polopoly_fs/1.119826!/file/FOIOverview.pdf (last accessed on April 28, 2016).

38 Ibid.

39 Aruna Roy, How UK can learn from India's Right To Information Act, Available at <http://www.theguardian.com/society/2012/apr/10/india-freedom-of-information> (last accessed on April 28, 2016).

40 K.P.Narayana Kumar, Right to Information: Private Firms will not be Exempted, Available at <http://www.livemint.com/Home-Page/fMnwNTAvSXZVTYEJdSkca/Right-to-information-Private-firms-will-not-be-exempted.html> (last accessed on April 28, 2016).

41 W.P.(C) 3444/2012.

High Court finally giving a categorical finding on the issue stating that even though the information seeker would not get photocopies of the documents showing Singh's proof of address and identity, the noting of the officer shall be provided as long as it does not contain any information that can be considered to be personal information under Section 8(1)(j).

While, it is quite understandable that there is no simple solution to balancing the two rights of information and privacy but the conflict can be diminished a little through enactment of clear definitions, guidelines, illustration of certain situations that would allow disclosures would be constructive, akin to the 'illustrations' part mentioned in the IPC. An appropriate public interest test is needed which mentions certain factors or conditions that would substantiate what information would serve public interest.

Appropriate institutional structures that help in balancing the two rights by co-ordinating with each other is essential even if the bodies belong to different departments. Implementing these steps would help in bringing about significant balance between the conflicting rights of information and privacy and would benefit in achieving Good Governance.

* * * * *

TRANSPARENCY & PRIVACY: UNCONSCIONABLE OR AMICABLE

Raj Kamal* & Eeshanee**

Abstract

The Right to Privacy and the Right to Information (RTI) are both essential human rights enshrined in the Constitution of India. These two rights are mainly complementary rights that tend to promote individual's rights to protect against actions that threaten the privacy and to promote government accountability. But there exists a potential conflict between these rights when there is a demand for access to personal information held by government bodies. RTI has injected a new phase of transparency in an infamously opaque public governing institution. The preamble of the RTI Act sets out that the citizens shall have the right to secure access to the information under the control of the public authorities, to promote transparency of information which are vital in the functioning of the public authorities, to contain corruption, to hold Governments and their instrumentalities accountable to the governed and thereby develop the participatory governance. However, many public authorities tend to deny disclosure of information taking the shelter of the exemption provisions provided under the Act. At the very outset it appears that a right to receive information though achieving greater transparency in public life could impinge on the right to privacy of certain people. Any potential infringement of the right to privacy by the provisions of the RTI Act are sought to be balanced by exemption provided therein, which states that no information should be disclosed if it creates an unwarranted invasion of the privacy of any individual. However, public authorities may allow disclosure of such information if they are satisfied that the larger public interest justifies the disclosure of such information. As equal human rights, neither privacy nor access takes precedence over the other. Thus it is necessary to consider how to adopt and implement the two rights and the laws that govern them in a manner that respect both the rights. Most importantly, the individual right to privacy should not be lost in this paper war. Thus, this paper examines the two rights and their potential conflict, and highlights how the courts and the laws in India address question of transparency vs. privacy.

Introduction

The Right to Information is indispensable for the effective functioning of democracy. The preamble of the RTI Act sets out that the citizens shall have the right to secure access to the information under the control of the public authorities, to promote transparency of information which are vital in the functioning of the public authorities, to contain corruption, to hold

* Student, Hidayatullah National Law University, Raipur.

** Student, Hidayatullah National Law University, Raipur.

governments and their instrumentalities accountable to the governed and thereby develop the participatory governance. Thus, the principle of democratic accountability would yield to the public the right that the governing institutions and administrative agencies shall not create artificial obstructions to shield their working from common man's sight and that the different departments shall make available the information that is sought by the public.¹

Right to privacy is a part of Article 21 of the Indian Constitution, which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The safeguards are, therefore, provided that though the right to privacy is a part of fundamental rights guaranteed under the Constitution, but specific laws can override this where larger public interest is involved. This means that no rights including the right to privacy are absolute rights.

The right of access to information in actual practice is likely to conflict with other protected interests including the right to protection of personal privacy.² Many public authorities tend to deny disclosure of information taking the shelter of the privacy exemption provisions provided under the RTI Act. Right to information (RTI) provides a fundamental right for any person to access information held by government bodies. At the same time, right to privacy grants every individual a fundamental right to control the collection of, access to, and use of personal information about them that is held by governments and private bodies. Privacy and RTI are often described as “two sides of the same coin”—mainly acting as complementary rights that promote individuals' rights to protect themselves and to promote government accountability. As equal human rights, neither privacy nor access takes precedence over the other.³ Thus, it is necessary to consider how to adopt and implement the two rights and the laws that govern them in a manner that respects both rights.

-
- 1 B. K Chakraborty, RTI Act, 2005 vis-à-vis the Right to Privacy, available at http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/rti_&_protection_of_individual_privacy_bk_chakraborty.pdf. (last accessed on May 21, 2016).
 - 2 Preamble, the Right to Information Act, 2005 (Act No. 22 of 2005).
 - 3 David Banisar, The Right to Information and Privacy: Balancing Rights and Managing Conflicts, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1786473&download=yes (last accessed on May 21, 2016).

Freedom of Information and Right to Know

“Right to information enriches knowledge, knowledge makes a nation great.”

*Dr. APJ Abdul Kalam*⁴

Hon’ble Supreme Court in the case of *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*⁵ recognised that the Right to Information is a fundamental right under Article 21 of the Constitution. Court speaking through Justice Sabyasachi Mukharji, held:

“...We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of 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. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform.”⁶

The Universal Declaration of Human Rights, through Article 19 also articulates the right to information, which is as follows:⁷

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Right to information holds immense importance in modern world where it is the need of the society and the very existence of democratic governance. Prime Minister Narendra Modi while pitching his pet ‘Digital India initiative’ with the titans of the IT world, promised to make governance

4 President of India (As he then was), presidential address at the inauguration of national convention on the completion of first year Right to Information, 13th October 2006, available at http://cic.gov.in/Conference/inaugural_address_of_president.htm.

5 *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*, 1989 AIR 190.

6 *Ibid.*, at para 34.

7 See also, International Covenant on Civil and Political Rights, which was ratified by India in 1978.

more accountable and transparent while assuring data privacy and security.⁸ The underlying rationale behind the right to information is that, it will heighten the accountability of government and its agencies to the electorate and it will conduce to fairness in administrative decision-making processes affecting individuals.

Right to Privacy

The philosophy underlying the privacy protection concern links personal autonomy to the control of information concerning oneself and suggests that the modern acceleration of personal data collection, especially by government agencies, carries with it a potential threat to a valued and fundamental aspect of our traditional freedoms. Thus, one of the cardinal principles of privacy protection is that personal information acquired for one purpose should not be used for another purpose without the consent of the individual to whom the information pertains.

In India, the Constitution does not expressly recognize the right to privacy.⁹ Nevertheless, in several judgments including *Kharak Singh v. State of U.P.*¹⁰, *Gobind v. State of M.P.*¹¹, *R.Rajagopal v. State of Tamil Nadu*,¹² *People's Union for*

8 Press Trust of India, 27 September 2015: PM Modi Promises More Accountable and Transparent Governance, available at <http://gadgets.ndtv.com/internet/news/pm-modi-promises-more-accountable-and-transparent-governance-745070> (last accessed on May 22, 2016).

9 However, the Privacy Bill, 2011, to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalization for violation of such rights and matters connected therewith, is pending in parliament.

10 *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 (The Court held that: the Right to Privacy is an integral part of the Right to Life, but without any clear cut laws, it still remains in the grey area).

11 *Gobind v. State of M.P.*, AIR 1975 SC 1378: 1975 SCR (3) 946 (Supreme Court, while upholding the regulation in question which authorized domiciliary visits by security personal, also held: Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest).

12 *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632 (The Supreme Court held that the right to privacy is a right to be let alone. None can publish anything concerning the above matters without his consent, whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Jeevan Reddy, J. speaking for the Court observed that in recent times, the right to privacy has acquired

Civil Liberties (PUCL) v. Union of India,¹³ and *State of Maharashtra v. Bharat Shanti Lal Shah*,¹⁴ the Supreme Court has recognized the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.¹⁵

Right to privacy is also recognized as a basic human right under Article 12 of the Universal Declaration of Human Rights Act, 1948 and Article 17 of the International Covenant on Civil and Political Rights Act, 1966. India is a signatory to both conventions, wherein Article 17 is as follows:¹⁶

- 1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or correspondence, or to lawful attacks on his honour and reputation.
- 2) Everyone has the right to the protection of the law against such interference or attacks.

However, overall effect of the above precedents enabling privacy to be interpreted as fundamental right is not explicit in nature as the right to privacy has not been conferred strict status of fundamental right envisaged under the Constitution of India. Thus, Supreme Court on August 11, 2015 referred to a Constitution Bench a batch of petitions¹⁷ challenging the Centre's ambitious scheme to provide Aadhar card to all citizens and to decide whether right to privacy is a fundamental right.¹⁸

constitutional status. The learned Judge referred to Kharak's case, Govind's case and considered a large number of American and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone.").

- 13 *People's Union for Civil Liberties (PUCL) v. Union of India*, AIR 1997 SC 568 (the court held that the telephone tapping is the violation of the right to privacy.).
- 14 *State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5.
- 15 Right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy; Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".
- 16 Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.
- 17 The bench is hearing a batch of pleas against decisions of some states to make Aadhar cards compulsory for a range of activities including salary, provident fund disbursement, marriage and property registration, available at <http://www.ndtv.com/india-news/supreme-court-refers-aadhar-card-matter-to-constitution-bench-1206078> (last accessed on May 21, 2016).
- 18 Supreme court refers Aadhar Card matter to Constitution Bench, available at http://articles.economictimes.indiatimes.com/2015-08-11/news/65452339_1_constitution-bench-larger-bench-aadhar-cards (last accessed on May 21, 2016).

Right to Information under RTI Act, 2005

“...democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.”

– Source: RTI Act, 2005

This legislation is intended to provide for an effective framework for effectuating the right of information recognized under Article 19 of the Constitution of India.¹⁹ The RTI Act is based on following premises:²⁰

- (i) Regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.
- (ii) To express the ideals of Constitution of India establishing India as democratic republic.
- (iii) Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.
- (iv) Harmonize the conflicting interests (where revelation of information in actual practice is likely to conflict with other public interests) while preserving the paramountcy of the democratic ideal;

The Act in above considerations puts an obligation on all public authorities to provide information to citizen who seeks it unless the information sought comes in the exempted category.²¹

Protection of Personal Information under the RTI Act

The right to information, being integral part of the right to freedom of speech, is subject to restrictions that can be imposed upon that right under Article 19(2) of the Constitution of India.²² The right to privacy by the provisions of the RTI Act are sought to be balanced by section 8 which provides that no information should be disclosed if it creates an

19 Statement of Objects and Reasons, the Right to Information Act, 2005 (Act No. 22 of 2005).

20 See, Preamble of the Right to Information Act, 2005 (Act No. 22 of 2005).

21 See Sections 3, 4, 6, 7, 8 and 11 of the Right to Information Act, 2005.

22 Chief Information commissioner & Anr v. State of Manipur & Anr, AIR 2012 SC 864.

unwarranted invasion of the privacy of any individual.²³ Privacy exception is envisaged into Section 8(1)(j) of the Right to Information Act, 2005. The provision reads as follows:

- (j) “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 appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information...”.

Thus, the exception in Section 8(1)(j) prohibits the disclosure of personal information for two reasons:

- (i) Either if, disclosure does not relate to any public activity or interest.
- (ii) Or if, it would be an unwarranted invasion into privacy.

However, the above two conditions get trumped and the disclosure is permitted²⁴ if:

- (i) Either if, a larger public interest justifies the disclosure of such information.
- (ii) Or if, public interest in disclosure outweighs the harm to the protected interests.

Provided that, if the information relates to, or belongs to, or concerns to any third party then third party would be consulted before information relating to him is decided to be disclosed.²⁵

Unfortunately, the RTI Act does not define the terms "personal information" or "larger public interest" used in section 8(1)(j), which leaves

23 Section 8(1) of the Right to Information Act, 2005.

24 See, Clause (1)(j) and Clause (2) of Section 8 of the Right to Information Act, 2005; See also, *Reliance Industries Ltd. v. Gujarat State Information Commission*, AIR 207 GUJ. 203.

25 See, Section 11 of the Right to Information Act, 2005; See also, *Reliance Industries Ltd. v. Gujarat State Information Commission*, AIR 207 GUJ 203; *Arvind Kejriwal v. C.P.I.O.*, AIR 2012 DEL 29.

some amount of ambiguity in interpreting the privacy exception to the RTI Act. Nevertheless, Central Information Commission in the case of *V.R. Sharma v. Ministry of Labour and Employment*²⁶ laid down parameters that could be used to check if information should be considered to be ‘personal information’.

- i. The information must be personal: 'Personal information' cannot be related to institutions, organizations, or corporate entities.
- ii. The disclosure of information has no relationship to any public activity or interest: Public authorities in performing their functions routinely ask for ‘personal’ information from citizens, and this is clearly a public activity.
- iii. The disclosure of the information would lead to an unwarranted invasion of the privacy: The State has no right to invade the privacy of an individual except in extraordinary situations. In these circumstances, special provisions of the law must apply with safeguards.

Transparency v. Privacy

In fall of 2012, Prime Minister Manmohan Singh expressed that sometimes disclosures under the RTI Act could infringe upon the privacy of an individual and that the Right to know should be circumscribed if disclosure infringes on privacy.²⁷ Thus, where speech right infringes the privacy interest of an individual, it gives rise to a conflict between the two fundamental rights, none of which is subordinate to the other. Accordingly, they have to be reconciled and this is done by striking a proper balance between the two.

As early as 1859 in his famous essay on liberty,²⁸ the political philosopher J.S. Mill, wrote that an individual could be prevented from doing those things which could harm others. Lord Denning while advocating for the

26 *V.R. Sharma v. Ministry of Labour and Employment*, Appeal No. CIC/SG/A/2011/000464: Decision No. CIC/SG/A/2011/000464/12432;

27 The Centre for Internet and Society, Privacy and Transparency in India, available at http://www.cbic.meiji.jp/ja/news/pdf/13_Privacy_and_transparency_in_India.pdf (last visited on May 21, 2016).

28 J.S. Mill, *On Liberty* (1859). Quoted in Udai Raj Rai, *Fundamental Rights and Their Enforcement* (PHI Learning Pvt. Ltd., 2011 - Center for Public Policy and Governance) at p 268.

recognition of a right to privacy, stated that:²⁹

“Right to privacy is not absolute and is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance it is a balancing exercise for the Courts.”

Hon’ble Supreme Court in the case of *R. Rajgopal v. State of Tamil Nadu*³⁰ observed that there is only one aspect of privacy right that comes into conflict with the speech right i.e. the right against unwanted publicity of personal affairs. While privacy interest demands that people should not be unnecessarily inquisitive about the personal matters of the individual, there are occasions when personal matters become legitimate concern of the public and when such situation claims the right to inform people about such matters. B.P. Jeevan Reddy, J. has rightly defined the scope of privacy right against unwanted publication in following words:

“Citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent but where his personal affairs have already become part of official records the claim of privacy right would not stand. 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 official duties.”³¹

Hon’ble Supreme Court in the case of *People’s Union for Civil Liberties (PUCL) v. Union of India*³² held that the right to privacy is not absolute and voters do have a fundamental right to know relevant qualifications of candidates for office, including information about their income and assets.

Court in the case of *Union of India v. Association of Democratic Reforms & Anr.*³³ held that:

29 *Rajinder Raina v. Central Information Commission & Others*, Writ Petition (Civil) No. 8524 of 2009, at para 66 (quoted).

30 *R. Rajgopal v. State of Tamil Nadu*, (1994) 6 SCC 632: AIR 1995 SC 264.

31 *Ibid.*, at para 9.

32 *People’s Union for Civil Liberties (PUCL) v. Union of India*, AIR [2003] SC 2363.

33 AIR 2002 SC 2112.

There are widespread allegations of corruption against persons holding post and power. In such a situation, the question is not of knowing personal affairs but to have openness in a democracy for attempting to cure the cancerous growth of corruption by a few rays of light. Thus, public has right to know about every public act by public functionaries. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not miscomputed himself in collecting wealth after being elected.

The need for balancing individual interest and public interest in giving effect to this right appears to have been in the mind of the judge while laying down the principles.

General Standards

The right to access information is not absolute. Freedom of information is subject to limitations to protect certain types of information from disclosure.³⁴ However, these restrictions on access must be narrowly drawn exceptions necessary to protect legitimate interests, and strictly interpreted in line with the presumption of access. For a restriction on freedom of information to be proportionate:

- i. The restriction must be related to a legitimate aim;
- ii. The public authority must demonstrate that disclosure of the information threatens substantial harm to the aim; and
- iii. The public authority must demonstrate that the harm to the legitimate interest is greater than the public interest impeded.³⁵

Public Interest Test

The right to information increases with the importance of the information at issue to the individual or society. Matters of particular importance include the competence for public service of public officials and candidates, the functioning of government and public agencies, and public health issues. The laws of several countries contain an explicit public interest override

34 *Indira Jaising v. Registrar General*, Supreme Court of India (2003) 5 SCC 494.

35 General Standards, available at <http://www.right2info.org/exceptions-to-access/general-standards> (last accessed on May 21, 2016).

concerning some or all of the permissible grounds for exceptions to access, compelling the disclosure of information in the public interest.

More broadly, both privacy and transparency are tools of public good essential for the proper functioning of a democratic society, and both are tools against abuses of power. Yet there are times when they come into conflict. For example, many records held by public bodies inevitably identify, or contain personal information about, their employees. Public bodies also hold the kind of personal data many employers require of their employees, such as their home addresses, salary information, employment histories and photographs, and occasionally (though rarely), it may be in the public interest for some of this information to be revealed.

The public interest test requires that a public authority, or oversight body, weigh the harm that disclosure would cause to the protected interest against the public interest served by disclosure of the information. The existence of public interest test in RTI Act ³⁶ is considered as a sign of the strength of the right. In general terms public interest issues favouring disclosure usually involve matters of public debate, public participation in political debate, accountability for public funds and public safety. The issues related to safety and environment, significant threats to health and information relating to grave human rights violations are considered to be subject of mandatory public interest override. ³⁷

The Inter-American Court of Human Rights and several national courts have also ruled that information must be disclosed when to do so, if it serves a public interest, even if private interest could thereby be harmed, so long as the public interest in disclosure outweighs the likely harm. The Inter-American Court of Human Rights on landmark *Claude Reyes* ³⁸ judgment became the first international court to recognize and affirm the vitality of the 'public interest' and 'harm tests'. It ruled that in all cases, a restriction of the right of access: "... must not only be related to one of the [legitimate] objectives [that justify it], but it must also be shown that disclosure could cause substantial prejudice to this objective and that the

36 Section 8(1)(j) of the Right to Information Act, 2005.

37 Sunil Abraham, *Privacy v. transparency: Can you have both?* NEW INTERNATIONALIST MAGAZINE, available at <http://newint.org/features/2015/01/01/privacy-transparency/> (last accessed on May 21, 2016).

38 *Claude Reyes et al v. Chile*, Inter-American Court of Human Rights (International / IACHR), Series C No. 151, decided on 19 September 2006.

prejudice to the objective is greater than the public interest in having the information (evidence of proportionality)".³⁹

Hon'ble Madras High Court in the case of *V. Madhav v. T.N. Information Commission*,⁴⁰ stated that in the event a member of public requests information about public servants, a distinction must be made between official information inherent to the position and those that are not which affect only the private life. The balancing exercise necessarily depended on case to case basis on the following relevant considerations:⁴¹

- (i) Whether information is deemed to comprise the individual's private details unrelated to his position in the organisation?
- (ii) Whether the disclosure of personal information is with the aim of providing knowledge of the proper performance of the duties and task assigned to the public servants in any specific case? And
- (iii) Whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources?

Cases where access to Information conflicted with Privacy

In the case of *Ansari Masud A.K v. Ministry of External Affairs*,⁴² the Central Information Commission held that:

“Details of a passport are readily made available by any individual in a number of instances, example to travel agents, at airline counters, and whenever proof of residence for telephone connections etc. is required. For this reason, disclosure of details of a passport cannot be considered as causing unwarranted invasion of the privacy of an individual.”

Hon'ble Karnataka High Court in the case of *H.E. Rajasekarappa v. State Public Information Officer*⁴³ stated that:

“Citizen has no right to seek personal information of officials of public authority but pertaining to public affairs of public authority.”

39 Ibid., at para 77.

40 V. Madhav v. T.N. Information Commission, AIR 2012 Mad 5.

41 Similar test was given in the case of Vijay Prakash v. Union of India, AIR 2010 Del 7.

42 Ansari Masud A.K v. Ministry of External Affairs, CIC/OK/A/2008/987/AD.

43 AIR 2009 KAR 8.

Hon'ble High Court of M.P. in the case of *Shrikant Pandya v. State of M.P.*,⁴⁴ observed that the certified copy of personal record as well as service book of third party containing annual confidential reports and other information like details of family and nomination thereof, are personal in nature and a Government servant has a right to guard the same. This information has no relationship to any public activity and if parted with will certainly lead to the unwarranted invasion of the privacy of a Government servant.

Hon'ble Madras High Court in the case of *V. Madhav v. T.N. Information Commission*,⁴⁵ held that:

*“Asset details of a public officer are not personal information affecting his privacy if it is already submitted to the government for inspection.”*⁴⁶

It is very important to note that in all such instances where the disclosure of information is denied or going to be denied under the provisions of the RTI Act, burden of proof that the information is exempted is on the public authority and he has to show why information sought, should not be disclosed.⁴⁷

Hon'ble Delhi High Court in the case of *Chief Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal*⁴⁸ observed that:

- (i) In case of public servants, the degree of their privacy protection is lower and thus a larger public interest in disclosure is more likely to override the interest in privacy.⁴⁹
- (ii) Once the information requester demonstrated “the larger public interest”, the next step for a relevant authority is to consult the third party (the public servant)⁵⁰. and
- (iii) Eventually, to balance the interest in disclosure against the privacy concerns.⁵¹

44 AIR 2011 MP 14.

45 W.A.No.551 of 2010.

46 Rule 16 of the All India Services (Conduct) Rules, 1968 mandated the member of the service to submit a return of his assets and liabilities to the Government.

47 State Bank of India v. Mohd. Sahjahan, AIR 2010 DEL 205.

48 W.P. (C) 288/2009, High Court of Delhi (Appellate).

49 Ibid., at para 67.

50 Ibid., at para70.

51 Ibid., at para 66.

Thereby, the court held that:

“Asset declarations of Supreme Court judges should be disclosed if there is public interest in disclosure; where the interest is shown, the authority should consult the concerned judge and balance the interest in disclosure against privacy concerns.”

Hon’ble Supreme Court in the matter of *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizvi*,⁵² once again explained the link between the right to privacy guaranteed under Article 21 and Section 8(1)(j) of the RTI Act in the following words:

“The scheme of the Act contemplates for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. It was aimed at providing free access to information with the object of making governance more transparent and accountable. Another right of a citizen protected under the Constitution is the right to privacy. This right is enshrined within the spirit of Article 21 of the Constitution. Thus, the right to information has to be balanced with the right to privacy within the framework of law.”

However, if the applicant does not make a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.⁵³ For all practical purposes, thus, personal information in the possession of the government is totally dependent on the good sense of the seeker of the information and the government officials.⁵⁴

Conclusion & Suggestions

Both the right to privacy and right to information intended to help the individual in making government accountable and transparent. The notion of both of these rights hold immense importance to the very existence and

52 (2012) 13 SCC 61.

53 *Girish Ramchandra Deshpande v. Central Information Commissioner*, (2013) 1 SCC 212; Special Leave Petition (Civil) No. 27734 of 2012 (@ CC 14781/2012).

54 *Vijay Prakash v. Union of India*, AIR 2010 Del 7.

continuance of the Democratic Republic of India. Wherein, privacy holds the status of individual being immune from unreasonable external interference to his/ her personal sphere, right to information holds together the need and the expectation of the society towards a responsible government. As of now right to privacy is recognized as an interpreted fundamental right envisaged in the Constitution of India. However, the two rights are ranked at par with each other and thus, it becomes difficult to adjudicate the importance of one over the other. Nevertheless, it would not be out of line to say that the two can be subjectively analysed so that the best interest or the protection is served. As of now this conflict is being resolved through judicial or quasi-judicial methods and still there exists uncertainty over the outcome. Hence, this issue has to be resolved and resolved quickly so that the notion of right to information for public interest would be settled without unreasonably encroaching into the sphere of individual privacy.

- Most issues can be mitigated through the enactment of clear definitions in legislation, guidelines, techniques, and oversight systems. Due diligence would ensure that the access to information and data protection laws have compatible definitions of personal and public information.
- Appropriate institutional structures and public interest tests should be created to balance these rights and ensure that data protection and right to information work together in harmony.
- The public authorities should deal with the applicants in a friendly manner and public interest should be the core & the disclosures should be made accordingly.
- Section 8, when applied, should be given a strict interpretation as it restrains not only statutory right granted under the RTI Act but also pre-existing constitutional right to know under Article 19 of the Constitution of India.
- Effective training course for Central Public Information Officers and State Public Information Officers, so as to evaluate the nature and purpose of disclosure of any information, especially in conflict with Section 8, 9 and 11 of the Right to Information Act, 2005.

* * * * *

TRANSPARENCY AND THE RIGHT TO PRIVACY

Dipam Sengupta & Nikita Jaluka***

Abstract

Privacy in public affairs is an anathema to the very notion of democracy and transparency, the exception. RTI has originated from the Doctrine of Crown Privilege which strengthens the community's right to access government-held information, unless, on balance, releasing the information would be contrary to the public interest. Most public documents are withheld in any legal proceedings in guise of protecting the states interest and privacy in public affairs and this is used as a shield by the government for concealing their action from government scrutiny. Access to information, on the other hand, is power in the hands of the officials. The hallmark of meaningful democracy is the institutionalisation of transparent and participative processes. The concern of this paper is not with why privacy has come to be so highly prized, and if so, when and why. This would mean the concern would be with what privacy is, its domain, whether there is a right to privacy, and if so, whether it is ultimate, basic, albeit, a prima facie right or simply a conditional right.

Firstly, the paper aims at achieving greater transparency because the legislature did not realize that the right to receive information could infringe the right to privacy, which is necessary for making the Government accountable to individuals. RTI and right to privacy are potentially at conflict when there is a demand to access personal information held by government bodies. Where the two rights overlap, state needs to develop a mechanism for identifying core issues to limit conflicts and balance rights. This paper examines legislative and structural means to define and balance the right to privacy and information. The right to privacy should not be lost in the paper war, as citizen will most certainly have to rely on the RTI for full disclosure about its government's activity. Secondly, this paper conceptualises to constitute an equitable and constitutional approach towards protecting the privacy of the third party whose information is at risk of being disclosed as well as the privacy of the applicant. This reveals that the applicant's right to disclosure, although important is not absolute. The RTI Act defines the term information but does not define the term "personal information". Therefore one has to rely on judicial pronouncements for applying the exemption clause u/s 8(1)(j). Even though right to privacy is contained in section 8(1)(j), it has its origins in Articles 14, 19(1)(a) and 21 of the Constitution of India but still its implementation is complex and obscure. Thirdly, the paper examines how the unification project can be accomplished, why it is desirable, and whether it is consistent with Supreme Court's methodological guidance in privacy controversies. Finally, it outlines how the disclosure of privileged information is an ideal vehicle for pushing the law of information and privacy.

*Student of BBA.LLB (3rd year) at KIIT UNIVERSITY, Bhubaneswar.

**Student of BBA.LLB (3rd year) at KIIT UNIVERSITY, Bhubaneswar.

Introduction

Major assumption behind a new style of governance is the citizen's access to information. Much of the common man's distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision-making processes. He remained ignorant and unaware of the processes, which vitally affected his interest. Government procedures and regulations shrouded in a veil of secrecy donot allow the clients to know their cases are being handled. They shy away from questioning officers handling their cases because of the latter's snobbish attitude. Right to information should be guaranteed and needs to be given real substance. In this regard, government must assume a major responsibility and mobilize skills to ensure flow of information to citizens. The traditional insistence on secrecy should be discarded. In fact, we should have an oath of transparency in place of an oath of secrecy. Administration should become transparent and participatory. Right to information can usher in many benefits, such as speedy disposal of cases, minimizing manipulative and dilatory tactics of the babudom, and, last but most importantly, putting a considerable check on graft and corruption. Dissemination of information about policies and actions in the public realm leads to a more accountable government.¹ The Freedom of Information Act, 2002 succeeded by The Right to Information Act, 2005 is a clear example of how transparency is promoted in government activity.

Article 17 of the International Covenant on Civil and Political Rights provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour or reputation. Any interference with the right to privacy can only be justified if it is in accordance with the law, has a legitimate objective and is conducted in a way that is necessary and proportionate. Surveillance activities must only be conducted when they are the only means of achieving a legitimate aim, or when there are multiple means, they are the least likely to infringe upon human rights.

1 *Exccutive and public adminsitration*, available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch6.htm> (last accessed on May 21, 2016).

Doctrine Of Crown Privilege

In *Conway v. Rimmer*,² the House of Lords crippled the judge-made doctrine of Crown privilege. No longer was a Minister's objection on grounds of public interest to the production of evidence in legal proceedings to be conclusive. A court would determine independently whether evidence for which privilege had been claimed should be withheld, after it had assessed the detriment that might accrue to the public interest from disclosure, and to parties and to administration of justice and non disclosure. Deference would be paid to objections to the disclosure of material relating to defence, security, external relations and high level policy decisions or discussions. On the other hand, little weight should be attached to objections that the proper functioning of the public service would be prejudiced as a result of the inhibitions that might afflict persons within the public service faced with the prospect of subsequent disclosure of their confidential reports and assessment. Yet the substitution of judicial discretion for absolute executive discretion left vital questions of judicial policy unanswered – some of them perhaps too fundamental to be dealt with on case to case basis. Three recent House of Lords decision on "Crown privilege" have indeed clarified certain issues; but one's original impression, that in *Conway v. Rimmer* the judiciary set itself an immensely difficult task, has been fortified.

Right to Information Act

With the judicial support, the right to information became a cause of public action and there was strong demand for a formal law on freedom of information. The States of Goa, Tamil Nadu and Rajasthan have, since 1997, enacted laws ensuring public access to information, although with various restraints and exemptions. There was a pressure on the Central Government also to enact law granting the right to information. Various drafts were submitted for consideration by empowered bodies like the Press Council of India and by independent citizen's groups. Ultimately, the Freedom of Information Act, 2002 was passed which was assented to by the President on 6 January, 2003. However, on the suggestion of the National Advisory Council and others, for significant changes in law, government decided to repeal the Freedom of Information Act, 2002 and in its place enacted the Right to Information Act, 2005 to effectuate the right to information recognised under Article 19 of the Constitution. The

2 [1968] A.C. 910.

Preamble of the Act provides for the setting up of the practical regime of right to information to all citizens to secure access to information under control of public authority. Thus, the Act aims at making government a participating government. Present law converts the 'freedom of information' to the 'right to information' for all citizens. "Information" includes any mode of information in any form of record, document, e-mail, circular, press release, contract, sample, electronic data and other such types. The right to information covers inspection of work, document, record and its certified copy, and information in the form of diskettes, floppies, video cassettes in electronic form, tapes or stored information in computers and such types. Information can be provided on written request or by request by electronic means with payment of nominal fee. It is incumbent for the authority to supply required information within a span of 30 days from the date of request and if the information relates to life or liberty of a person, then it can be obtained within a span of 48 hours. Penalty for refusal of application or for not providing information within the stipulated time is Rs.250 per day, but the total amount should not exceed Rs.25,000. The Act prohibits information in certain specified categories and puts restriction on third party information.³

Section 8⁴ provides for restrictions on information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security strategic, scientific or economic interest of the State, relation with foreign States, forbidden information and disclosure of such material which would cause a breach of privilege of Parliament or State Legislature.

What is privacy?

Privacy is a fundamental right, essential to autonomy and the protection of human dignity, serving as the foundation upon which many other human rights are built. Privacy enables us to create barriers and manage boundaries to protect ourselves from unwarranted interference in our lives, which allows us to negotiate who we are and how we want to interact with the world around us. Privacy helps us establish boundaries to limit who has access to our bodies, places and things, as well as our communications and our information. The rules that protect privacy give us the ability to assert our rights in the face of significant power imbalances. As a result, privacy is

3 Proposed points for discussion on important RTI provisions, available at <https://www.iitgn.ac.in/RTI/RTI-Guidelines.pdf>. (last accessed on May 21, 2016).

4 Right to Information Act, 2005.

an essential way we seek to protect ourselves and society against arbitrary and unjustified use of power, by reducing what can be known about us and done to us, while protecting us from others who may wish to exert control. Privacy is essential to our identity as human beings, and we make decisions about it every single day. It gives us a space to be ourselves without judgement, allows us to think freely without discrimination, and is an important element of giving us control over who knows what about us. Privacy is recognised as inherent to the right to personal liberty guaranteed under Article 21 of the Constitution of India.⁵

Why does it matter?

In modern society, the deliberation around privacy is a debate about modern freedoms. As we consider how we establish and protect the boundaries around the individual, and the ability of the individual to have a say in what happens to him or her, we are equally trying to decide:

- the ethics of modern life;
- the rules governing the conduct of commerce; and
- the restraints we place upon the power of the state.

Technology has always been intertwined with this right. For instance, our capabilities to protect privacy are greater today than ever before, yet the capabilities that now exist for surveillance are without precedent. We can now uniquely identify individuals amidst mass data sets and streams, and equally make decisions about people based on broad swathes of data. It is now possible for companies and governments to monitor every conversation we conduct, each commercial transaction we undertake, and every location we visit. These capabilities may lead to negative effects on individuals, groups and even society. They also affect how we think about the relationships between the individual, markets, society, and the state. If a situation arises where institutions we rely upon can come to know us to such a degree so as to be able to peer into our histories, observe all our actions, and predict our future actions, even greater power imbalances will emerge where individual autonomy in the face of companies, groups, and governments will effectively disappear and any deemed aberrant behaviour identified, excluded, and even quashed. Perhaps the most significant challenge to privacy is that the right can be compromised without the

5 Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295.

individual being aware. With other rights, you are aware of the interference - being detained, censored, or restrained. With other rights, you are also aware of the transgressor -- the detaining official, the censor, or the police. Increasingly, we aren't being informed about the monitoring we are placed under, and aren't equipped with the capabilities or given the opportunity to question these activities. Secret surveillance, done sparingly in the past because of its invasiveness, lack of accountability, and particular risk to democratic life, is quickly becoming the default. Privacy International envisions a world in which privacy is protected, respected and fulfilled. Increasingly institutions are subjecting people to surveillance, and excluding us from being involved in decisions about how our lives are interfered with, our information processed, our bodies scrutinised, our possessions searched. We believe that in order for individuals to participate in the modern world, developments in laws and technologies must strengthen and not undermine the ability to freely enjoy this right.⁶

Is privacy a right?

Privacy is a qualified, fundamental human right. The right to privacy is articulated in all of the major international and regional human rights instruments, including the United Nations Declaration of Human Rights (UDHR) 1948, Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." The International Covenant on Civil and Political Rights (ICCPR) 1966, states in Article 17: "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."

The right to privacy is also included in:

- Article 14 of the United Nations Convention on Migrant Workers;
- Article 16 of the UN Convention on the Rights of the Child;
- Article 10 of the African Charter on the Rights and Welfare of the Child;

⁶ Supra note 5.

- Article 4 of the African Union Principles on Freedom of Expression (the right of access to information);
- Article 11 of the American Convention on Human Rights;
- Article 5 of the American Declaration of the Rights and Duties of Man,
- Articles 16 and 21 of the Arab Charter on Human Rights;
- Article 21 of the ASEAN Human Rights Declaration; and
- Article 8 of the European Convention on Human Rights.

Over 130 countries have constitutional statements regarding the protection of privacy, in every region of the world.

An important element of the right to privacy is the right to protection of personal data. While the right to data protection can be inferred from the general right to privacy, some international and regional instruments also stipulate a more specific right to protection of personal data, including:

- the OECD's Guidelines on the Protection of Privacy and Transborder Flows of Personal Data,⁷
- the Council of Europe Convention 108 for the Protection of Individuals with Regard to the Automatic Processing of Personal Data,⁸
- a number of European Union Directives and its pending Regulation, and the European Union Charter of Fundamental Rights,
- the Asia-Pacific Economic Cooperation (APEC) Privacy Framework 2004,⁹ and
- the Economic Community of West African States has a Supplementary Act on data protection from 2010.¹⁰

Over 100 countries now have some form of privacy and data protection law. However, it is all too common that surveillance is implemented without regard to these protections. That's one of the reasons why Privacy International is around -- to make sure that the powerful institutions such as

7 Articles 1(c), 3(a) and 5(b) of the Convention on the Organisation for Economic Co-operation and Development.

8 Article 6, 7 and 8 of the Convention.

9 Part-III, Principle VIII, Para-23-25 of the Framework.

10 Articles 2, 3, 6 and 19 of the Economic Community of West African States.

governments and corporations don't abuse laws and loopholes to invade your privacy.¹¹

Privacy as freedom

Privacy is a fundamental human right, enshrined in numerous international human rights instruments.¹² It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information and association. Activities that restrict the right to privacy can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim.¹³ As innovations in information technology have enabled previously unimagined forms of collecting, storing and sharing personal data, the right to privacy has evolved to encapsulate state obligations related to the protection of personal data.¹⁴ A number of international instruments enshrine data protection principles,¹⁵ and many domestic legislatures have incorporated such principles into national law.¹⁶

-
- 12 Universal Declaration of Human Rights (Article 12), International Covenant on Civil and Political Rights (Article 17); regional treaties and standards including the African Charter on the Rights and Welfare of the Child (Article 10), the American Convention on Human Rights (Article 11), the African Union Principles on Freedom of Expression (Article 4), the American Declaration of the Rights and Duties of Man (Article 5), the Arab Charter on Human Rights (Article 21), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8).
 - 13 Human Rights Committee, General Comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17); see also report by the UN High Commissioner for Human Rights, the right to privacy in the digital age, A/HRC/27/37, 30 June 2014.
 - 14 Human Rights Committee, General Comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17).
 - 15 See the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (No. 108), 1981; the Organization for Economic Co- operation and Development Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data (1980); and the Guidelines for the regulation of computerized personal data files (General Assembly resolution 45/95 and E/CN.4/1990/72).
 - 16 As of December 2014, over 100 countries had enacted data protection legislation: David Banisar, National Comprehensive Data Protection/Privacy Laws and Bills 2014 Map (December 8, 2014). Available at SSRN: <http://ssrn.com/abstract=1951416> (last accessed on May 21, 2016).

Right to Information as a Constitutional Right

The development of the right to information as a part of the Constitutional law of the country started with petitions by the print media in the Supreme Court seeking enforcement of certain logistical implications of the right to freedom of speech and expression such as challenging Government orders for control of newsprint, bans on distribution of paper and others. It was through the following cases that the people's right to know developed. In *Bennett Coleman v. Union of India*,¹⁷ the Court held that the impugned Newsprint Control Order violated the freedom of the press and therefore was ultravires to Article 19(1)(a) of the Constitution. The Order did not merely violate the right of newspapers to publish, which was inherent in the freedom of press, but also violated the right of the readers to get information which was included within their right to speech and expression. In this particular case, the Chief Justice quoted "It is indisputable that the freedom of the press is means the right of all citizens to speak, publish and express their views. The freedom of press embodies the right of the people to read." In a subsequent case *Indian Express Newspaper v. Union of India*,¹⁸ the Court held that the independence of the mass media was essential for the right to citizen to information. The concept of the right to information was eloquently formulated by the learned Judge Mathew in the case, the *State of U.P. v. Raj Narain*¹⁹. He said that "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 the right to know every public act, everything that is done in public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The 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. To cover with veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

17 AIR 1973 SC 106.

18 AIR 1986 SC 515.

19 AIR 1975 SC 865.

Constitutional restriction

Since there is not extensive academic discussion on the meaning of the term "larger public interest" or "public interest" as provided in section 8(1)(j), one is forced to turn to other sources to get a better idea of these terms. One such source is constitutional law, since the right to privacy, as contained in section 8(1)(j) has its origins in Articles 14, 19(1)(a) and 21 of the Constitution of India. The constitutional right to privacy in India is also not an absolute right and various cases have carved out a number of exceptions to privacy, a perusal of which may give some indication as to what may be considered as 'larger public interest', these restrictions are:

- a) Reasonable restrictions can be imposed on the right to privacy 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;²⁰
- b) Reasonable restrictions can be imposed upon the right to privacy either in the interests of the general public or for the protection of the interests of any Scheduled Tribe;²¹
- c) The right to privacy can be restricted by procedure established by law, the procedure would have to satisfy the test laid down in the Maneka Gandhi²² case.
- d) The right can be restricted if there is an important countervailing interest which is superior;²³
- e) It can be restricted if there is a compelling state interest to be served by doing so;²⁴
- f) It can be restricted in case there is a compelling public interest to be served by doing so;²⁵

20 Article 19(2), of Constitution of India, 1950.

21 Article 19(5) of Constitution of India, 1950.

22 Maneka Gandhi v. Union of India, Supreme Court of India, WP No.231 of 1977, dated 25.01.1978.

23 Govind v. State of Madhya Pradesh, Supreme Court of India, WP No.72 of 1970, dated 18.03.1975.

24 Ibid.

25 Ibid.

- g) The case of *R.Rajagopal v. Union of India*, lays down three exceptions to the rule that a person's private information cannot be published, viz. i) person voluntarily thrusts himself into controversy or voluntarily raises or invites a controversy, ii) if publication is based on public records other than for sexual assault, kidnap and abduction, iii) there is no right to privacy for public officials with respect to their acts and conduct relevant to the discharge of their official duties. It must be noted that although the Court talks about public records, it does not use the term 'public domain' and thus it is possible that even if a document has been leaked in the public domain and is freely available, if it is not a matter of public record, the right to privacy can still be claimed in regard to it.²⁶

Lack of Constitutional Protection of the Right to Privacy

The Constitution of India does not guarantee the right to privacy as one of the fundamental rights, in so many words. But the Supreme Court has inferred that right from the ones explicitly guaranteed. Even in the U.S. and Britain its legal recognition came in slow stages. It began with an article in the Harvard Law Review by Louis D Brandeis and his friend and law partner, Samuel Warren. Titled as 'The right to privacy', it was widely noticed. In 1928 as a judge of the Supreme Court, Brandeis gave a vigorous dissent upholding this right which he called "the right to be let alone". This was in *Olmstead v. U.S.*,²⁷ the famous telephone tapping case. The ruling has suffered much battering since. English common law recognised no right to privacy. Committees were set up to consider legislation on the right only to find that no easy solution was possible. Reconciliation of this right with the freedom of speech was not an easy task. However, the Human rights Act, 1998 "incorporates" as British law, the European Convention for the Protection of Human Rights and fundamental freedoms signed in 1950. Article 8(1) of the Convention says "Everyone has the right to respect for his private and family life, his home and his correspondence." Clause (2) carves out permissible restrictions which are "necessary in a democratic society" in the interest of national security, for the prevention of crimes, and other such activities.

26 *R.Rajagopal v. Union of India*, 1995 AIR 264, Supreme Court of India, dated 07.10.1994.

27 277 U.S. 438 (1928).

Besides in Andhra Pradesh, an amendment permits inspection being carried out by the Collector by having access to documents which are even in private custody; custody other than that of public officer. It empowers invasion of the home of the person in whose possession the documents "tending" to or leading to various facts stated in Section 73, are in existence. Section 73 is devoid of any safeguards as to probable or reasonable cause or reasonable basis or materials. It, therefore, violates the right to privacy both of the house and the person. In the *Maneka Gandhi v. Union of India* case, the Court ruled: Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must be prescribe a procedure (ii) the procedure must withstand the test of one or more fundamental rights conferred under Article 19 which may be applicable in the given situation and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorising interference with personal liberty and the right to privacy must also be a right and just and fair and not arbitrary, fanciful or oppressive. If the procedures prescribed do not satisfy the requirement of Article 14 it would be no procedure at all within the meaning of Article 21. The net result is that the fundamental right to "personal liberty" embodied in Article 21, covers the right to privacy as well.²⁸

8(1)(j)- An Exception to RTI

We do not have absolute right to information in respect of each and every activity. There are some areas where the government can withhold information and deny the same to people by giving cogent reasons. The golden principle is that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to people. There are some areas, which have been kept outside the purview of this law in view of security and integrity of the country and such other important matters. The areas, which have been specifically identified for withholding information, are given in section 8 of the Act. However the Competent Authority or the Public Authority can give information in respect of items mentioned at (d), (e) and (j), if the public interest overweighs the harm to the protected interests.

28 A.G. Noorani, *Economic and Political Weekly*, Volume 40 No. 9, (Feb 26- Mar 4, 2005), p.802.

Concerning security and integrity of India:

A copy of the order through which the Ministry of Home Affairs had authorized the CBI to intercept telephone calls under the Indian Telegraph Act, 1885. The commission examined the issue and held that the specific cases of interception and surveillance by the authorized agency have to be kept highly confidential because of the very nature of the surveillance operation. Its security implications are undisputed. As such all cases of this nature will be covered by the exemptions provided under Section 8(1)(a) of the RTI Act.²⁹ In this, the commission held the following: “in our view, since it is a well-known fact that the Union Home Secretary is empowered to authorize interception of telephone under the Indian Telegraph Act and, in his absence or in an emergency, he could delegate this power to a subordinate officer, it would be fallacious to argue that the former is not sensitive but the latter is”.

Forbidden to be published by the court of law:

Information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court is exempted. In a recent judgement³⁰ the Ministry of Railways has been specifically directed by the High Court not to place the enquiry report of Godhra investigation report prepared by the committee on their behalf, before the Parliament.

Disclosure of which leads to breach of privilege of Parliament/Assembly:

Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature is also exempted. We do not have absolute right to information in respect of each and every activity. There are some areas where the government can withhold information and deny the same to people by giving cogent reasons. The golden principle is that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to people. There are some areas, which have been kept outside the purview of this law in view of security and integrity of the country and such other important matters. The areas, which have

29 S.C Sharma v. Ministry of Home Affairs, Decision No. IC/BS/A/2013/001420/5623 dated 24.07.2014.

30 Shital C. Joshi v. Gujarat State Road Transport, (2003) 4 GLR 674.

been specifically identified for withholding information, are given in section 8 of the Act. However the competent authority or the public authority can give information in respect of items mentioned above if the public interest overweighs the harm to the protected interests.

Commercial confidence, trade secrets and intellectual property:

Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information, is exempted under this Act. However, competent authority may decide to give information in such cases if public interest outweighs the harm to the protected interests.

Protection of Personal Information

The Protection of Personal Information Act is based on a model that was developed by the Canadian Standards Association and widely adopted across Canada. It sets standards that the provincial government must follow when it handles information about individuals. It is intended to be a framework for decision-making regarding the handling of personal information to ensure that it is handled in a conscious, consistent manner. The Act applies to all “personal information.” It defines this as any “information about an identifiable individual, recorded in any form.” There are 10 principles – the Statutory Code of Practice³¹ – which the government must follow in regard to the personal information it has in its possession. These principles deal with issues relating to the proper collection, use and disclosure of personal information. The principles also state that you are entitled to find out what information government has about you, and to correct this information if it is wrong.³²

Supreme Court’s Methodological Guidance

In order to fall under the purview of the exception of privacy, the information must be concerning the private life of a person. What about the acts of a public functionary? Can they plead privacy as a defence to

31 Right to Information and Protection of Personal Information Review Task Force, Access to information and privacy review: A Discussion Paper, available at <http://leg-horizon.gnb.ca/e-repository/monographs/31000000048473/31000000048473.pdf>. (Last accessed on May 21, 2016).

32 Ibid.

disclosure of information relating to their public duties? The Supreme Court dealt with this problem in *R Rajgopal v. State of Tamil Nadu*.³³ The petitioner was the editor, printer and publisher of a Tamil Weekly. The petitioner had agreed to publish the autobiography of one Shankar who had been convicted of murder and sentenced to death. The autobiography was to reveal the close association of some police officers in the crimes committed by him. The police authorities had issued a warning to the petitioner against publishing that book because (i) the petitioner had no authority to do so as auto shankar (Shankar was known by that name since he drove an auto rickshaw) could not give the power of attorney which could be given only by the prison authorities; (ii) the petitioner's action of publishing the autobiography would cause breach of their privacy and amount to blackmail. The petitioner therefore petitioned the court from restraining the police from interfering with the publication of the book because such interference would cause unreasonable restriction on their right to give information included in the right to freedom of speech.

Justice BP Jeevan Reddy, in his judgement traced the decisional law in the United States and India on the right to privacy. The learned Judge observed that the petitioner had the right to publish, what they alleged to be the autobiography of Shankar in so far as it appeared from public records, even without her consent or without the permission of the prison authorities. If the petitioner went beyond the public records, the petitioner might be violating the right to privacy of the person concerned, if such information was published without defendant's consent. If such a person voluntarily gave information about herself, the petitioner would be deemed to have forfeited her right to privacy to that extent. However, if such disclosure causes breach of privacy of other persons or causes harm to their reputation, they could sue for breach of privacy or defamation. If such persons are government servants, they could not stop the publication but they may take the action after publication. No prior restraint on a publication on the ground that it might violate the right to privacy could be imposed consistently with the right to freedom of speech. In the case of such a public functionary's action for breach of privacy, however, the right to privacy would have limitations. The judge said: in the case of public officials, it is obvious, right to privacy, or for that matter, the remedy for the action for damages is simply not available with respect to their acts and

33 (1994) 6 SCC 632, S P Sathe, Constitutional Law I (Fundamental Rights) in XXX Annual Survey of Indian Law, 1994, pg. 99, 104.

conduct relevant to the discharge of their official duties. This is so even when the publication is based upon facts and statements, which were not true, unless the officials established that the publication was made by the defendant with reckless disregard for truth. In such case, it would be enough for the defendant to prove that he acted after a reasonable verification of the facts; it is not necessary for the defendant to prove that what he has written is true.

The court relied upon a similar decision of the United States Supreme Court in *New York Times Co. v. Sullivan*³⁴ where it was held that in the case of defamation suit by a public official, the defendant need not establish absolute truth of her statement; it was enough if it was proved that the statement was made after verification and not maliciously. The Supreme Court, while extending that the principle held that a public official would not be able to raise the plea of breach of privacy for assailing the statement against her in respect of her acts done in exercise of her duties as such public functionary, unless it was proved that the publication was made 'with reckless disregard for truth'. Such stricter burden of proof on a public official was felt to be justified because the information about misbehaviour or abuse of power on her part must be allowed to come out freely. In fact, the decision was about privacy but a similar view could be taken in regard to a suit for defamation. Since defamation was not involved in this case, the court left that question open. This means that no breach of privacy would be caused when information was given which was available on public records. It also means that information about the public acts of the public functionaries would not come within the exemption contained in Section 8(1)(j) of the Right to Information Act, 2005, which entitles the public information officer to refuse information which is related to the 'personal information, the disclosure of which has no relationship to any public activity or interest'. Should her income tax return be disclosed in response to such information is a different question altogether. It is submitted that only actions done in official capacity and in exercise of her powers as Government servant and which are part of public record would be subject to disclosure. Her property or asset cannot be disclosed. They will be disclosed in the Court when the person is tried under the Prevention of Corruption Act or for any other criminal offence where such evidence becomes relevant.³⁵

34 376 US 254, 11 L 2nd Ed 686(1964).

35 S.P. Sathe, Right to Information (LexisNexis Butterworths, 2006) at pp 85-86.

Conflict and Balance of RTI And Privacy Interest

RTI and privacy law are often conflicting in nature. Government collects large amounts of personal information, and sometimes there is a demand to access that information for various reasons. The requestors include journalist, investigating stories, civil society groups fighting for accountability, individuals demanding to know why a decision was made in a certain way, companies seeking information for marketing purposes, and historians and academics researching and not so recent events. Every national RTI law has an exemption for personal privacy. Many countries have adopted separate privacy and data protection laws that may interact with the RTI law in determining the release of information. Given the often complex relationship between privacy and RTI laws, the conflict frequently arises from misunderstanding about what is intended to be protected. Officials must deal with numerous issues: should official's names and other details be considered private? Is information in public registers available for any use? Are court and criminal records public? Clarity in law, policy, and practice to limit these problems is essential. These issues have taken on greater importance as information increasingly is being disclosed in database format and over internet sites. Questions about the relevance of data protection laws for the reuse of personal information (even if it is publicly available) are important. Under EU data protection law, the mere public access to information does not mean it can be used for any purpose (Working Party 1999). In many countries, the privacy exemption is one of the exemptions used most often. In the United States, the exemptions for personal privacy and law enforcement records concerning individuals have consistently been the two most used exemptions.³⁶

Information Concerning a Third Party

Where the CPIO or SPIO intends to disclose any information or record on request made under this Act, which relates to and was supplied by a third party, and has been treated as confidential by the third party, it shall be within five days of the receipt of such request, given a written notice to such third party inviting her to make submission in writing or orally regarding whether such information should be disclosed, and such submission shall be kept in view while taking a decision regarding the disclosure of such information.³⁷ Except in the case of trade or commercial

36 David Banisar, *The Right to Information and privacy: Balancing Rights and Managing Conflicts*, The World Bank Institute Governance Working Paper Series, at p 12.

37 Section 11(1) of Right to Information Act, 2005.

secrets protected by law, disclosure maybe allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interest of the third party. Where a notice is served on the third party regarding the disclosure of information pertaining to her, she will be given an opportunity to make a representation against the proposed disclosure within ten days.³⁸ The disclosure of such information regarding third party, the CPIO or the SPIO shall take such submission into consideration.³⁹ The disclosure of such information regarding the third party will be further subject to the provision providing for non disclosure of information relating to privacy of a person.⁴⁰

Conclusion

RTI Act as well as the case laws under it reveal that the legislature was aware of the dangers posed to the privacy of individuals from such a powerful transparency law. However, it did not want the exceptions carved out to protect the privacy of individuals to nullify the objects of the RTI Act and therefore drafted the legislation to incorporate the principle that although the RTI Act should not be used to violate the privacy of individuals, such an exception will not be applicable if a larger public interest is to be served by the disclosure. This principle is in line with other common law jurisdictions such as the U.K, Australia, Canada, etc. which have similar exceptions based on privacy or confidentiality.⁴¹

However it is disappointing to note that the legislature has only left the legislation at the stage of the principle which has left the language of the exception very wide and open to varied interpretations. It is understandable that the legislature would try to keep specifics out of the scope of the section to make it future proof. It is obvious that it would be impossible for the legislature or the courts to imagine every single circumstance that could arise where the right to information and the right to privacy would be at loggerhead. The ambiguity that arises in application when trying to balance the right to privacy against the right to information is a drawback in incorporating only a principle and leaving the language ambiguous in any legislation.

38 Section 11(2) of Right to Information Act, 2005.

39 Section 7(7) and Section 11(3) of Right to Information Act, 2005.

40 Section 8(1)(j) of Right to Information Act, 2005.

41 Vipul Kharbanda, White Paper on RTI and Privacy V1.2, available at <http://cis-india.org/internet-governance/blog/white-paper-on-rti-and-privacy-v-1.2>, (last accessed on May 21, 2016).

RTI AND MEDIA LAW

Monisha Katiyar & Sreejita Ghosh***

Abstract

The world is currently so technologically and scientifically advanced that the only medium of contact with the world and its people is via media, which further helps in spreading public information for the identification of government work for its people and vice versa. We cannot only blame the government for not doing enough for its people; even we are the ones who should be concerned about what is right and what is wrong, so that we have the correct information on our part before putting blame on the chosen government. To be able to achieve this, we have Right to Information Act of 2005.

The aim of our research is to synchronize the Right to Information Act with the boosted up media law, to seek a platform for people to fight against corruption or add up to empowerment of citizens, to seek legal remedy and legal aid for the national and personal benefit. It is also required to unveil the constitutionality regarding the Act and to bring into effect Article 19 of the Constitution of India and how media law has helped and will always be a guiding law of the Press Council. It is very important to bring about a synthesis among Indian case studies to throw light on the chief aspects of legislature, executive and judiciary wing of the government and how the three tier system of the government has helped us with this statute to mirror the essential information through media law.

The free flow of information has become a right of every citizen to avoid cheating and deviousness from the outside world and we have to protect ourselves, which is best done via Right to Information Act, 2005 and media law in order to gather clear information of whatever we demand from the government, in addition to being aware of the duties and rights of the citizens so that both the government and its subjects are accountable to each other for any information of public importance.

Introduction

“If anyone could point out an intermediate and yet a tenable position between the complete independence and the entire subjection of the

*IV Year, B.A. LL.B (Hons) with specialization in Energy Laws, University of Petroleum and Energy Studies, Dehradun.

**IV Year, B.A. LL.B (Hons) with specialization in Energy Laws, University of Petroleum and Energy Studies, Dehradun.

expression of public opinion, I should perhaps be inclined to adopt it; but the difficulty is to discover this position” by De Tocqueville.¹

India is a democratic country and its citizens have every authority to voice their opinion and demand the same from the government for any kind of goods and services. Article 19 of the Constitution of India, 1950 gives us the freedom of speech and expression which gives us the power to know the proper working and functioning of the Government and Public Institutions and local authority. Article 19 of the Indian Constitution is the main reason for the “birth” of Right to Information Act of 2005. Through the media, the public can obtain information pertaining to the government, public authorities and local institutions. It has taken 82 years for Right to Information Act to come into force after it was given support by another Act called the Official Secrets Act of 1923.²

“The passage of the Right to Information Act of 2005 is a historic movement. It replaces the culture of secrecy and control with openness but the legal framework on RTI has so far resulted in little change³ but still it has helped the citizens a lot and this change has made access to information for the citizens which has increased the responsiveness of government to community needs and brought about a significant shift for Indian democracy.⁴ “More than law, RTI is a process, a mechanism and a cultural approach to life”.⁵

Information means any kind of documents of public importance like records, memo, e-mails, opinion, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, models, data in any form which is

1 Nick Couldry, *Religitimation Crisis: Beyond the dull compulsion of media-saturated life*, available at http://webcache.googleusercontent.com/search?q=cache:tBHyQ5PyUMQJ:eprints.lse.ac.uk/52392/1/Couldry_Religitimation_crisis_2012.pdf+&cd=13&hl=en&ct=clnk&gl=in (last accessed on April 26, 2016).

2 Dheeraj Mani, *Right To Information Act-An Overview*, available at http://www.legal-serviceindia.com/articles/rti_dh.htm (last accessed on April 26, 2016).

3 S.V. Joga Rao, *Law Relating to Right to Information (2 Vols.)*set, available at <http://www.pentagonpress.in/bookdetails.aspx?this=168> (last accessed on April 26, 2016).

4 Ibid.

5 C K Ram, *9 years of RTI Act: Implementation and Levels of Awareness*, available at <http://comments.gmane.org/gmane.law.india.rti/17483> (last accessed on April 26, 2016).

related to private body under any law which is enforced at present and when citizens ask for their benefit of doubt, these important documents, it is known as their Right to Information as it is their Constitutional right to get information, in the form of an answer from the government authority.⁶ Right to information is the legitimate right of the citizens and a duty on behalf of the government to discharge its duties for the gathered and stored information for the public at large. Journalists or media personnel uncover the secret by using media law with respect to right to information in a planned and a methodical manner by obtaining the records from the government and unravel it to the public for information.⁷ The freedom of media is a necessity for a democratic state. “The Press Council of India works to regulate the ethics of the print media and to regulate the freedom of press”⁸. The media world was spread out and is constantly increasing its boundary so the laws governing it are also getting stronger with respect to the protection of media. Media, together with the Right to Information available to the public, makes a person aware of his rights and assists him in using this by staying within the purview of Indian Judiciary by making them aware of legal framework in India, “freedom of speech and expression” and “transmission of knowledge”.⁹

In 2001, the Press Council of India declared Right to Information as the most important legislation for the media. It stated that “At present, one of the difficult tasks in the path of investigative, analytical and popular journalism is the difficulty in getting access to the official information. The bureaucracy, the police, the army, judiciary and even the legislature guard or secure information regarding even the most ordinary subjects. Few journalists are able to break this barrier of official non-cooperation. The protected right to information will encourage journalists and society at large to be more interrogative about the state of affairs and will be powerful tool to check the unmitigated goings-on in the public realm to promote

6 About to Right to Information Act, 2005, available at http://www.tn.gov.in/rti/about_rti.htm (last accessed on April 26, 2016).

7 Aditi Datta & Sohini Paul, Media Guide to Right to Information Act 2005, Commonwealth Human Rights Initiative, 1 (Sept 16, 2015), available at http://www.humanrightsinitiative.org/new/media_guide_for_rti.pdf (last accessed on May 16, 2016).

8 Dhruv Tripathi & Barkha Chhabra, Right to Information and Media Law, available at <http://www.slideshare.net/DhruvATripathy/right-to-information-and-media-law> (last accessed on April 27, 2016).

9 Ibid.

accountability. Through this legislation, transparency in public, professional, social and personal sphere can be achieved and any misinformation will be concealed.”¹⁰ This shows that media act as a bridge of communication between the Government and all the public officials and public servants on the one hand and the citizens or the public on the other hand and keeps a check that not any one side gets the upper hand regarding passage of important information.

In the case, *Secretary, Ministry of I & B, Government of India v. Cricket Association of Bengal*,¹¹ it was held that right to information and to disseminate it and right to impart and receive information in electronic form shall be included under freedom of speech and expression.¹²

In a democracy, where every wrong-doer wants to increase their wealth at an incredible speed at the expense of everyone else, right to information along with the aid of media helps to tackle the corruption that would otherwise prevail in the society with the rich people getting richer and the poorer people getting poor.

Role of Media in Enacting The RTI Act, 2005

Media has played a very important role in the implementation of the Right to Information Act, 2005. The media has showcased many incidents of consumers who enforced RTI to propagate RTI within the public domain. The journalists and media personnel have both played dual role, i.e the users of RTI and also acted as a watch dog for scrutinizing the proper functioning of the Act.¹³

Media has played a crucial role in eradicating corruption. The traditional print media, television, internet and even the social media has proved to be a great source in eradicating corruption and therefore served as a helping hand in the enactment of RTI Act and propagating it. Many N.G.Os have used media and specially internet to inform people about their objectives

10 Legal Junction, *The Legality and the Reality-Role of Media and the Right to Information*, available at <http://www.legallyindia.com/Blogs/Entry/the-legality-and-the-reality-role-of-media-and-the-right-to-information> (last accessed on April 27, 2016).

11 (1995) 2 SCC 161.

12 Ibid.

13 PricewaterhouseCoopers, *Final Understanding the Key issues and Constraints in implementing the RTI*, 2, (Mar 1st, 2016).

and make the public aware of their programmes and initiatives for upliftment of the society.

Media acts as an agent to propagate the right of the citizen to seek information and to bring about a change in the society. Media via Right to Information promises free access to information from development sector to service sector which generates great transparency in the sectors.

The sole objective of the media to help in the enactment of the RTI Act, 2005 is to bind people and other sections of the society for a social cause. The media stands unbiased and helps in making the system transparent and accountable. Media's aim was to uphold the integrity and freedom and support of media for right to information and to encourage the highest ethical standards.¹⁴

In one of the cases, a group of ten villagers and volunteers went to various offices in Banda District of Uttar Pradesh to file RTI application. The issue was that the application could not be filed easily; the officers were non-conversant and had little knowledge about the Act itself. The applications were filed but with great trouble and struggle and reports were also filed to the District Magistrate of the Banda District, who improved the situation in most of the offices after the incident.

In another case, a village school teacher of pre middle school of Panchampur village which was few kilometers away from the District Headquarters of Banda District was appointed but was absent for most time. The workers and volunteers from Delhi based organizations invoked RTI and questioned the Government on attendance records; leave records, medical records and so on. They filed an application to the Primary Education Officer, Banda and questioned the Primary Educational Department about its role and responsibilities. Immediate action was taken against the teacher and a new teacher was appointed and regular classes commenced from the next day itself.¹⁵

14 P Chitra & Dr. M Neela Malar, *Print Media Technology and Social Change: The Role and Effectiveness of Right to Information (RTI) Act*, INTERNATIONAL JOURNAL OF EMERGING TECHNOLOGY AND ADVANCED ENGINEERING, Vol 3, Issue 5, 296-300 (2013).

15 *Right to Information*, CIVIL SERVICE TIMES, February 2011, XVII Year, Issue No.02 at page 94.

Media's Assistance towards RTI

Media has a very wide ambit within which RTI Act of 2005 may very well fit in and help to improve the condition of the society. It is very influential in the society and therefore to keep a check on its functions and workings there are many regulations as enacted by the parliament from time to time to control it.

The Indian Constitution does not give the freedom of media separately but judges interpret it from Article 19(1)(a) as directed from “freedom of speech and expression”. The Indian Constitution also provides certain restrictions¹⁶ on media so that the relevant information of public importance can spread in the society and that which might cause injury to any private or public individual and cause harm to the sovereignty of the State, such information may be restricted. Some of the laws and rules that are applicable to media industry are The Press and Registration of Books Act of 1867, The Press Council Act of 1978, The Press Council Rules of 1979, The Working Journalists and other Newspaper Employees Tribunal Rules of 1979, Right to Information Act of 2005 and so on. The laws that are applicable for information are Press and Registration of Books Act of 1867, The Young Persons (Harmful Publications) Act of 1956, Press Council (Procedure for Inquiry) (Amendment) Regulations of 2006 and so on.¹⁷

The scope of Right to information is related to media and media laws. It should both be restricted and should also deal with openness and transparency while looking into the matters of the applicants of RTI; so Public Information Officer and Assistant Public Information Officer are designated to disseminate information to the applicant of RTI for public interest.¹⁸

The scope of RTI is both wide and of narrow ambit as till now the “echo” of RTI has not reached many regions of India but still through various legal, technological, techno-legal and social aid, people have come to know about RTI and have utilized it in many ways. Till past few decades, it was

16 Art. 19(3) of Constitution of India.

17 CA Rajkumar S. Adukia, Media Laws of India, Available at http://www.caaa.in/Image/media_laws.pdf (last accessed on April 27, 2016).

18 Amit Kumar & Sandeep Sharma, Right to Information, available at [www.scopegujarat.org/PDF/RTI_SCOPE_website%20\(1\).pdf](http://www.scopegujarat.org/PDF/RTI_SCOPE_website%20(1).pdf) (last accessed on April 27, 2016).

difficult for any government servant or official to be held accountable for their wrong deeds but now with the advent of RTI, the public servants and officials will have to respond, show records and give explanations due to a change in the functionary level of RTI Act.¹⁹

In the case of *Maneka Gandhi v. Union of India*,²⁰ right to information has been rightly utilized. The petitioner had to surrender her passport within seven days as decided by the government because of “public interest”. The petitioner immediately sent a letter to the Regional Passport Officer to furnish a copy of reason as to why such an order was passed but the Government decided not to furnish a copy of statement of reason “in the interest of general public”. The petitioner then filed a writ petition demanding an answer as to why the Government impounded her passport without giving any reason. The Court held that it was wrong in the part of the Government not to answer to a public question and that “a Government which functions in secrecy not only acts against democratic decency but also buries itself with its own burial”.

In the case *Indian Express Newspaper v. Union of India*,²¹ although the Indian Constitution does not specifically state freedom of press, but still many judges have interpreted Article 19 and said that although media has the power and the freedom of speech and expression still it should be limited and restricted as provided in Article 19(2) of Indian Constitution and as held in this case, the Supreme Court should promote the access of information and media industry should be leniently taxed.

This is so because it would result in the aggrieved party approaching media without any hesitation and media also will publish correct and crisp news where there will be no mixture of impurity or false news involved, as at times even the media industry gets influenced by corrupt politician or business men or anyone with an intention to mislead the public and misrepresent. So to not to contaminate this industry and mislead the public, restrictions are imposed on this industry. There should also be no interference from any authority regarding publication of any news or piece of information in the name of public interest, if the news is of great

19 Divya J. Jaipuria & Jayshree Satpute, *Leading cases on Right to Information* (Socio Legal Information Cent, 2009) at p vii.

20 1978 AIR 597.

21 (1985) 1 SCC 641.

importance and would help the public in a positive way without affecting any party or State. As in the case of *Romesh Thapper v. State of Madras*,²² the Court opined that if a piece of publication would impose threat to the security of any nation or public order, then the degree of seriousness of the affect of that threat has to be seen and then it should be decided whether to publish that information or not which may be of public interest.

In situations where public might invoke Right to Information Act and ask for any information which would be indecent as per the society or of public view, then that type of information should be restricted and prohibited from publication, irrespective of the fact that the publisher had the knowledge about that information or not, and that it would result in a serious offence and serious penalties would be imposed.²³ This is also subjected to exceptions; again if the case is of public interest and if the person himself voluntarily agrees to give that information, then it would not fall under the purview of restriction of Article 19(2) of Constitution of India.²⁴

Media industry has ample scope to grow under Indian Constitution, still to keep a balance between media and Right to Information, Parliament enacted laws and the Constitution of India has imposed restrictions on it, so that the importance of media is recognized and people are equipped with necessary information and necessary publications which should be published.

The Shourie Draft on RTI

MazdoorKisan Shakti Sangathan (MKSS) was a reform movement which brought about a transparency in village account through minimum wage system and was the startup of right to information campaign in India. MKSS demanded for the official record of the government files and this movement soon spread across the whole of India.

In 1993 a draft RTI Act was proposed by CERC, Ahmedabad and in 1996 the Press Council of India which was headed by Justice P B Sawant presented a draft of RTI law to the Government of India which was later renamed as the PCI-NIRD Freedom of Information Bill, 1997, but none of the Bills were considered by the Indian Government.

22 AIR 1950 SC 124.

23 Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 88.

24 Prabhu Dutt v. Union of India, AIR 1982 SC 6.

Meanwhile National Campaign on People's Right to Information was formed for the right to information at a national level in 1996. It provided with great support at the grassroot level for the right to information and to propagate speedy and accurate access to information legislation. In 1997, under the chairmanship of Mr. H D Shourie, the Central Government mandated for the drafting of a legislation of freedom of information at the state and national level. But it was highly criticized for not achieving high standards. The law provided with too many exemptions and involved "disproportionate diversion of the resources of a public authority".²⁵ The Shourie Committee draft law was never introduced in the Parliament and was later reworked into Freedom of Information Bill, 2000.²⁶

1997 Draft of The Press Council of India

The right to information movement began in India when the activists in Rajasthan worked to get accountability in the functioning of the state government in early 1990s. People started to question the expenditure by the government and also sought explanation for their non-functioning. This movement, then spread over to other parts of the country and became a massive movement whereby demand from all quarters started to emerge for transparency in governance.

The movement of Right to information also got impetus from various Supreme Court judgments. The Hon'ble Supreme Court of India has also interpreted fundamental rights incorporated in articles 19 (1) (a) and 21 of the Constitution of India and said that the Right to Information is the fundamental right of the citizens of India. Supreme Court also took a view that 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

25 Shirahatti Town Panchayat, *Right to Information Act*, available at <http://www.shirahattitown.mrc.gov.in/node/103> (last accessed on April 27, 2016).

26 *National Level RTI, Right to Information: India*, available at <http://www.humanrightsinitiative.org/programs/ai/rti/india/national.htm> (last accessed on April 27, 2016).

public security. But the legislative wing of the State did not respond to it by enacting suitable legislation for protecting the right of the people for long.

It was only in 1996, Justice P B Sawant, Chairman of the Press Council of India at that time, drafted a bill in this regard. This bill took all governmental and non-governmental entities, which perform public functions, into the purview of the right to information. On 2nd January 1997, Government of India set up a working group on 'Right to Information and Promotion of Open and Transparent Government' under the chairmanship of Mr. H. D Shouri. The committee came up with detailed report and Draft Freedom of Information Bill on 24th May 1997. This draft provided that not only the Central and the State Ministries, but also public sector undertakings, municipal bodies and panchayats and other bodies substantially funded by Government, would come within the purview of the Act. Later the Consumer Education Research Council (CERC) draft also came up. It was by far the most detailed proposed freedom of information legislation in India. In 1997, a conference of chief ministers resolved that the central and state governments would work together on transparency and the right to information. Following this, the Centre agreed to take immediate steps, in consultation with the states, to introduce freedom of information legislation, along with amendments to the Official Secrets Act and the Indian Evidence Act, before the end of 1997. The central and state governments also agreed to a number of other measures to promote openness. These included establishing accessible computerised information centres to provide information to the public on essential services, and speeding up on-going efforts to computerise government operations. In this process, particular attention would be placed on computerisation of records of particular importance to the people, such as land records, passports, investigation of offences, administration of justice, tax collection, and the issue of permits and licences.

For the first time in 2000, the Freedom of Information Act was passed by the parliament of India. This enactment never came into force as the appointment of the officers to execute the Act and the modalities to enforce the Act were never notified. This Act was a weak legislation and was not at all operational. This enactment was replaced by Right to Information Act, 2005 which came into force from 12th October 2005. Prior to this date modalities like appointment of Public Information Officers (PIOs) and other modalities were completed. Now this Act is in force and can be used in every state of India.

Now Right to Information Act is completing a decade next year. In last ten years, various people have achieved a lot by using Right to Information Act and in future also, it will be helping many in getting desired information from government functionaries and in making them transparent.²⁷

Media's Role towards a Developed Society

The terms, media and development are closely related and are interconnected to each other. Media has changed many lives of the indigent and underprivileged people in many ways:-

1. Making individuals aware of their rights and claims;
2. Enabling people to have access to government documents, policies, schemes and benefits;
3. Awareness of political development and issues;
4. Providing education to the people in various aspects like social, economical and environmental issues;
5. Exposing of fraud, waste, abuse of power so that people may aware of the reality; and
6. Providing better resources, knowledge, technology etc.

The three main areas through which the media can make a significant impact on development and poverty reduction are:-

1) Empowerment

Media has a definite role to play in the empowerment of citizens. It gives voice to the needs and aspirations of the people and provides them access to relevant information. When people lack a voice in the public arena, or access to information on issues that affect their lives, and if their concerns are not reasonably reflected in the public domain, their capacity to participate in democratic processes is undermined.²⁸ Especially, if we talk about cases like women empowerment, child labour, human trafficking; media has played a predominant role.

Media, in all its varied forms, has opened up the potential for new forms of participation. The access to information and accessibility of information

28 A Right To Information Act 2005- A Guide For media, available at <http://www.pressacademy.org/wp-content/uploads/2015/02/RTI-Guide-for-Media.pdf>(last accessed on April 27, 2016).

has increased with growth of print and electronic media and the Internet. Thus, the vulnerable and marginalized sections of the society such as the poor, women, weaker sections and socially disadvantaged are also using the media to make their voices heard.

2) Social Awareness & Action

The potential of mass media to be effectively employed to enhance social awareness is unquestionable. The media can be effective in not only preserving freedom but also extending it. The news media plays a decisive role in establishing a platform for public deliberations over social issues. The formative influence of the media on public attitudes, thoughts and perceptions is fundamental to the process of citizen engagement in public dialogue.

Giving a voice to the poor also entails giving the poor people adequate opportunities to take initiatives for overcoming their problems. The media, through its role in shaping public awareness and action, can be a critical factor in facilitating sustainable development and poverty reduction.²⁹

3) Good Governance

Good governance is recognized as central to poverty eradication, and a free media is a necessary condition for good governance. As an information conduit between corporations, government, and the populace, the media acts as a watchdog against government malfeasance, while at the same time fostering greater transparency and accountability.³⁰

The media monitors public service delivery and reports on key issues to the public at large, and in this process exerts pressure on public service providers. By highlighting institutional failings to guard against and institutional successes for replication, the media creates the right framework of incentives for good governance.

29 Sashwat Yogi, Role of Media In Social Awareness, 1st INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCES, 71-73 (2013), available at http://webcache.googleusercontent.com/search?q=cache:hU_I15xAEgAJ:www.giapjournals.org/uploads/2/6/6/2/26621256/role_of_media_in_social_awareness_a_review.pdf+&cd=1&hl=en&ct=clnk&gl=in (last accessed on April 27, 2016).

30 Rahul Deo, Freedom of Press: Pillar of Democracy, available at <http://www.lawctopus.com/academike/freedom-press-pillar-democracy/> (last accessed on April 28, 2016).

A free press is integral to good governance. It lets people voice diverse opinions on governance and reform, expose corruption and malpractices and help build public consensus to bring about change. Last but not the least, it educates the public and builds public awareness on key socio-economic issues.

The World Association of Newspapers (WAN), the global organisation of the world's press has long argued that a free and unfettered press is a positive force for accelerated and equitable socio-economic development.³¹ It held that the predominance of free and independent press accompanies economic growth and human development.

In countries with free press, human development indicators such as school enrollment, teacher-pupil ratio, pupil performance, infant mortality, maternal mortality, nutritional status of women and children etc. tend to fare better than countries with restrictions on press and freedom of information. The work of the Nobel Laureate, Amartya Sen has even established a link between active media and the avoidance of disasters like famines. The role of media as a watchdog of the government and the corporate sector, a transmitter of new ideas and information, a voice of the poor, a safeguard against the abuse of power and neglect of the socially vulnerable, and a builder of public consensus to bring about change is pervasive.³²

Role of Media in United Kingdom

Britain has no written Constitution, however, freedom of speech, expression and media is an important aspect of the unwritten Constitution. United Kingdom has always been a part of European Convention of Human Rights (ECHR). In 1998, New Labour's Human Rights Act, 1998 incorporated ECHR into UK law which further strengthened the freedom of speech and expression and freedom of press and media.

In 1684, the licensing of the press was removed and the Government has been non intervening since then. Due to abolition of licensing of the press there has been the right to publish newspapers, books, magazines without

31 RTI Cell, ATI, Kohima, RTI and Media, available at <http://atigl.nic.in/Downloads/RTI%20and%20Media.pdf> (last accessed on April 28, 2016).

32 Supra note 34.

any prior permission and authorization from the State. The UK press is not subsidized apart from the VAT exemption and therefore the Government had nil influence on the press so there was complete freedom.

The main restrictions on press and media is advocated by UK's strict libel laws. The burden of proof falls upon the defendant. This had a negative effect on the freedom of speech and expression of the media and in 2006, UK's libel laws were reformed. The restrictions to the freedom of press and media were limited to the issues of national security. The privacy of the citizens have been narrowly protected from the press as there is no particular statute on privacy. This gave a positive side to media as it gave rise to "investigative journalism" which flourished in UK but "tabloid journalism" also arose due to which the Government mandated stricter regulations.³³

Watergate Scandal In USA

Watergate scandal, interlocking political scandals of the administration of U.S. Pres. Richard M. Nixon that were revealed following the arrest of five burglars at Democratic National Committee (DNC) headquarters in the Watergate office-apartment-hotel complex in Washington, D.C., on June 17, 1972. On August 9, 1974, facing likely impeachment for his role in covering up the scandal, Nixon became the only U.S. president to resign.

Early on June 17, 1972, police apprehended five burglars at the office of the DNC in the Watergate complex. The arrest was reported in the next morning's Washington Post in an article written by Alfred E. Lewis, Carl Bernstein, and Bob Woodward, the latter two, a pair of relatively undistinguished young reporters relegated to unglamorous beats—Bernstein to roving coverage of Virginia politics and Woodward, still new to the Post, to covering minor criminal activities. Soon after, Woodward and Bernstein and Federal Bureau of Investigation (FBI) investigators identified two coconspirators in the burglary: E. Howard Hunt, Jr., a former high-ranking CIA officer only recently appointed to the staff of the White House, and G. Gordon Liddy. At the time of the break-in, Liddy had been overseeing a similar, though uncompleted, attempt to break into and surveil the

33 Peter Humphreys, *Media Freedom And Pluralism in the United Kingdom (UK)*, available at <http://webcache.googleusercontent.com/search?q=cache:W6shUTW0dzwJ:www.intellectbooks.co.uk/File:download,id%3D721/9781841502434.197.pdf+&cd=2&hl=en&ct=clnk&gl=in> (last accessed on April 28, 2016).

headquarters of George S. McGovern, soon to become the Democratic nominee in the 1972 U.S. presidential election.

Presidential Press Secretary Ron Ziegler responded that the president would have no comment on a “third-rate burglary attempt.” The preponderance of early media reports, driven by a successful White House public relations campaign, claimed that there had been no involvement by the Nixon administration or the reelection committee. Meanwhile, the conspirators destroyed evidence, including their burglary equipment and a stash of \$100 bills. Transcripts of wiretaps from an earlier break-in at the DNC’s offices, were burnt. The president, his chief of staff, H.R. (Bob) Haldeman, and the special counsel to the president, Charles Colson, Nixon’s close political aide, spread alibis around Washington. Meanwhile, the White House arranged for the “disappearance” to another country of Hunt (who never actually left the United States), part of a plan for the burglars to take the fall for the crime as overzealous anticommunist patriots. On June 23, 1972, the president, through channels, ordered the FBI to tamp down its investigation. Later, this order, revealed in what became known as the Nixon tapes (Nixon’s secret recordings of his phone calls and conversations in the Oval Office), became the “smoking gun” proving that the president had been part of a criminal cover-up from the beginning.

Throughout the 1972 campaign season, Woodward and Bernstein were fed leaks by an anonymous source they referred to as “Deep Throat,” who, only some 30 years later, was revealed to be FBI deputy director W. Mark Felt, Sr. They kept up a steady stream of scoops demonstrating (1) the direct involvement of Nixon intimates in Watergate activities, (2) that the Watergate wiretapping and break-in had been financed through illegally laundered campaign contributions, and, in a blockbuster October 10 front-page article, (3) that “the Watergate bugging incident stemmed from a massive campaign of political spying and sabotage conducted on behalf of President Nixon’s re-election and directed by officials of the White House,” part of “a basic strategy of the Nixon re-election effort.”³⁴

RTI in India – A Tool to Curb Corruption and Fraud-related Issues

September 28 is celebrated internationally as Right to Know Day, highlighting the critical importance of people’s right to access information

34 Rick Perlstein, *Watergate Scandal*, available at <http://www.britannica.com/event/Watergate-Scandal> (last visited on April 27, 2016).

held by their governments. In India, following a nationwide campaign led by grassroots and civil society organizations, the government passed a landmark Right to Information Act in 2005. Since then, social activists, civil society organizations, and ordinary citizens have effectively used the Act to tackle corruption and bring greater transparency and accountability in the government. Social activist Aruna Roy has described India's RTI Act as "the most fundamental law this country has seen as it can be used from the local *panchayat* (a unit of local government) to parliament, from a nondescript village to posh Delhi, and from ration shops to the 2G scam."³⁵ As a citizen of India, RTI has given a lot of power to the people. By using this Act, people have the power to change the nation. The RTI Act has made the inner working of the government transparent.

RTI Act has given the freedom to the citizens so that they can demand information from the government departments, inspect government documents and even ask for material samples in certain cases. The RTI Act says that complaint filed through this Act must be replied to for within thirty days. This Act has great significance in promoting the rights of the citizens or individuals. In this modern era, corruption has crossed all its boundaries. But with the commencement and enforcement of RTI Act, politicians, businessmen, government officials; etc; have fear in their hearts and minds. This Act is very beneficial to the citizens as they have a channel to access a broad bracket of information. It is a weapon in the hands of citizens. Rising corruption is worsening the situation in India day by day. But after introducing this Act, a lot of improvements can be seen.

There was a case, Manju, 34, is a cook who works in private homes in Calcutta, and a widow, with two children. She is entitled to a monthly government pension of \$20, but "it's such a task to ensure that the money reaches me," she says. "I have to pay at least \$3 to the officer who releases my claim every time." Facing similar corruption, her neighbor Ratna finally resorted to use the RTI to get her money. "Thank God for those smart young people from my local NGO who helped," says Ratna, who like many Indians has never been to school and can't read.³⁶ It seems that every

35 Mandakini Devasher Surie, RTI in India- An Effective Tool to Tackle Corruption, available at <http://asiafoundation.org/in-asia/2011/09/28/right-to-information-in-india-an-effective-tool-to-tackle-corruption/> (last accessed on April 28, 2016).

36 Paromita Pain, India's Right to Information Act is exposing Nationwide Corruption, available at <http://www.occupy.com/article/indias-right-information-act-exposing-nationwide-corruption> (last accessed on April 28, 2016).

individual has a duty towards other citizens in protecting their rights which are being violated.

Corruption has touched the sky in all its ways and has become a hot topic of discussion all over the country. Almost every citizen is talking about corruption because not only is it deteriorating the society but also affecting the growth of the nation. Corruption has worsened all the aspects such as social, political, economic and cultural activities. Especially it is affecting the industrial growth in small scale industries. Certain amendments were also made in RTI Act in order to avoid these situations and problems.

Corruption is pandemic in India. It is impossible to get any work done in government departments without giving bribes. And if someone refuses to pay bribes then unnecessary objections would be raised and their work won't be done on time. But after the enactment of Right To Information Act, 2005, legislations have been made for the protection of the rights of the citizens. It also brings transparency in the government activities and gives remedies to the victims. Certain policies have been made to get rid of this corruption. RTI defines the relationship between the individual and the government. So it is the duty of every citizen to curb the corruption from the society.³⁷

In a democratic society, a citizen can realize his right to live in corrupt-free society only when the iron veils of secrecy are lifted and culture of transparency brought down. There are two significant phases in bringing in the culture of transparency in imposing an obligation of the state in informing and providing a substantial right to know on the part of the citizens.

In modern constitutional democracies it is axiomatic that citizens have a right to know about the affairs of the government which having been elected by them, seek to formulate sound policies of governance aimed at their welfare. But like all other rights even this right has recognized limitations.

In transactions which have serious repercussions on public security, secrecy and like nature, public interests demand that they should not be publicly

37 Jeevan Singh Rajak, *Right to Information Act: A vital tool to curb against Corruption in India*, available at www.academicresearchjournals.org/IJPSD/PDF/2014/May/RAJAK.pdf (last accessed on April 28, 2016).

disclosed or disseminated. To ensure the continued participation of the people in the democratic process they must be kept informed of the vital decisions taken by the government and the basis thereof. Democracy, thus, expects openness is a concomitant of a free society. Sunlight is the best disinfectant.

Right to Know is an inherent attribute of every person. Right to know differs only in one sense with right to information. Right to know is a natural right and right to information is a provision given by government to its people. It came into existence for the first time in India in Rajasthan. People revolted against the corrupt activities of the Government.

Every citizen should curb corrupt activities in society through the help of this right. It is most possibly done only in a democratic government. Indian Constitution speaks impliedly about this right with a reasonable restriction. It can be considered as a natural right.

Natural rights do not have any value legally until they are legally considered. Hence right to know as such implied in the freedom of speech and expression which is a legally considered right must have to be given a special value. It should be considered as a special fundamental right by the legislature. The idea of preventing corruption through such an effective instrument namely, the Right to Information Act should be considered by the people and taken recourse to. Armed with such a power and time have come to address the issue and cure the disease of corruption.

Right to information as such will bring transparency of the government activities and allow the people to find remedies for those things by which they suffered.³⁸

RTI's Helping Hand to NGOs

NGO'S are the non-governmental organizations which are neither a part of government body or nor a conventional for profit business. These organizations are usually set up by ordinary citizens. It basically deals with

38 Lairenjam Dhanamanjuri Devi, *RTI to Curb Corruption- As a tool in the hands of citizens*, available at http://www.epao.net/epPageExtractor.asp?src=education.RTI_a_tool_to_curb_corruption.html (last accessed on April 28, 2016).

welfare of the people in social, political, cultural, economic aspects. They are funded by governments, foundations, businessmen, private persons. RTI Act plays a vital role in the working of NGOs.

Through RTI Act these organizations can raise their voices against crimes which are happening in this society. People can be aware of schemes, policies, legislations, rules made by the government for the benefit and interest of the society.

Using the RTI Act, NGOs and CSOs, therefore, can facilitate social audits of government processes, activities, programmes, schemes etc., and help improve public service delivery and the efficacy and accountability of public officials. They can use the RTI Act to inspect various processes, programmes and schemes of any public authority. They can even examine the works undertaken by any Government Department at any stage and draw samples of materials that are in use. NGOs and CSOs can also collect and verify records, documents and samples of particular works undertaken by the Government.³⁹

Role of media

Information is power and is regarded as the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of the society. Freedom of expression, free dissemination of ideas and access to information are vital to the functioning of a democratic government. Information is crucial for a vibrant democracy and good governance as it reflects and captures government activities and processes. Access to information not only facilitates active participation of the people in the democratic governance process, but also promotes openness, transparency and accountability in administration. 'Right to Information' (RTI), the right of every citizen to access information held by or under the control of public authorities, can thus be an effective tool for ushering in good governance. Transparency means that decisions are taken openly and

39 RTI Cell, ATI, Kohima, RTI and role of NGOs, CSOs etc., available at atigl.nic.in/Downloads/RTI_Role%20of%20NGO.pdf (last accessed on April 28, 2016).

enforced as per rules and regulations. It requires that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided to all the stakeholders in easily understandable forms and media to enable their meaningful participation in decision making processes. Accountability means that public institutions and functionaries are answerable to the people and to their institutional stakeholders. Accountability cannot be enforced without a regime of transparency.⁴⁰

Conclusion

Right to information gives media the right to bring information of “public importance” to limelight and provides a safe forum for publication and broadcasting other news. Earlier journalists and media personnel had to run errands to gather information and unmask corruption but now at the advent of the Right to Information Act of 2005, aggrieved people themselves approach the media to make the news public. Also some news may not be made public because of governmental importance or because of the nature of the news and its impact upon the public.

It was very easy for public officials to hide essential information, but RTI keeps a check on the lawfulness of the authorities and the functioning of different public, private and government sectors with a view to inform ignorant masses and citizens and to check the arbitrariness of both media industry and the corruption which is going on in phase in our country.

Right to Information Act of 2005 helps to make the public aware of various happenings and ongoing circumstances that arise in our country via various phases of media, as it is not only an easy way of communication but also reaches the public at large because of its various heads like television, radio, newspapers, magazines and so on. Right to Information is open for everyone and so is media for spreading awareness about various particular details of any aspect under the world.

RTI gives true information to the public and media has played a very vital role in this, because of this, public opinion is created through public

40 Ibid.

debates, blogs, opinions, discussions, publications, broadcasting and soon. It acts as an open platform to invite public to actually utilize their freedom as generated by the Constitution of India.

A mention has to be made about other communication facility, one of them being NGOs and Inter-governmental organizations and other social services which equally help in generating information to the public and RTI has enacted a new regime through these features of our Constitution of India. A better functioning and a better tool of approach and communication is now available, which encourages many people to obtain an answer to their questions. RTI is a weapon in the hands of the public for a better government and a better India.

* * * * *

RTI ACT & THE PROTECTION OF WHISTLEBLOWERS IN INDIA

*P. Anantha Bhat**

Abstract

'Whistleblower' can be deemed to be a bonafide agent of the government. On account of revealing significant information on corruption, whistleblowers encounter various challenges including whistleblower deaths, and threats to the family and property of whistleblowers. In independent India, whistleblowers have played a highly active role in governance. Despite the growing number of challenges to whistleblowing, we continue to witness instances of corporate and government scams being exposed by the brave actions of a few individuals. In light of this, the author traces the evolution of law in India with respect to protection of whistleblowers, and various provisions under the RTI Act, which ensure whistleblower protection. An attempt is also made to highlight the various cases before the Supreme Court and High Court, and recent events, which deal with the issue of whistleblower protection. The author also makes recommendations with respect to additional measures which need to be taken to effectively protect whistleblowers.

Introduction

At present citizens have a right to freedom of speech and expression which provides a stand to express his view or opinion.¹ But this right is subject to reasonable restrictions provided under the Constitution under Article 19(2). Even Courts allows fair criticism on the system of administration of justice or functioning of institutions or other authorities entrusted. Only few criticisms which attempt to scandalize or demean the authority of the Court or other judicial institutions; or as an attempt to interfere with the administration of justice can be held undemocratic. The Court would not use the power to punish for its contempt as a tool to curb the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution.² Additionally, citizens have a right to information, right to receive and disclose information in public interest. Even Articles 38 and 39 of the Constitution enjoin upon the State a duty to

* Student of LLM (Constitution & Administrative Law), Gujarat National Law University, Gandhinagar.

1 As per the Constitution of India, 1950, Article 19(1) (a), all citizens shall have the right to freedom of speech and expression.

2 *Re S Mulgaokar v. Unknown* [1978] 3 SCC 339; MANU/SC/0067/1977 (Supreme Court).

consistently endeavour to achieve social and economic justice. With respect to curbing corruption, the citizens should be vigilant and shall ensure accountability.

The Central Vigilance Commission (CVC) being the 'Designated Agency' of Government of India, acts as a supervisory body against corruption and several other activities. This Commission, in 2014, received 64,410 complaints of corruption, which when compared to the previous year is a rise of 80% in corruption complaints.³ Whistle blower protection is therefore essential to encourage reporting of misconduct, fraud and bribery. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith, suspected acts of corruption and other wrongdoing, is therefore integral to efforts to combat corruption, safeguard integrity, enhance accountability, and support a clean business environment.⁴ The CVC website⁵ provides for Whistleblower Complaints link and other regulations.⁶ Public Interest Disclosure and Protection of informers (PIDPI) resolution was passed to protect the informer of corrupt activities. Further the Commission would investigate on the issues of whistleblower complaints. CVC could take help of CBI or other Police Authorities for investigation.⁷

3 Shri Rajiv, Central Vigilance Commission, Annual Report for the year 2014, available at <http://cvc.nic.in/ar2014.pdf> (Paras 2.25 & 2.29) (last accessed on May 7, 2016).

4 Whistleblower protection: encouraging reporting, available at <http://www.oecd.org/cleangovbiz/toolkit/whistleblowerprotection.htm> (last accessed on May 7, 2016).

5 Available at <http://cvc.nic.in/> (last accessed on May 7, 2016).

6 Ibid. The above link provides guidelines for complaint procedure and other important public notice relating to Whistleblower.

7 No. 371/4/2013-AVD-III Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training North Block New Delhi Dated the 3rd September, 2013; the 14th August, 2013. No.371/4/2013-AVD-III — This Ministry's Resolution No.371/12/2002-AVD-III dated 21st April, 2004, published in the Gazette of India, Extraordinary, Part 1, Section 1, authorised the Central Vigilance Commission (CVC) as the Designated Agency for handling of complaints under the Public Interest Disclosure and Protection of Informers.; No. 371/12/2002-AVD-D1 Cl (5), available at <http://www.mea.gov.in/Images/pdf/Document2nd.pdf> (last accessed on May 7, 2016).

Backdrop of Whistleblower Protection

The term whistleblowing may be a new advancement in disclosure of corruption associated matters. However, the philosophy of disclosure of information for security reasons can be traced in a variety of sources of ancient literature. The disclosure of information about threat of war or other external aggression could be traced in many of the historical events, wherein, internal and external scouts used to reveal information when the ruler or other authorities were committing injustice with individuals. The said information which would be disclosed would ultimately benefit society, and subsequently promote ethical and moral trustworthiness of informers in society.

Aim of whistleblower legislation

The intention of whistleblower legislation is to protect the person who reveals the truth about unprofessional conduct of an organisation, for the betterment of public good. Thus, the intention of whistleblower legislation in the present context is to protect the whistleblower financially and physically, as their lies a threat to life or victimization to them or their family from the vengeful acts of the alleged perpetrator of corruption. The State should ensure certainty in protecting his/her identity and even other personal information. Whistleblowers can be deemed to be a bonafide agent of government at the preliminary stage in public interest, consequently that proceedings shall not be preceded against them. This is to focus on the real issue of corruption by investigation and not to look at the credibility of whistleblowers. If the identity of the whistleblower is revealed by the State or other agencies of the State, then it should be the liability of State to compensate the potential victim and provide all further basic necessities of living. Whistleblower enactment should provide for transparency in various agencies, especially in governmental organisation for better governance and to act as a watch dog. This can help as a precautionary measure to have good governance in country with efficient working of governmental institutions. Thus as per N. Vittal, "Good governance will be the engine for development in a liberalized economy. The ability to use governance as an effective tool for economic development will depend upon our success to effectively check the corruption."⁸

8 N. Vittal, *Governance for Development*, at p 30; MADRAS LAW JOURNAL - Civil (Journal Article) 2012/Volume 2/Free Flow of Information and the Issues of Good Governance- A Critique - [2012] 2 MLJ 9.

Historical Development

As per John Locke the society learns from the experience on one's behalf,⁹ he quoted:

Whenever the legislature breaks this fundamental rule of society and—whether through ambition, fear, folly or corruption—try to grasp for themselves or for anyone else an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite different purposes. And then the people have a right to resume their original •natural• liberty, and to set up a new legislature. . . .to provide for their own safety and security. . . .¹⁰

He emphasised that the citizens of the State have a 'right to revocation' wherein the people have the right to change the ruler at any instance, as in his 'State of nature' no arbitrary power lies with ruler over the life, liberty and property. The purpose of this proposition was that the State has a duty to protect people as a part of the 'social contract'. Thus, after the glorious revolution in 1688 in United Kingdom, the shift from absolute monarchy to constitutional monarchy occurred. This led to the development of theory of Bill of Rights in United Kingdom and United States of America which influenced the development of UN Charter and Universal Declaration of Human Rights.

Some Contemporary Instances

The present situation for the sustenance of whistleblowers in India, is a dreadful experience, which is illustrated in the case of S.P. Mahantesh, an honest officer who was killed. He succumbed to injuries after he was brutally attacked. This incident is a gloomy reminder of the risks of being upright in an environment that stinks of corruption. Similarly Satyendra Dubey, was the Bihar based engineer who exposed irregularities in road contracts and was murdered,¹¹ for this reason, the Supreme Court in 2004

9 John Locke, *The Second Treatise of Government*, available at http://www.earlymodern texts.com/assets/pdfs/locke1689a_2.pdf (last accessed on May 8, 2016).

10 Ibid.

11 *A law for those who speak up*, THE HINDU, available at <http://www.thehindu.com/opinion/editorial/a-law-for-those-who-speak-up/article3443093.ece> (last accessed on May 8, 2016).

had made a strong pitch for a legal mechanism to protect whistleblowers. Many deaths of RTI activists and loyal officers resulted in hue and cry in the general public platform. Therefore, there was a requirement for a legislation to protect such citizens. If trustworthy citizens of a country fight against corruption or bribery, they need to be protected. As a whistleblower is neither an agent nor an informer, he works voluntarily without expecting any remuneration or kind.¹² Thus Whistleblower Act was enacted as a separate legislation to provide adequate protection to the persons reporting corruption.

Before Enactment

The Law Commission in its 179th Report has proposed a Public Interest Disclosure (Protection of Informers) Bill, which provides protection to whistleblowers.¹³ The Bill has provisions for providing safeguards to the whistleblowers against victimization in the organization. It also has a provision that the whistleblower may himself seek transfer in case he apprehends any victimization in the current position. The most functional definition adopted by various international organisations such as Asian Development Bank is that “corruption includes misuse of public office for private profit or political gains and as it covers all types of corrupt practices and abuses of public office”.¹⁴ India was fighting against corruption and unfair treatment of reliable citizen, this eventually realised the need for Whistleblowers Act, 2011 (Hereinafter ‘Act’).¹⁵

A few Recommendations made by Law commission of India

- In order to ensure protection to whistleblowers, it is necessary that immediate legislation may be brought by the central government.
- Enactment of whistleblower Act and the burden of proof shall be on the public servant or public authority against whom the

12 N V Paranjape, *Right to Information Law in India* (Lexis Nexis, Noida, 1st ed. 2014) at p 239.

13 Law Commission of India, 179th Report on Public Interest of Disclosure and Protection of Whistleblowers, available at <https://indiankanoon.org/doc/131592217/> (last accessed on May 7, 2016).

14 Ibid.

15 Law Commission has already forwarded its 161st report on ‘Central Vigilance Commission and Allied Bodies’ in 1998 and 166th report on ‘The Corrupt Public Servants (Forfeiture of Property) Bill’ in 1999 to tackle this problem.

allegations of victimization are made before the Competent Authority.¹⁶

- The legislation should cover corporate whistleblowers unearthing fraud or serious damage to public interest by wilful acts of omission or commission.
- The right to freedom of expression as contained in Article 19(1)(a) of the Constitution, and the similar right contained in the US Constitution and in Art. 10 of the European Convention, has held that allegations against public servants are not actionable merely because they are wrong or have been found to be not proved.¹⁷
- President may, by notification in the Official Gazette, make rules for the purpose of carrying out the provisions of the Act.

Meaning and Significance

Whistleblower is a person who reports misconduct, fraud and corruption within an organisation,¹⁸ who plays a crucial role in providing information about corruption.¹⁹ Public servants who work in a department/agency know the antecedents and activities of others in their organization, which qualify to be illegal activities. Thus, whistleblower is a person who exposes the misconduct, scam, corruption or other mismanagement of an office or an organisation. They are, however, often unwilling to share the information for fear of reprisal. He may be presumed to act in good faith for betterment of society. He acts voluntarily in public interest to bring transparency in system. These whistleblowers may be from government or private or other organisations but, their sole motive is to wipe out the corruption in any organization.

16 This is to establish that the same action would have been taken or the same proceedings would have been issued against the public servant making the disclosure, even if he had made no such disclosure.

17 It is also necessary to further establish that the allegations were made by the person with knowledge that they were false or were made, recklessly or maliciously.

18 OECD, The importance of whistleblower protection, available at <http://www.oecd.org/gov/ethics/whistleblower-protection.htm> (last accessed on May 7, 2016).

19 Para 3.6, Government of India Second Administrative Reforms Commission Fourth Report Ethics In Governance January 2007 by Second Administrative Reforms Commission Government of India, available at <http://arc.gov.in> (last accessed on May 8, 2016).

There is a very close connection between the public servant's willingness to disclose corruption in his organization and the protection given to him and his/her identity. If adequate statutory protection is in place, it is likely that government would be able to get substantial information about corruption.

The law that a government enacts to protect such persons who help expose corruption is called a whistleblower protection law. Corruption, that is abuse of public office for private or personal gain whose possibility of detection and investigation is negligible, undermines good governance. The Supreme Court has observed that "corruption is like a plague which is not only contagious but if not controlled, spreads like a fire in a jungle; its virus is compared with HIV leading to AIDS, being incurable. It may also be termed as royal thievery."²⁰

Footsteps of whistleblower enactment in India

The central government introduced a Bill in Lok Sabha in 2006 named Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010,²¹ has a provision that proposes to empower the Central Vigilance Commission (CVC) akin to a civil Court to severely penalise people disclosing the identity of whistleblowers. During the next four years, the CVC received as many as 1354 complaints from whistleblowers from different government organisations and public enterprises.²² The second Administrative Reforms Commission in 2007 in its fourth report highlighted the need and urgency for a specific law to be enacted to protect whistleblowers.²³

Consequent to increasing pressure on bringing out an effective whistleblowers' protection law and multiple instances of threatening,

20 State of Maharashtra & Ors v. Brijlal Sadasukh Modani, 2016 SAR (Criminal) 232 at para 20.

21 The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010, available at <http://www.prsindia.org/uploads/media/Public%20Disclosure/Public%20Interest%20Disclosure%20Bill,%202010.pdf> (last accessed on May 8, 2016).

22 Kaushiki Sanyal, Year wise Break-up of complaints Received from Whistle blowers during 2005-2008 is as Follows:- Year 2005- 412 Complaints, 2006-338 complaints, 2007-328 complaints and 2008- 276 complaints.; <http://www.prsindia.org/uploads/media/Public%20Disclosure/Legislative%20Brief%20%20Public%20Interest%20Disclosure%20Bil.pdf> (last accessed on May 8, 2016).

23 Second Administrative Reforms Commission, Fourth Report (January 2007) at p 77.

harassment and even murder of various whistleblowers, the union cabinet cleared the Whistleblowers Protection Bill on 26 August, 2010 and it was laid before the Indian Parliament in early 2011.²⁴ A Parliamentary recommendation in June, 2011 proposed that ministers, the higher judiciary, security organizations, defence and intelligence forces and regulatory authorities be also brought under the Whistleblowers' Protection Bill to check corruption and wilful misuse of power. The Act was approved by the cabinet as part of a drive to eliminate corruption in the country's bureaucracy and passed by the Lok Sabha on 27 December, 2011. The Bill became an Act when it was passed by the Rajya Sabha on 21 February, 2014 and received the President's assent on 9 May 2014.²⁵ The basic motive of the enactment is to stamp out corruption in society.²⁶

India, with respect to corruption was ranked 76th out of 168 countries in the world.²⁷ Corruption is a social evil which prevents proper, balanced social growth and hinders economic development. One of the impediments felt in eliminating corruption in the government and public sector undertakings is the lack of adequate protection to the complainants reporting corruption or wilful misuse of power or wilful misuse of discretion, which causes demonstrable loss to the government or commission of a criminal offence by a public servant.

Whistleblowers may be internal (within the organisation) or external (people outside the organization like media, public interest groups or enforcement agencies).²⁸

24 Parliamentary Standing Committee Report dt.9 June, 2011, available at <http://www.prindia.org/billtrack/the-public-interest-disclosure-and-protection-of-persons-making-the-disclosures-bill-2010-1252/> (last accessed on May 8, 2016).

25 The aforesaid Act of Parliament received the assent of the President on the 9th May, 2014; Gazette-Extraordinary Part II Section 1 no. 19, New Delhi, 12 May, 2014.

26 Act was established with an objective a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimisation of the person making such complaint and for matters connected therewith and incidental thereto.

27 Transparency International Corruption Perceptions Index 2014, 175 Countries. 175 Scores. How Does Your Country Measure Up? available at <https://www.transparency.org/country/#IND> (last accessed on May 8, 2016).

28 Adissha Lankar, Whistleblowers and their protection in India, available at <http://www.legalservicesindia.com/article/article/whistleblowers-and-their-protection-in-india-1693-1.html> (last accessed on May 8, 2016).

RTI and Whistleblowers

The RTI Act, 2005 has been one of the key initiatives of the Indian government for preventing and curbing corruption in the public sector, in particular. It is one of the most effective tools against corruption because all public officials are bound by the Act to give correct information. The Act provides for stringent punishment for wrongful denial/refusal to provide access to information.²⁹ A public authority cannot be asked to provide applicant information outside the scope of the RTI Act.³⁰

In *Parmod Goyal v. State Bank of Patiala*,³¹ under Section 8(1)(j) of RTI Act, appellant was denied disclosure of information about wrong doings/malpractices by bank officials. It was observed that the appellant, being a whistleblower, has the right to know the outcome of his efforts in exposing these wrongdoings. The Commission noted that respondent had admitted that on the basis of the various irregularities pointed out by the appellant, investigation against the erring officials was conducted, and that action had been taken to classify the identified accounts as NPAs and thereafter corrective action taken in terms of IRAC norms. Therefore, the Commission sees no harm in providing information as sought by the appellant and the Commission held that the information was to be provided within 2 weeks of receipt of the order.³²

Similarly, in *Shri Vinay Singh Negi v. Kendriya Vidyalaya*, the Commission had heard both parties and directed that on the grounds that the appellant has played the role of a whistleblower and has provided inputs to the respondent on the basis of which enquiry was conducted, he would be provided a copy of the enquiry report along with the decision taken by the disciplinary authority after the final decision is taken in the matter.³³

29 Section 20 of the RTI Act, 2005, which prescribe punishment of 250/- per day upto a maximum of Rs. 25000/-.

30 *Shri Ashwani Kumar v. Department of Expenditure*. F.No.CIC/AT/A/2010/000643, decided on 19th October, 2010 (Central Information Commission).

31 Central Information Commission Appeal No: CIC/DS/A/2011/000929.

32 Ibid.

33 Central Information Commission Appeal, No. CIC/DS/A/2011/00230, decided on 10 August 2011.

Overview of Whistleblowers Act

The Act contains 7 chapters with 31 Sections,³⁴ and repealed the Government of India, Minister of Personnel, Public Grievance and Pensions (Department of Personnel & Training) Resolution.³⁵ The preliminary chapter provides for the extent and non-application of the Act to Armed Forces of the Union,³⁶ Section 3 provides for different terms such as Central Vigilance Commission³⁷ such other terms like ‘complainant’ which means any person who makes a complaint relating to disclosure under this Act and ‘disclosure’ means a complaint relating to an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988.³⁸ Section 4 provides for requirement of public interest disclosure. It gives Official Secrets Act of 1923 a more paramount position than the present Whistleblowers Act. This provision also provides for disclosure of information in public interest to the competent authority,³⁹ which is made in good faith, which is substantially true and which could be communicated through writing or electronic mail. The Act safeguards the complainant if disclosure is found to be false. Under Section 5, the inquiry can be conducted by the competent authority; further Section 7 provides power to such authority as a civil Court trying a suit under Code of Civil Procedure, 1908.

Prima facie, Section 11, which is the cornerstone of this Act safeguards whistleblowers and defines duty on Central government to protect such person from any victimisation or other ill-treatment. Sections 12–14 provide for protection of witness, identity of complaint and power of competent authority to pass interim orders. Section 15 provides the penalty for furnishing incomplete or misleading reports to the competent authority.

34 The Whistleblowers Protection Act, 2011 No. 17 of 2014, available at http://persmin.gov.in/DOPT/EmployeesCorner/Acts_Rules/TheWhistleBlowersProtectionAct2011.pdf (last visited on May 9, 2016).

35 Resolution No. 371/12/2002-AVDIII dated 21 April, 2004.

36 Constituted under the Special Protection Group Act of 1988.

37 Commission constituted under Section 3 of the sub-Section (1) of Central Vigilance Commission Act, 2003.

38 (iii) attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure referred to in sub-Section (2) of Section 4.

39 3 (b) "Competent Authority" means— (i) in relation to a Member of the Union Council of Ministers, the Prime Minister;..” of Act, 2011.

Section 16 could be termed as the soul of the Act as it provides penalty for any person who negligently or in a mala fide manner reveals the identity of the complainant. Other offences such as punishment for false and frivolous disclosure or punishment to Head of Department for the guilt of offence is as deemed by the Commission. Offences by companies are dealt under Sections 19 and Section 20 provide for appeal to High Court. Section 21 bars civil court jurisdiction; and other miscellaneous provisions are dealt with in the remaining Sections.

Comparative framework of Whistleblower Protection

USA was one of the earliest nations to have the Whistleblower Protection Act of 1989, while the UK has the Public Interest Disclosure Act of 1998. Laws providing Whistleblowers protection laws exist in the UK,⁴⁰ Australia,⁴¹ Canada,⁴² Japan⁴³ and New Zealand.⁴⁴

The UK Public Interest Disclosure Act, 1998 which has 18 Sections protects individuals who make certain disclosures of information in public interest; to allow such individuals to bring action in respect of victimisation, and for connected purpose.⁴⁵ The U.K. is considered to have one of the

40 Public Interest Disclosure Act, 1998.

41 Public Interest Disclosure Act, 2013 (An Act to facilitate disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector).

42 Public Servants Disclosure Protection Act of 2005 (An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings). The Supreme Court of Canada recognised Whistleblower protection in *Vaughan v. Canada*, [2005] 1 SCR 146.

43 Whistleblower Protection Act of 2004 (The Purpose of this Act is to protect Whistleblowers to provide for nullity, etc. of dismissal of Whistleblower on the grounds of Whistleblowing and the measures that the business operator and Administrative Organ shall take concerning Whistleblowing, and to promote compliance with the laws and regulations concerning the protection of life, body, property, and other interests of citizen, and thereby to contribute to the stabilization of the general welfare of the life of the citizens and to the sound development of socio-economy).

44 Protected Disclosures Act 2000 (Part 5 provides of this Act is to promote the disclosure in public interest— (a) by facilitating the disclosure and investigation of matters of serious wrongdoing in or by an organisation; and (b) by protecting employees who, in accordance with this Act, make disclosures of information about serious wrongdoing in or by an organisation).

45 Public Interest Disclosure Act, 1998, available at http://www.legislation.gov.uk/ukpga/1998/23/pdfs/ukpga_19980023_en.pdf (last accessed on May 8, 2016).

most developed comprehensive legal systems having adopted a single disclosure regime for both private and public sector whistleblower protection, which Indian legislations lack vitally.

With respect to USA, sector functions are outsourced to private contractors⁴⁶ and the Whistleblowers Protection Act, 1989 of USA⁴⁷ which has 11 Sections provides protection for whistleblowers. Furthermore, after the spectacular collapse of Enron and WorldCom, the US Congress passed the Sarbanes-Oxley Act of 2002,⁴⁸ granting sweeping protection to whistleblowers in publicly traded companies. Anyone retaliating against a corporate whistleblower can now be imprisoned for up to 10 years.⁴⁹ All these laws generally provide for preserving the anonymity of the whistleblower and safeguarding him/her against victimization within the organization.

United Nations Convention against Corruption, also known as Vienna Convention, introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption.⁵⁰ Likewise the G20 Anti-Corruption Action Plan Protection of Whistleblowers emphasises that leaders identified the protection of whistleblowers as one of the high priority areas in their global anti-corruption agenda.⁵¹

48 The Act aims to prevent and protect corporate and criminal fraud, and hold wrongdoers accountable for their actions. *Lawson v. FMR LLC*, 2014 SCC online US SC 32, available at <https://www.sec.gov/about/laws/soa2002.pdf> (last accessed on May 7, 2016).

49 Raghu Dayal, *Whistleblowers need to be protected*, ECONOMIC TIMES, December 26, 2006, available at http://articles.economictimes.indiatimes.com/2006-1226/news/27434235_1_public-interest-disclosure-whistleblowers-coal-miners (last accessed on May 7, 2016).

50 General Assembly resolution 58/4 of 31 October 2003, United Nations Convention against Corruption New York, 2004, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (last accessed on May 8, 2016).

51 At the 2011 G20 Summit “it was discussed about support to the compendium of best practices and guiding principles for whistleblower protection legislation, prepared by the OECD, as a reference for enacting and reviewing, as necessary, whistleblower protection rules by the end of 2012.” available at <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf> (last accessed on May 7, 2016).

Present Scenario of the Act

The Whistle Blowers Protection (Amendment) Bill, 2015,⁵² is presently pending in the Parliament. Under Section 4 of the Bill, there are many exceptions which are proposed to be added to ensure that the said Act incorporates necessary provisions aimed at strengthening the safeguards against disclosures which may prejudicially affect the sovereignty and integrity of the country, security of the State, etc.,⁵³ it is proposed to amend Sections 4, 5 and 8 of the Whistle Blowers Protection Act, 2011 and amendment in Section 5 provides that the competent authority shall not inquire into any public interest disclosure which involves information of the nature specified in the amended Section 4. Section 4 involves major amendments, 10 new proposed Amendments which would nullify the basic philosophy of Act.

Death of RTI Activists

In India, many RTI activists have been allegedly murdered for seeking information to promote transparency and accountability in public authorities.

Niyamat Ansari, an activist from Jharkhand was killed as he exposed the malpractice in the NREGA by contractors through the RTI Act.⁵⁴ Manjunath Shanmugham, an IIM graduate and a sales manager of the Indian Oil Corporation was murdered on November 19, 2005 for revealing the racket of adulteration of petrol and other mafia behind it.⁵⁵

52 The Whistle Blowers Protection (Amendment) Bill, 2015, available at <http://www.prsIndia.org/uploads/media/Public%20Disclosure/Whistle%20Blowers%20%28A%29%20bill,%202015.pdf> (last accessed on May 7, 2016).

53 “(a) information, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security of the State, the strategic, scientific or economic interests of the State, friendly relations with foreign States or lead to incitement to an offence; (f) information received in confidence from a foreign government; (j) 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 such information has been disclosed to the complainant under the provisions of the RTI, 2005” and many other exception are supplemented.

54 National Campaign for People’s Right to Information, List of RTI Activists Killed, available at <http://righttoinformation.info/974/list-of-rti-activists-killed/> (last accessed on May 7, 2016).

55 Utkarsh Anand, *Supreme Court hands out life term to six convicts in Manjunath murder case*, INDIAN EXPRESS, March 12, 2015, available at <http://indianexpress.com/article/india/sc-hands-out-life-term-to-six-convicts-in-manjunath-murder-case/> (last accessed on May 6, 2016).

Whistleblower and RTI activist Satish Shetty who exposed many land scams in Maharashtra was killed by unidentified men while on a morning walk at Talegaon.⁵⁶ As India's Right to Information (RTI) Act was enacted in 2005, at least 45 Right to Information users and activists have been killed and over 250 assaulted, harassed, or threatened, according to local groups.⁵⁷ Thus, Indian RTI may be an ambitious Act by aiding the discovery of illegalities in system but, it comes at the cost of death of honest activists.

Supreme Court and High Court nexus with whistleblowers

Supreme Court refused to frame guidelines for protection of whistleblowers in 2011, but from the period of 2012 to 2015 we observe the vigilant role played by the Court to protect whistleblowers.⁵⁸ In *Pawan Kumar alias Monu Mittal v. State of Uttar Pradesh & Anr*,⁵⁹ the deceased, Manjunath, who was working as a Sales Officer with the Indian Oil Corporation (IOC), while inspecting one of the agencies, was murdered by a set of six people in Uttar Pradesh.⁶⁰ Supreme Court finally dismissed the appeal and confirmed the life sentence.⁶¹

In *Indirect Tax Practitioners Association v. R.K. Jain*,⁶² the respondent was the director of Excise Law Times. A contempt petition was filed by petitioner

56 Whistleblower Activist Satish Shetty killed, THE HINDU, January 10, 2013, available at <http://www.thehindu.com/news/whistleblower-rti-activist-satish-shetty-killed/article80222.ece> (last accessed on May 6, 2016).

57 India: New Killing of Right to Information Activist, available at <https://www.hrw.org/news/2015/09/10/India-new-killing-right-information-activist> (last accessed on May 7, 2016).

58 Supreme Court refuses to frame guidelines for Whistleblowers, available at <https://archive.is/keiYb> (last accessed on May 6, 2016).

59 (2015) 7 SCC 148.

60 As deceased would again inspect the bunk and report the irregularities, in which event he may end up either paying fine or it will result in his licence being cancelled, accused No.1 with the assistance of other accused, had conspired to do away with the deceased, and accordingly killed him. Trial Court convicted and sentenced the accused No.1 - Pawan Kumar Monu Mittal to death for offences u/s 302 r/w 149, IPC and to pay a fine of Rs 10,000/-, other life imprisonment, in the High Court the life imprisonment was awarded. When the matter was posted in Supreme Court, Courts considered the conspiracy of the accused and commit the offence of murder of the deceased. Court was with view that there is nexus between the accused and murder of deceased which was established by the prosecution beyond all reasonable doubt.

61 Supra note 55.

62 (2010) 8 SCC 281.

under Section 2(c) of Contempt of Court Act 1971,⁶³ as he wrote an editorial on June 1, 2009. In the piece, he highlighted the irregularities on behalf of the President of CESTAT's in transfer and posting of some of members of Tribunal.

With regard to whistleblowers, this case could be considered as one of the important decisions, as the Court considered the concept of whistleblower, discussed its impacts, types and merits. The judgment started with the phrase 'growing acceptance of the phenomenon of whistleblower', which defined the term whistleblower as a person who raises a concern about wrongdoing occurrence in an organization. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues).⁶⁴ In these cases, depending on the information's severity and nature, whistleblowers may report the misconduct to lawyers, the media, law enforcement or watchdog agencies, or other local, state, or federal agencies. The Supreme Court was of the view that the petitioner, the Indirect Tax Practitioners Association lacked the bonafide interest to file the petition and imposed 2 lakh for filing the frivolous petition. The Court made a few suggestions to improve the CEGAT and other Tribunals.

Supreme Court in *Common Cause v. Union of India*,⁶⁵ issued directions to Mr. Ranjit Sinha, Director, CBI, not to interfere in the coal block allocation case investigations and prosecutions being carried out by the CBI and to recuse himself from these cases. It directed an SIT appointed by the Hon'ble Court to investigate the abuse of authority committed by the CBI Director in order to scuttle inquiries, investigations and prosecutions being carried

63 Contempt of Courts Act, 1971 Section 2(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which— (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any Court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.

64 Most whistleblowers are internal whistleblowers, who report misconduct on a fellow employee or superior within their company. External whistleblowers report misconduct on outside persons or entities.

65 (2015) 6 SCC 332 (Criminal Misc. Petition No. 387 of 2015).

out by the CBI in coal block allocation cases and other important cases.⁶⁶ Ranjit Sinha had met several persons at his residence who are accused in prominent cases including the Coal Block Allocation scam without any of the investigating officers being present. Petitioner requested for an SIT investigation into the gross abuse of authority committed by the CBI Director in trying to scuttle investigations and prosecutions being carried out in 2G scam cases and other prominent cases.⁶⁷ During submission of oral evidence, the petitioner submitted that the 'file noting' received by him was from a whistleblower.

Court held the allegation in of violation of the provision of Official Secrets Act, 1923, and that the file notes in this case cannot be described as an 'official secret' for the purposes of prosecuting Mr. Prashant Bhushan. Court fixed liability on CBI, as, if somebody accesses documents that ought to be carefully maintained by the CBI, it is difficult to find fault with such a whistleblower particularly when his or her action is in public interest.⁶⁸ Court viewed that the identification of whistleblower is not necessary as the information revealed was in the interest of public. The Court finally held that petitioner,⁶⁹ had no intention to mislead the court in any manner, with regard to allegation of a violation for the provisions of the Official Secrets Act, 1923, the Court held that the file notes in this case cannot be described as an 'official secret' for the purposes of prosecuting Mr. Prashant Bhushan and dismissed the petition.

In *M. K. Tyagi v. K. L. Abuja and Anr.*,⁷⁰ the petitioner was a whistleblower who revealed the acts of corruption of his higher officer and further sought

66 Mr. Prashant Bhushan learned counsel for Common Cause made his submissions. Keeping the submissions in mind it was directed that the Director, CBI shall henceforth ensure the secrecy of inquiries and investigations into the allocation of coal blocks and that no access of any nature whatsoever is provided to any person or authority including any Minister of the Central Cabinet, Law Officers, Advocates of the CBI, Director of Prosecution and Officials/Officers of the Central Government.

67 In support of his submission that an SIT should be constituted to look into the abuse of authority by Mr. Ranjit Sinha in attempting to scuttle the investigations into the coal block allocations, Mr. Prashant Bhushan filed a short note dated 12th January, 2015. Along with the note, he annexed a photocopy of a file in respect of the case against the Dardas.

68 It is another matter if the whistle blower uses the documents for a purpose that is outrageous or that may damage the public interest.

69 Mr. Prashant Bhushan, Common Cause and Mr. Kamal Kant Jaswal.

70 W.P. (C) 7372/2007 & CM APPL 14017/2007.

CVC to provide information under RTI Act concerning the respondent, which CVC failed to appreciate, despite the expiry of thirty days. Only a few documents were furnished by the CVC to the petitioner. High Court of Delhi considered the petitioner as a whistleblower and ordered CVC to furnish information with Rs. 30,000 as a cost of compensation.

In *National Stock Exchange of India Limited, Mumbai v. Moneywise Media Private Limited, Mumbai and Ors.*,⁷¹ The Court held there was no defamation of NSE in the article published by the defendant on 19th June 2015.⁷² Even the Government sources also noted that “NSE's management of HFT servers in the initial years until 2013 (which are the subject of the whistleblower's letter) may need a detailed review by SEBI or an investigation agency”, thus, the same view was published by defendants. Court opined that all institutions face the crisis of dwindling public confidence. Neither the NSE nor the judiciary are exceptions to this. Hence, to achieve good governance, transparency and accountability, a fair comment is essential. The Court imposed costs of Rs. 1.5 lakhs each against of Ms. Dalal and Ms. Basu separately. In addition, the plaintiff was ordered to pay an amount of Rs. 47 lakhs in punitive and exemplary costs payable to public causes.⁷³

Claiming to be whistleblower without having locus to challenge the same could be dismissed by Court under criminal revision petition.⁷⁴ In *Manoj H. Mishra* case, it was held that a whistleblower included a person, who has tried to highlight the malfunctioning of an important institution established for dealing with cases involving revenue of the State and there is no reason to silence such a person by invoking Articles 129 or 215 of the Constitution or the provisions of any Act.⁷⁵

71 2016 (1) BomCR112.

72 Moneylife Digital Team, The suit and the NSE's conduct seem to me attempts at deflection and evasion, September 10, 2015, available at <http://www.moneylife.in/article/the-suit-and-the-nse-conduct-seem-to-me-attempts-at-deflection-and-evasion/43335.html> (last accessed on May 7, 2016).

73 These amounts were ordered to be paid within a period of two weeks from date of judgement.

74 Uma Kant and Others v. Central Bureau of Investigation C.G.O. Complex and Others High Court Of Judicature At Allahabad, Lucknow, Criminal Revision Defective No.143 Of 2009 26 May 2015.

75 Manoj H. Mishra v. Union of India & Ors, 2013 III LLJ 289.

In *Pradyuman Prasad v. State of Jharkhand*,⁷⁶ wherein petitioner cannot prove or demonstrate any reasonable nexus for initiation of the departmental proceedings, consequently petitioner cannot claim whistleblower protection under the resolution of the Government of India dated 21.4.2004 or direct CVC to take appropriate Steps.

Recent Trends of Whistleblowers

i) Volkswagen fraud

In September 2015, the global market was shocked by the Volkswagen emission crisis where it was found that there were about 11 million diesel cars of Volkswagen, which are equipped with devices that can cheat pollution tests worldwide and which was found by pollution tests conducted by John German. The research found that Volkswagen had installed sophisticated software designed to hoodwink strict emission tests across the world which could be termed one of the world's biggest corporate scandals.⁷⁷

ii) Vyapam Scam

Most of the scams in the country are disclosed by the whistleblowers. In *Dr. Vinod Bhandari v. State of M.P.*,⁷⁸ where in mismanagement of admission took place in professional courses and streams in M.P. Vyavsayik Pareeksha Mandal (M.P. Professional Examination Board) known as Vyapam was unearthed. This scam caused more than 40 deaths.

iii) D K Ravi Case

D K Ravi who was a vigilant IAS officer of State of Karnataka and was found dead in his house, the police termed it as suicide case, and was further confirmed by the CBI.⁷⁹ However, the prevailing public opinion is

⁷⁶ 2014 SCC Online Jhar 943.

⁷⁷ *Meet John German: The man who helped expose Volkswagen's emission scandal*, THE GUARDIAN, September 26, 2015, available at <http://www.theguardian.com/business/2015/sep/26/volkswagen-scandal-emissions-tests-john-german-research> (last accessed on May 16, 2016).

⁷⁸ 2015 SCC Online SC 96.

⁷⁹ *D K Ravi death: CBI probe finds IAS officer killed self, closure report soon*, available at <http://Indianexpress.com/article/India/India-news-India/d-k-ravi-death-cbi-probe-finds-ias-officer-killed-self-closure-report-soon/> (last accessed on May 7, 2016).

that the officer was killed for exposing misdemeanours of the State government.

iv) Saurabh Kumar

Saurabh Kumar, a 31-year old engineer was posted as senior Supervisor of Indian Railways. He was posted in Kharagpur to supervise the passing of railway tenders for scrap metal auctions, and it was alleged that the local mafia offered him a bribe to pass a tender.⁸⁰ But when he refused and cancelled it, he was allegedly murdered. Local Police officer declared that he had died of a snake bite. A CBI inquiry was ordered in the matter.

Thus, all the above cases suggest that loyal citizens were harassed or victimised and existing law may be insufficient to protect the whistleblower. Ethical principles, principle of natural justice upholding the rule of law shall be required to achieve good governance.

Recommendations

- Political leadership has to safeguard the whistleblowers in organizations and political leadership should see to it that legislation is provided with effective provisions. Political leadership should provide security to a whistleblower or to a RTI activist, if the situation is so demanding.⁸¹
- The CBI may be one of the highest investigation agencies, but its trustworthiness could be disputed. As in most of the cases, state level agencies itself misplace and mislead the evidence. We are in need of a separate agency to regulate the malpractices which need to be proposed to protect whistleblowers.

80 Kabeer Sharma, *Another Satyendra Dubey? 31 YO Railway Engineer Murdered After Turning Down A Bribe, Police Term It Death by Snake Bite*, available at <http://www.Indiatimes.com/news/India/another-satyendra-dubey-31-yo-railway-engineer-murdered-after-turning-down-a-bribe-police-term-it-death-by-snake-bite-245824.html> (last accessed on May 16, 2016).

81 Shri V. Narayanasamy, Hon'ble Minister Of State (Planning & Parliamentary Affairs), Talking Points Address, Annual Convention Of Central Information Commission Responsibility of Political Leadership In Promoting RTI, September 13, 2010 at DRDO Bhawan New Delhi, available at <http://cic.gov.in/convention-2010/Speeches/Narayanasamy.pdf> (last accessed on May 7, 2016).

- The whistleblowers enactment cannot save life of RTI Activists. The prime motto of the Act was protection from victimisation. The government should take liability and prescribe separate funds to whistleblowers and states should ensure safety of RTI activists and sustainable rules should be enacted.
- Despite notification in the gazette, the Act has not yet come into force. Public will lose confidence in Whistleblower Act if not enforced in India due to delays by the Central Government.⁸² Rules need to be formed and before implementing of the Act. Prescribing punishment and fine for false and frivolous complaints, and providing no action on disclosure if there is no indication of the identity of the complainant, will result indiminishing of the importance of the Act.⁸³
- CVC must effectively handle the complaints of corruption under Public Interest Disclosure and Protection of informers (PIDPI) as per Resolution.⁸⁴ CVC under PIDPI should accept anonymous complaint as step for better transparency in system, though by June 2014 dummy complaint so made would be submitted to the 'Designated Authority'⁸⁵ and 'Designated Authority' can ensure that no punitive action is taken by any concerned Administrative authority against any person on perceived reasons/suspicion of being whistleblower.
- Subsequent to the receipt of Commission's directions to undertake any disciplinary action based on such complaints, the Chief Vigilance Officer has to follow up and confirm compliance of further action by the DA and keep the Commission informed of delay, if any. In case a complainant seeks protection and reports that his life is indanger, the

82 Available at http://www.humanrightsinitiative.org/programs/ai/rti/india/national/email_alerts/2014/WhistleblowersProtectionAct2011.html (last accessed on May 16, 2016).

83 Economic & Political Weekly, *Sending Whistle-blowers to Their Deaths Whistle-blowers continue to be murdered even as a law for their protection awaits notification*, EPW, March 21, 2015 Vol 1 No. 12, available at http://www.epw.in/journal/2015/12/editorials/sending-whistle-blowers-their_deaths.html?0=ip_login_no_cache%3D69c96a40e7cf28ac9c977286faab77a4 (last accessed on May 8, 2016).

84 Supra note 10.

85 Ibid., Page 3, para (6).

'Designated Authority' would examine the same and send his recommendation to the CVC to take up the matter with the Nodal Officers of respective States/UTs appointed by the Ministry of Home Affairs/State Governments for the purpose of providing security cover to whistle blowers.

- PIDPI protects the identity of the whistleblower but, interestingly Personnel employed by the State Governments and activities of the State Governments or its Corporations, etc; will not come under the purview of the Commission. The Commission must not entertain or inquire into any disclosure in respect of which a formal and public inquiry has been ordered under the Public Servants Inquiries Act, 1850, or a matter that has been referred for inquiry under the Commissions of Inquiry Act, 1952. In the event of the identity of the informant being disclosed in spite of the Commission's directions to the contrary, it is authorised to initiate appropriate action as per existing regulations.⁸⁶

Conclusion

India being plagued by the problem of corruption, the Whistleblowers Act is one of the measures to have good governance in country. Although the Act is yet to come into force by a notification of the Central Government in the Official Gazette, the provisions of the Act on the bare perusal of the Act seem inadequate and thus, there are chances that the zeal of the whistleblowers to make disclosure will be affected. The proposed amendments are not made to build protection to whistleblowers. Hence, there is a need for further amendments.

Even police often fail to investigate the attacks, under pressure from politicians and contractors with vested interests in keeping the information from becoming public. Hence, political leadership has to safeguard the whistleblowers in organizations. There is a need for a better legislation providing few strong provisions, appropriate rules should be formulated within Whistleblowers Protection Act, 2011.

There are cases like Satyendra Dubey, an engineer who was mercilessly killed in November, 2003 for highlighting corruption rampant in the

⁸⁶ *Important Features of the "Whistle-Blowers" Resolution*, available at <http://cvc.nic.in/pidpi.htm> (last accessed on May 9, 2016).

National Highway Authority of India (NHAI) and other various cases discussed above such as 'Vyapam' Scam which led to over 40 deaths. Therefore, death of RTI Activists leads to many difficulties in India. Even after the 'Vyapam' Scam, the Central Government did not bring any sustainable laws. The need of whistleblowers is a must in society.

Whistleblower, being an honest citizen of country, discloses information at the cost of victimization. Hence the citizen's trustworthiness is at the cost of losing his life. There is a need to frame rules for Whistleblower Act, a specific time period needs to be stipulated for the state government to adopt and implement the same. Though this Act has been passed recently, most RTI activists are not aware of the provisions of the Act. Hence, the duty lies on the government and other NGOs to enlighten the public regarding the provisions of the said Act so that the Act does not become a paper tiger. Most importantly, the Central Government has the discretion to notify the operationalisation of different provisions of this law on different dates, thus the Central Government should perform its discretion as an obligation, keeping the whistleblowers in mind.

* * * * *

INDIAN WHISTLEBLOWER PROTECTION POLICIES: PRONE TO VICTIMISATION

Nikhil Issar*

Abstract

The Whistleblower Protection Act, 2011 which was passed towards the end of the Congress led UPA regime sought to implement a formal system for the regulation of Whistleblower Protection in India. Prior to this, there existed a Government Resolution passed in furtherance of an order by the Supreme Court in Writ Petition © No.539/2003 regarding the murder of Shri Satyendra Dubey. However, this temporary Government Resolution which granted the power to the Central Vigilance Commission ("CVC") to address the complaints made by Whistleblowers remained ineffective due to the lack of acceptance of "Anonymous Complaints". Only 800 complaints were entertained by the CVC since its inception, demonstrating the fact that there existed wide fear of 'Victimisation' as whistleblowers refrained using this system which did not provide them with adequate protection.

The scenario was hoped to be changed by virtue of the new legislation of 'The Whistleblower Protection Act, 2011' ("the Act"). However, the Act has not defined 'Victimisation' and has left it to be ambiguous and uncertain. This omission has given discretionary power to the concerned competent authority which can now decide as to what acts constitute Victimisation. Furthermore, the Act also rejects anonymous complaints and states that the Competent Authority shall take no action if the disclosure does not indicate the identity of the complainant making the public interest disclosure or the identity of the complainant or public servant is found incorrect or false. The rationale behind such exclusion is the fact that there might be an excess of 'frivolous complaints' if anonymous complaints are admitted. However, it is submitted that this reasoning is flawed, as the fact that 'frivolous complaints' might exist does not mean that the channel of 'anonymous complaints' should be closed down for potential whistleblowers that fear victimisation. This Act gives a right to the competent authority to disclose the identity of the complainant to the head of the organization against whom the complaint has been filed during the course of investigations. But, the act has not mentioned any penalty against the head of the organization if he does indeed reveal the name of the complainant; thereby the protection provided by the Act is without any sanction.

It is submitted that the statute that is currently in force is hindered by a number of shortcomings because of which the objective of the Act i.e. to protect Whistleblowers from victimisation, has not been fulfilled. Thus, this research paper aims to critically analyse the concepts of 'Victimisation', 'Anonymous Complaints' and the 'Protection of the Identity of Whistleblowers', so as to suggest the creation of a legal framework that would provide a much more conducive environment for Whistleblowers.

*Student, Hidayatullah National Law University, Raipur.

Introduction

The Right to Information is indispensable for the effective functioning of democracy. The preamble of the RTI Act sets out that the citizens shall have the right to secure access to the information under the control of the public authorities, to promote transparency of information which are vital in the functioning of the public authorities, to contain corruption, to hold Corruption is similar to an infestation which settles upon organisations whose practices work against the principle of free speech. It is like a cobweb, which spreads when an organisation neglects morals and ethics. Corruption thrives in institutions whose processes lack transparency. If a veil exists between the decision makers and those affected by it, corruption is bound to exist. This figurative 'veil' can only be removed by the free flow of information, but it is often seen that organisations are unwilling to divulge information which may relate to a supposed misdeed. It is in circumstances like these where whistle-blowing comes into the picture. Information relating to misdeeds may be suppressed and if let out the organisations would lash out at the persons responsible. In such circumstances laws would come into effect, to safeguard the person against whom there can be retaliation.

A whistleblower is a person who divulges information related to the occurrence of corruption or any such misdeed by the organisation of which he is a part or he learns through other means.¹ Whistleblowers have been hailed as heroes in several countries and are credited for the reduction of corruption and an increase in managerial efficiency by the exposition of illegal, unethical or dangerous activities by government and private organisations. But there exists a constant threat of victimisation of these whistleblowers. Victimisation maybe in the form of reduction of responsibilities of the employee, demotion, transfer and it can even be physical violence in extreme cases. It is the job of the legislature to provide an environment which is conducive to whistle-blowing and provide protection from retaliation. In the absence of such protection the whistle-blowing mechanism shall cease to exist.

This research paper seeks to understand the scope and extent of protection which has been provided by the Whistleblower Protection Act, 2011

1 Mesmer-Magnus and Viswevaran, *Whistleblowing in Organisations: An Examination of Correlates of Whistleblowing Intentions, Actions and Retaliations*, JOURNAL OF BUSINESS ETHICS, December 2005, Volume 62, Issue 3, pp 277-297, at p.278.

(Hereinafter referred to as “the Act”). The ‘Scope of Protection’ refers to the definition of ‘Disclosure’ under the Act. The broader the definition of ‘Disclosure’ the more the number of disclosures would be amenable to be protected under the ambit of the Act. The extent of protection refers to the definition of ‘Victimisation’ under the Act. A broad definition of ‘Victimisation’ would confer a greater extent of protection of Whistleblowers from such activities which might constitute ‘Victimisation’.

Emergence of the Indian Whistleblower Protection Mechanism

While hearing the case of murder of Shri Satyendra Dubey,² the Supreme Court stated that pending enactment of a suitable legislation; suitable machinery should be put in place for acting on complaints from “whistle-blowers”. In pursuance thereof, the government through its Resolution dated 21st April 2004³ authorized the Central Vigilance Commission (CVC) as the Designated Agency to receive written complaints or disclosure on any allegation of corruption or of misuse of office by any employee of the Central Government or any corporation established under a central act or owned or controlled by the Central Government. The Government issued the following guidelines for the functioning of the CVC with respect to addressing whistleblower complaints:

- The Government directed the CVC to not entertain anonymous complaints and wished for the disclosure or complaint to contain as full particulars as possible and to be accompanied by supporting documents.⁴
- The Government directed that if a complaint accompanied by the particulars of the complainant who made the complaint was received, then CVC would first ascertain whether the complainant in question had actually made the complaint, conceal the identity of the complainant unless he himself has revealed it to an authority, initiate discreet inquiries in order to observe if the complaints have any legitimate basis.⁵

2 Writ Petition (C) No.539/2003.

3 Resolution no. 89 dated April 21, 2004, Government of India, available at <http://mnre.gov.in/file-manager/UserFiles/om-vig-02072014.pdf> (last accessed on May 5, 2016).

4 Ibid.

5 Ibid.

- During this process the identity of the complainant shall remain anonymous but would only be revealed to the head of the organisation concerned who would be asked not to reveal the identity of the complainant.⁶
- If the investigation by the designated authority proves the guilt of a public official, the CVC would recommend appropriate action to the government department concerned.⁷

The Government resolution on whistleblowers put forth temporary machinery on the matter of whistleblower complaints but this machinery proved to be ineffective as the whistleblower complaints received by CVC remained low indicating the lack of confidence reposed by prospective whistleblowers on the machinery created by the Government. During the year 2012 CVC received thirty six thousand complaints. Under the 2004 Government resolution which established CVC as the nodal agency to receive public interest disclosures only 800 complaints are received by the CVC.⁸

The Parliament passed ‘The Whistleblowers Protection Act, 2011’ on 9th May 2011⁹ to replace the temporary whistleblower protection machinery as instituted by the Government resolution.¹⁰ This research paper shall seek to understand as to how far has the new legislation been able to remedy the defects of its predecessor by analysing the two core definitions which are pertinent to any whistleblower protection legislation i.e. ‘Victimisation’ and ‘Disclosure’.

Definition of ‘Disclosure’ under the Whistleblower Protection Act, 2011

The definition of ‘Disclosure’ within Whistleblowing legislations is essential to understand the scope of protection conferred to whistleblowers by the

6 Ibid.

7 Ibid.

8 Draft Report, International Conference on Integrity Pact: From Commitment to Compliance, 9-10th December, 2013, available at [http://www.integritypact.in/download/3%20International%20Conference%20On%20Integrity%20Pact\(2\).pdf](http://www.integritypact.in/download/3%20International%20Conference%20On%20Integrity%20Pact(2).pdf) (last accessed on May 6, 2016).

9 The Whistleblowers Protection Act, 2014 Act No. 17 of 2014.

10 Supra note 4.

Act. A broader definition of the term ‘Disclosure’ would protect whistleblowers of a wider range of information that they make seek to disclose. This section thus analyses the constituents of ‘Disclosure’ under the Whistleblower Protection Act, 2011 and seeks to compare its import with the definition under other jurisdictions. A complaint which is not covered within the definition of ‘Disclosure’ shall not be treated as a complaint.¹¹ The ‘Disclosures’ which have been protected by the Act¹² have been independently discussed hereunder.

Constituents of ‘Disclosure’ under the Whistle Blowers Protection Act, 2011

This section shall briefly discuss the complaints which shall be regarded as ‘Disclosure’ under the Act.

Attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988¹³

The Prevention of Corruption Act, 1988 details the following offences, the disclosure of which is protected under the Act.

1. Public Servant taking gratification other than legal remuneration in respect of an official act¹⁴ and abetment of the same.¹⁵
2. Taking gratification, in order, by corrupt or illegal means, to influence public servant¹⁶ and abetment of the same.¹⁷
3. Taking gratification, for exercise of personal influence with public servant¹⁸ and abetment of the same.¹⁹
4. Public servant obtaining valuable thing, without consideration

11 Section 3(d), Whistle Blowers Protection Act, 2011 states “Disclosure” means a complaint relating to”, thus a complaint which is not relating to Section 3(d)(i), 3(d)(ii) and 3(d)(iii) would not be treated as a “Disclosure”.

12 Ibid., Section 3(d).

13 Ibid., Section 3(d)(i).

14 Section 7, Prevention of Corruption Act, 1988.

15 Ibid., Section 12.

16 Ibid., Section 8.

17 Ibid., Section 10.

18 Ibid., Section 9.

19 Ibid., Section 10.

from person concerned in proceeding or business transacted by such public servant²⁰ and abetment of the same.²¹

5. Criminal misconduct by a public servant.²²

Thus, under the Act a complaint with regard to any of the above mentioned offences shall be deemed to be a “disclosure” and shall be afforded with protection under the Act. This ground has been adopted from the Public Interest Disclosure (Protection of Informers) Bill, 2002 which had been recommended by the 179th Law Commission Report.²³

The usage of the definition of precise offences as listed under the Prevention of Corruption Act, 1988 has been an improvement over the formerly used government machinery which regarded ‘corruption and misuse of office’²⁴ as grounds for disclosure. Thus, a more specific definition of “Corruption” has been adopted under the Act in contradistinction to the erstwhile temporary machinery.

Wilful misuse of power or discretion causing demonstrable loss to the government or demonstrable gain to the public servant or third party²⁵

The Act provides the ground of “Wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party.”²⁶ Thus, this ground for disclosure is a more detailed exposition of the earlier ground of “Misuse of office”²⁷ which had been present in the erstwhile temporary Whistle Blower Protection Machinery instituted by the Government.

Attempt to commit or commission of a criminal offence by a public servant²⁸

The Whistle Blowers Protection Act, 2011 provides the ground of “Attempt to commit or commission of a criminal offence by a public servant” for providing disclosure. The same ground has been included

23 Clause 2(d), The Public Interest Disclosure (Protection of Informers) Bill 2002.

24 Supra note 4.

25 Section 3(d)(ii), Whistle Blowers Protection Act, 2011.

26 Ibid.

27 Supra note 4.

28 Section 2(d)(iii), Whistle Blowers Protection Act, 2011.

within the South African Protected Disclosure Act.²⁹ “Offence” has been defined as anything made punishable by the Indian Penal Code³⁰ and other legislations. Thus, the ambit of this particular ground is wide.

Elements that are not included within the statutory definition of “Disclosure”

The grounds of disclosure are constricted as it fails to include the following elements within its definition of “Misuse of office”:

- **Economic efficiency**

The Romanian Whistleblower Protection Legislation protects factual disclosures of a violation of any law, professional ethics, and principle of good administration, efficiency, effectiveness, economic efficiency and transparency.³¹ Thus, while the present definition within the Act considers a complaint to be a “disclosure” only if the same relates to a wilful misuse of power, the same does not address the issue of Economic efficiency which has plagued the Indian bureaucratic system. The lax nature of our public servants has made many of our public departments to become unsustainable in view of continued losses. Thus, if the definition of whistleblower protection had also included “Economic Efficiency” and “Principles of good administration”, the public servants who due to their lax attitude are causing the profits of the government to dip, would remain more cautious about their conduct.

- **Nepotism in discharge of one’s duties**

Romanian law protects disclosures relating to offences leading to or related to corruption and fraud at the work place such as acts of discrimination or nepotism.³² The Whistle Blower Protection Act, 2011 needs to have an inclusive definition of the word ‘Disclosure’ so as to include ‘Nepotism’ which has been rampant within the Indian Governmental setup. If acts of nepotism were brought within the definition of “Disclosure”, then whistleblowers would freely report the occurrence of such acts which might help curb them and increase the overall efficiency of administration.

29 Section 1(1)(a), Protected Disclosure Act, 2000.

30 Section 40, Indian Penal Code, 1860.

31 Article 3, Law on the Protection of Public Officials Complaining about Violations of the Law.

32 Ibid., Article 5.

- **Mal-administration**

The concept of ‘Mal-administration’ was proposed in the 179th Law Commission Report which has not been adopted in the Whistle Blower Protection Act, 2011.³³ ‘Mal-administration’ has been defined by the Law Commission as “any action taken, or purporting to have been taken. Or being taken or proposed to be taken, in the exercise of administrative or statutory power or discretion-

- (i) Where such action is unreasonable, unjust, oppressive or discriminatory.
- (ii) Where there has been negligence or undue delay in taking such action.
- (iii) Where there has been reckless, excessive or unauthorized use of power in taking such action.
- (iv) Where such action amounts to breach of trust.
- (v) Where such action involves the conduct of a public servant which would result in wastage of public funds or prejudice to the state or is prejudicial to public interest in any manner.
- (vi) Where such action is outside the authority of law or amounts to violation of systems and procedures.”³⁴

The concept of ‘Mal-administration’ would have widened ‘disclosable actions’ however the present legislation ignored this proposal of the 179th Law Commission Report and did not include ‘Mal-administration’, thereby constricting the areas upon which complaints can be received.

- **The environment has been is being or likely to be damaged**

The South African Protected Disclosures Act recognises “That the environment has been is being or is likely to be damaged”³⁵ as a ground for disclosure by the Whistleblower. India, being a major contributor to global pollution³⁶, environmental considerations must be given a priority. An inclusion of this ground would enable Whistleblowers to report actions of

33 Clause 2(e), the Public Interest Disclosure (Protection of Informers) Bill 2002.

34 Ibid.

35 Section 1(1) of Protected Disclosure Act, 2000.

36 Environmental Performance Index, Yale University 2014, available at <http://archive.epi.yale.edu/epi/country-rankings> (last accessed on May 5, 2016).

public servants which are likely to effect the environment in an adverse way and have not been routed through the clearances which are required for undertaking such actions.

Effect of exclusion of complaint from the purview of “Disclosure”

A constricted definition of “Disclosure” would deem that complaints which do not fall under the constituents of the Act shall not be deemed to be “Public Interest Disclosure for the purposes of this Act”.³⁷ This shall result in non-applicability of provisions under Chapter V of the Act which details provisions for “Protection to the persons making disclosure”. Thus, this would result in the Act not being applicable to whistle blowers resulting in a failure of the objective of the Act which is to provide adequate safeguards against victimisation of whistle blowers.³⁸

Definition of ‘Victimisation’ under the Whistle Blower Protection Act, 2011

Defining victimisation is the next crucial step for the setting up of a Whistle Blower Protection mechanism. The fear of victimisation is the greatest deterrent to Whistleblowing and if the law provides adequate protection against victimisation there would be a more open and unhindered Whistleblowing environment. A legislator must list out the forms of retaliation which may be initiated against the whistleblower and classify them as ‘Victimisation’, after which the law would go about protecting the whistleblower from such retaliations. The legislator must make a conscious effort to cover all forms of retaliatory action that can be imagined when he sets to define the term ‘Victimisation’.

The Law Commission of India in its 179th Report defined ‘Victimisation’ as ‘Suspension, transfer, dilution or withdrawal of duties, powers and responsibilities, recording adverse entries in the performance records, issue of memos, verbal abuse, all classes of major or minor punishments recognized in the disciplinary rules, orders or regulations applicable to such public servant and such other type of harassment’.³⁹

37 Section 4(2), Whistle Blowers Protection Act, 2011.

38 The Whistle Blowers Protection Act, 2011.

39 Clause 2(I), the Public Interest Disclosure (Protection of Informers) Bill.

The definition of Law Commission of India as was cited above comprehensively lays out the various acts which would come under 'victimisation'. However, the Whistleblowers Protection Act 2011 has not defined 'victimisation' and has left it to be ambiguous and uncertain. This omission has given discretionary power to the concerned competent authority⁴⁰ who can now decide as to what acts constitute victimisation.⁴¹

Within the Whistleblower Protection Act 2011, the Competent Authority shall give suitable directions to the concerned public servant or public authority in case of reported victimisation, prior to which a hearing shall be held within which "the burden of proof that the alleged action on the part of the public authority is not victimisation, shall lie on the public authority."⁴² However, in the absence of any statutory definition of "Victimisation", the public authority may be able to escape the brunt of the act as whether or not the alleged act constituted "Victimisation" is up to the judgment of the competent authority.

Definition of 'Victimisation' in other jurisdictions

There exist various elaborate definitions in foreign legislations which leave no room for interpretation while defining 'victimisation'.

The United States Whistleblower Protection Act 1988 defined 'victimisation' or prohibited personnel action as (A)—

- (I) An appointment;
- (ii) A promotion;
- (iii) An action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) A detail, transfer, or reassignment;
- (v) A reinstatement;
- (vi) A restoration;
- (vii) A reemployment;

40 'Competent authority' has been defined in Section 3(b), the Whistleblowers Protection Act 2011.

41 Section 11(2) of the Whistle Blowers Protection Act, 2011 states that if a person is being victimised on the ground that he had filed a complaint or made a disclosure, he may file an application before the Competent Authority.

42 Ibid.

- (viii) A performance evaluation under chapter 43 of this title;
- (ix) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this sub paragraph;
- (x) A decision to order psychiatric testing or examination; and
- (xi) Any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31.⁴³

In Ghana, the Whistleblowers Act creates a right for every whistleblower not to be subjected to victimisation by his/ her employer, any employee or any person as a result of making a disclosure of an impropriety.

The Act lists the kinds of actions and omissions that constitute victimisation of the whistleblower who is an employee:

- I. Dismissed
- ii. Suspended
- iii. declared redundant
- iv. Denied promotion
- v. transferred against the whistleblower's will
- vi. Harassed
- vii. Intimidated
- viii. Threatened with any of the matters set out in subparagraph (i) to (vii), or
- ix. Subjected to a discriminatory or other adverse measure by the employer.⁴⁴

The silence of the Whistleblowers Act 2011 significantly limits the right of the whistleblowers to protect themselves from reprisals. A legislation whose aim is to protect whistleblowers from victimisation can achieve this target only if 'victimisation' is defined within the legislation with no room for ambiguity. Only if the term 'victimisation' is understood, then only

43 5 U.S.C. § 2302(a)(2)(A).

44 Section 12(2), Whistleblower Act 2006.

mechanisms can be developed for the protection of whistleblowers from such ‘victimisations’.

Thus, it only logically follows that the protective mechanisms as laid out in the Whistleblower Protection Act 2011 are ineffective.

The definition as set by the Law Commission of India⁴⁵ must be accepted, but this definition should also include the aspect of threats to perform acts which are prohibited by the definition. Thus, a threat to suspend, transfer, dilute or withdraw duties, powers and responsibilities, etc; should also constitute victimisation.

The debate on acceptance of anonymous complaints under the Whistle Blower Protection Act, 2011

Anonymous complaints are out rightly rejected in the Indian Whistleblowing framework. The erstwhile effective guidelines issued by Department of Personal Training on public disclosure⁴⁶ state that anonymous complaints shall not be entertained by the Central Vigilance Commission.

The Law Commission of India had rejected anonymous complaints in The Public Interest Disclosure (Protection of Informers) Bill which states that ‘The person who makes complaint must disclose his identity’, in other words anonymous complaints shall not be entertained.⁴⁷

The Whistleblower Protection Act, 2011 rejects anonymous complaints by stating- “No action shall be taken on public interest disclosure by the Competent Authority if the disclosure does not indicate the identity of the complainant or public servant, making public interest disclosure or the identity of the complainant or public servant is found incorrect or false.”⁴⁸

Thus, there appears to be a general agreement that anonymous complaints are to be rejected, the rationale for this being the overflow of frivolous complaints which would occur if anonymous complaints are allowed.⁴⁹ This

45 Clause 2(i), the Public Interest Disclosure (Protection of Informers) Bill.

46 DoPT Guidelines regarding handling of complaints in Ministries/Departments, available at http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02ser/104_76_2011-AVD-I-18102013.pdf (last accessed on May 5, 2016).

47 Clause 3, The Public Interest Disclosure (Protection of Informers) Bill (2002).

48 Section 4(6), the Whistleblower Protection Act 2011.

would in turn lead to the impracticality of investigating all such frivolous complaints.

However, this rationale is extremely limited as whistleblowers who are in fear of retaliation may not repose their faith in the protection provided by the government and would seek an alternative path for obtaining redressal to their grievances. In a nation which knows widespread violence against whistleblowers, it is natural to assume that whistleblowers would refrain from disclosing whatever information they may possess by giving priority to their personal well-being. Thus, by rejecting anonymous complaints the system is blocking crucial information.

The argument of ‘explosion of frivolous complaints’ is still valid to an extent, but within the many frivolous complaints there would be some complaints which necessitate immediate action and disclose sensitive information which would never be known if anonymous complaints were altogether rejected. Even if only a miniscule of complaints received anonymously are worth investigating, those complaints should be reason enough to make this alternative pathway accessible. The frivolous complaints would reduce on their own when the complainants see that their complaints aren’t being taken under consideration and are being filtered out.

Countries such as the U.S, U.K., Canada and Australia⁵⁰ have some provision to investigate anonymous complaints, while Italy and Slovakia do not allow anonymous complaints⁵¹. However, even countries which allow anonymous complaints do not provide protection against victimisation if the identity of such a whistleblower becomes known. The existence of acceptance of anonymous complaints in these countries is because these countries have recognized the fact that anonymous complaints can be of a

49 *Alternative to Silence: Whistleblower Protection in 10 European Countries*, Transparency International, 2009, available at http://www.transparency.org/whatwedo/publication/alternative_to_silence_whistleblower_protection_in_10_european_countries (last accessed on May 5, 2016).

50 Whistleblower Protection Act (USA); Public Interest Disclosure Act, 1998 (UK); Public Servants Disclosure Protection Act (Canada); and Public Interest Disclosure Act (Australia).

51 Supra note 49.

much more serious nature as the fear of retaliation is such that the complainant is unable to disclose his identity while making the complaint.

The widespread violence against whistleblowers and RTI activists in India acts as a deterrent for others to file complaints. There exists a need in the Indian legislation to accept anonymous complainants as it would enable disclosures from people who fear extreme retaliation.

Conclusion

This research paper highlights the issues presented by the Whistle Blower Protection Act, 2011 which even though seeks to provide adequate safeguards against the victimisation of Whistleblowers, fails on the following accounts:

- Constricted definition of 'Disclosure'.
- Lack of definition of 'Victimisation' against Whistleblowers
- The denial of anonymous complaints

This research paper has furthermore provided remedial suggestions which if implemented would ensure a much more conducive environment for Whistle Blowing. The suggestions have been summarised hereunder

- Inclusion of 'Economic efficiency', 'Nepotism', 'Mal-administration' as defined by the Law Commission of India in its 179th Report, and 'Likelihood of damage to the environment' as being grounds for complaints to be considered as 'Disclosures'. Furthermore, this paper suggests that the definition of 'Disclosure' should not be an exhaustive one, and the Competent Authority may consider other complaints to amount to 'Disclosure' if acting upon the same would be in pursuance of public good.
- Adoption of the definition of 'Victimisation' as recommended by the 176th Law Commission Report so as to reduce the degree of discretion which the Competent Authority may have in deciding as to what actions constitute victimisation and what actions do not.

- Acceptance of anonymous complaints wherein the complaints pertain to a grave and serious nature.

It is stated that if the above mentioned suggestions are included within the Whistle Blowers Protection Act, 2011 it would result in a better and more conducive environment to Whistle Blowing within the nation.

* * * * *

RTI : TRANSPARENCY
AND
ACCOUNTABILITY

RIGHT TO INFORMATION ACT AND WHISTLE BLOWERS

Aditi Nidhi* & Apoorva Roy**

Abstract

History is witness to the fact that there have always been informers who reveal inside information to others. Ancient Greeks talked about whistleblowing centuries before. Lykourgos, the Athenian orator, in his speech against Leokratis said: neither laws nor judges can bring any results, unless someone denounces the wrongdoers. Even in Ancient India, the concept of a Whistleblower was in existence, Kautilya proposed- "Any informant (súchaka) who supplies information about embezzlement just under perpetration shall, if he succeeds in proving it, get as reward one-sixth of the amount in question; if he happens to be a government servant (bbritaka), he shall get for the same act one-twelfth of the amount.

Whistleblowers play an important role in fighting corruption, in protecting the public and the environment from harm, and in providing accountability for the violation of legal norms. When an individual blows the whistle on alleged wrongdoing, he/she may suffer severe financial consequences. The law recognizes the social good that can come from whistleblowing by providing some protection for them and encouraging such conduct in a variety of ways.

Even so, whistleblowers continue to occupy a fundamentally ambivalent position in society. Some whistleblowers are celebrated for their courage and self-sacrifice in protecting society from harm. But at the same time, many whistleblowers experience financial and social retaliation. This ambivalence is reflected in the law of whistleblowing: both its limited scope and how it actually operates. The law offers whistleblowers some legal protection, but government officials who are responsible for administering those laws often find ways to narrow that protection. Thus, even the most robust legal protection cannot protect whistleblowers from the social consequences of their action.

While whistleblowers can play a critical role in protecting the public, they often pay an enormous personal price. This article seeks to aid understanding of the ways in which different policy purposes, approaches and legal options can be combined in the design of better legislation. It provides a guide to key elements of the new legislation, as an example of legislative development taking place over a long period, informed by different trends.

*Student, LLM, Hidayatullah National Law University.

**Student, LLM, Hidayatullah National Law University.

Introduction

Corruption has been a common phenomenon all over the world, only the degrees of the corruption differs¹ and response towards it. The history is filled with various incidents that clearly prove that corruption leads to inequality² and hampers public interest. It constitutes a drain on the funds of many ordinary citizens, in the form of demand for bribes by the state functionaries. Hence, in the words of *Kofi Annan*, it undermines democracy and the rule of law³ (which is one of the basic features⁴ of our Indian constitution), leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.⁵

The United Nations had found that corruption was the chief reason why the poor nations continued to remain in poverty.⁶ World Bank's studies have established that "corruptionwas the single greatest obstacle to economic and social development"⁷ and when corruption goes unchallenged, when people do not speak out about it⁸ and it flourishes in a

-
- 1 Law Commission of India, One Hundred and Seventy Ninth Report – Part I - *On the Public Interest Disclosure & Protection of Informers*, December 2001, Chapter II, (2). *Phenomenon of Corruption: Causes and effects*, at p.7, para 1, available at <http://lawcommissionofindia.nic.in/reports/179rpt1.pdf> (last accessed on May 22, 2016).
 - 2 See, Sanjeev Gupta, Hamid Davoodi, Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, IMF Working Paper, WP/98/76, International Monetary Fund, available at <https://www.imf.org/external/pubs/ft/wp/wp9876.pdf> (last accessed on May 22, 2016).
 - 3 See, Margaret Bruce and Arvinder Sambei, *Whistleblowing Around the World Law, Culture & Practice*, COMMONWEALTH LAW BULLETIN, Vol. 32, Issue No. 2, 2006.
 - 4 See, *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2295; *SP Gupta v. Union of India*, AIR 1982 SC 149.
 - 5 See, United Nations Convention against Corruption (UNCAC), pg.26, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last accessed on May 22, 2016).
 - 6 *Corruption and Development*, United Nations Development Programme (UNDP), available at http://www.anticorruptionday.org/documents/actagainstcorruption/print/materials2012/corr12_fs_DEVELOPMENT_en.pdf (last accessed on May 22, 2016).
 - 7 *A Guide to the World Bank*, World Bank, World Bank Publications, 2011, 3rd Edition (illustrated), ISBN 08213 86573, pg. 165.
 - 8 Transparency International, *Whistleblowing*, available at <http://www.transparency.org/topic/detail/whistleblowing> (last accessed on May 22, 2016).

culture of inertia, secrecy and silence, then the problem becomes worse and in many cases damage is beyond repair.⁹ Consequently, United Nations' Convention Against Corruption (UNCAC) was signed on 9th December 2003,¹⁰ as being the only legally binding universal anti-corruption instrument. India has ratified it on 9th May, 2011.¹¹ Article 33 of UNCAC states that:

*"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."*¹²

It encourages states to provide protection against 'any unjustified treatment', and is thus not confined to physical threats or dismissal. Many legal systems have measures to cover crude forms of retaliation (e.g. life threats, abduction etc.) in the form of substantive laws (such as the Indian Penal Code, 1860), but there may be a gap as regards more subtle forms, which can have equally serious consequences (e.g. by forcing resignation). Article 33 requires states to consider adopting appropriate measures to protect whistleblowers because they play an important role as legal-monitors, they are frequently the victims of retaliation.¹³ Article 33 of UNCAC, has extremely wide scope, which may include any infinite list of

9 See, Kofele-Kale, Ndiva, *Change or the illusion of change: the war against official corruption in Africa*. GEO. WASH. INT'L L. REV. 38 (2006): 697.

10 See, United Nations Convention against Corruption Signature and Ratification Status, available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last accessed on May 22, 2016).

11 UNCAC Signature and Ratification Status as of 1 December 2015, available at <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last accessed on May 25, 2016).

12 Complying with Article 33 UNCAC, available at <http://www.pcaw.org.uk/files/whistleblowingUNCAC.pdf> (last accessed on May 22, 2016).

13 See, Rebecca L. Dobias, *Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?*, vol. 13, FEDERAL CIRCUIT BAR JOURNAL, 117 (2003) (discussing a 2000 study by the Merit Systems Protection Board which revealed that one in fourteen federal employees experienced retaliation after reporting government misconduct, fraud, waste, or abuse (last accessed on May 22, 2016).

different forms of mistreatment that can be anticipated.¹⁴ What may be an appropriate measure to provide protection for people to report corruption will depend on the cultural, social and legal frameworks that apply in that particular state.

A key challenge in preventing and fighting corruption is to detect and expose bribery, fraud, theft of public funds and other acts of wrongdoing. People are often aware of misconduct but are frightened to report it. Public inquiries into major disasters and scandals have shown that such a workplace culture has cost lives, damaged livelihoods, caused thousands of jobs to be lost and undermined public confidence in major institutions.¹⁵

To overcome that and to promote a culture of transparency and accountability, a clear and simple framework should be established that encourages legitimate reporting of corruption and other malfeasance and protects such "whistleblowers" from victimization or retaliation.¹⁶

Definition and Need for Whistle Blower Protection in India

Defining Whistle- Blowing

The concept of whistleblowing can be defined as raising a concern about a wrong doing within an organization. The concern may be a genuine concern or not, about a crime, criminal offence, miscarriage of justice, dangers to health and safety and of the environment – And the cover up of any of these. Whistleblowing is also taken to mean disclosure by organization members about matters of ‘public interest’—that is, suspected or alleged wrongdoing that affects more than the personal or private interests of the person making the disclosure.¹⁷

14 Whistleblower Protection & UNCAC, Transparency International, at p 6 para 2.5, available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/ti_report/ti_report_en.pdf (last accessed on May 25, 2016).

15 United Nations Office on Drugs and Crime, The Global Program Against Corruption- UN Anti- Corruption Tool Kit, available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020658.pdf>.

16 Food and Agriculture Organization, Addressing corruption in the tenure of land, fisheries and projects, available at <http://rightslinklao.org/wp-content/uploads/downloads/2014/12/Tackling-corruption.pdf> (last accessed on May 20, 2016).

17 A. J. Brown, Whistleblowing Legislation in Queensland, available at [https:// www.griffith.edu.au/business-government/centre-governance-public-policy/publications/whistleblowing/publications/?a=195497](https://www.griffith.edu.au/business-government/centre-governance-public-policy/publications/whistleblowing/publications/?a=195497). (last accessed on May 22, 2016).

Black's Law Dictionary, defines a "whistleblower" as meaning "An employee who reports employer wrongdoing to a governmental or law-enforcement agency"¹⁸. Federal and state laws protect whistleblowers from employer retaliation." A whistleblower is sometimes described as an 'internal witness', or as a person making 'public interest disclosure'¹⁹, or 'protected disclosure'²⁰ or giving 'public interest information'²¹.

In the words of *Calland & Dehn*, whistleblowing is now used to describe the options available to an employee to raise concerns about workplace wrongdoing.²² The test is not the whistleblower's subjective motives or ethics (complaints or grievances) but the whistleblower's perception or reason to believe that there has been wrongdoing. The definition given by *Near and Miceli*²³ 'the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action'. A whistleblower who wishes to disclose bribery, corruption and patronage networks may live in a dictatorship with no rule of law, governed by secrecy, fear, reprisal and death.²⁴ It refers to the process by which insiders, called 'whistleblowers'²⁵, go public with their claims of malpractices by, or within, organizations - usually after failing to remedy the matters from the inside, and often at great personal risk to them and it can be said to be a

18 Black's Law Dictionary, p.1327 (Bryan A. Garner ed., 8th ed., West 2004).

19 See, eg, Whistleblowers Protection Act 1994 (Qld) Schedule 6.

20 See, eg, Protected Disclosures Act 2000 (NZ) Section 6(2).

21 See, eg, Public Interest Disclosure Bill 2007 Section 7.

22 Richard Calland and Guy Dehn, *Introduction - Whistleblowing Around the World: the State of the Art*, available at, <http://www.u4.no/recommended-reading/whistleblowing-the-state-of-the-art-the-role-of-the-individual-organisations-the-state-the-media-the-law-and-civil-society/downloadasset/2018> (last accessed on May 22, 2016)

23 See, Janet Near & Marcia Miceli, *'Organizational Dissidence: the Case of Whistleblowing'* (1985) 4 JOURNAL OF BUSINESS ETHICS1, 4; adopted by, eg, Brown, Whistleblowing in the Australian Public Sector.

24 Estanislao Oziewicz, *Polonium is Costly, Undetectable, Trillion Times More Toxic than Cyanide*, globeandmail.com, 2 December 2006, available at <http://www.theglobeandmail.com/news/world/polonium-is-costly-undetectable-trillion-times-more-toxic-than-cyanide/article18179025/> (last accessed on May 22, 2016).

25 Mansbach, Abraham, *Whistleblowing as Fearless Speech: The Radical Democratic Effects of Late Modern Parrhesia, Whistleblowing and Democratic Values*, ed. by David Lewis & Wim Vandekerckhove, The International Whistleblowing Research Network, November 2011. ISBN 978-0-957138407.

form of dissent²⁶. Sometimes the cost of such valiant efforts is just too high to pay.

In, *Indirect Tax Practitioners Association v. R. K.Jain*,²⁷ the appellant levelled serious allegations against officers of Health Department in which he was working. His exposure of corruption was not through media but by proper representation to appropriate authority. Unfortunately it was not done. This generally creates a serious personal security threat to whistle blower. Thus the Supreme Court in this case, observed that

A whistleblower is a person who raises a concern about wrongdoing occurring in an organization or body of people. Usually this person would be from that same organization. The revealed misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organization) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues). Most whistleblowers are internal whistleblowers, who report misconduct on a fellow employee or superior within their company.

A definitional issue relates to the motivations of the whistleblower. Fletcher, Sorrell and Silva, for instance, assert that the whistleblower must blow the whistle for the right moral reasons.²⁸ However, author argues that, provided the whistleblower is acting in the public interest it is of little importance if the informant's motivations are not entirely pure. That is, even if the whistleblower is driven by anger, spite or even dislike for the person against whom they are making the complaint, the more important issue is the stopping of illegal or corrupt activities.

26 W.C Redding, Rocking boats, blowing whistles, and teaching speech communication, 1985 COMMUNICATION EDUCATION, 34, 245-258; J.W Kassing, From the look of things: Assessing perceptions of organizational dissenters, MANAGEMENT COMMUNICATION QUARTERLY, February 2001, 14: 442-470.

27 (2010) 8 SCC 281.

28 Fletcher, JJ, Sorrell, JM, and Silva MC, Whistleblowing as a Failure in Organizational Politics, ONLINE JOURNAL OF ISSUES IN NURSING, Dec 31, 1998.

The Supreme Court has observed in the case of *Manoj H. Mishra v. Union of India & Ors*,²⁹ that

One of the basic requirements of a person being accepted as a “whistle blower” is that his primary motive for the activity should be furtherance of public good. In other words, the activity has to be undertaken in public interest, exposing illegal activities of a public organization or authority.....that every informer cannot automatically be said to be a bonafide whistleblower. A whistleblower would be a person who possesses the qualities of a crusader. His honesty, integrity and motivation should leave little or no room for doubt. It is not enough that such person is from the same organization and privy to some information, not available to the general public. The primary motivation for the action of a person to be called a whistleblower should be to cleanse an organization. It should not be incidental or byproduct for an action taken for some ulterior or selfish motive.

In the above case, the civil suit was filed by Mishra from the Power Project at Surat, Gujarat, he was working as a tradesman at the power-plant, when one night Surat faced massive flooding inside the complex and thus Mishra wrote a letter to the editor of Gujarat Samachar mentioning flooding inside the nuclear facility demanding an inquiry by a high-level committee but, he was sacked by the inquiry committee for criticizing the project and passing confidential information to the media. The Supreme Court says that Mishra breached confidentiality agreement by alleging about corruption in the organization.

This judgment according to author is unacceptable as truth should prevail in all circumstances and personal interest and ulterior motives of author should not be taken into consideration.

Constitutional Provisions Relating To Whistle Blowing

The strongest justification for allowing the use of whistle blowing is that the people of India have the right to impart and receive information. The right to impart and receive information is a species of the right to freedom of speech and expression guaranteed by Article 19(1) (a) of the

²⁹ (2013) 6 SCC 313.

Constitution of India. A citizen has a Fundamental Right to use the best means of imparting and receiving information. The State is not only under an obligation to respect the Fundamental Rights of the citizens, but also equally under an obligation to ensure conditions under which the Right can be meaningfully and effectively be enjoyed by one and all.

In *State of U.P. v. Raj Narain*,³⁰ Mathew, J. eloquently expressed this proposition in the following words, “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”. Similarly in *Dinesh Trivedi v. Union of India*,³¹ the court observed that in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. To ensure that the continued participation of the people in the democratic process, they must be kept informed of the vital decisions taken by the government and the basis thereof.

A public servant may be subject to a duty of confidentiality however; this duty does not extend to remaining silent regarding corruption of other public servants. Society is entitled to know and public interest is better served more if corruption or maladministration is exposed. The Whistleblower laws are based upon this principle.

Article 21 enshrines right to life and personal liberty. The expressions “right to life and personal liberty” are compendious terms, which include within themselves variety of rights and attributes. Some of them are also found in Article 19 and thus have two sources at the same time. In *R.P. Limited v. Indian Express Newspapers*³² the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression “liberty” must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to

30 (1975) 4 SCC 428.

31 1997 (4) SCC 306.

32 AIR 1989 SC 190.

expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know, which includes a right to receive information. The ambit and scope of Article 21 is much wider as compared to Article 19(1) (a).

Article 19 and Article 20 justify the act of the whistleblowers hence, the method whereby a whistleblower may uncover the corrupt activities of the others must be channelized and our legislators must provide the people of India a law which protects him/her from being victimized, which is mostly eminent in such cases.

Need for Legislation for protection Whistle Blowers

Whistleblowing is an important public policy issue for two major reasons. Integrity in government relies on the effective operation of a range of 'integrity systems' for keeping institutions and their office-holders honest and accountable.³³ Within these systems, few individuals are better placed to observe or suspect wrongdoing within an organization than its very own officers and employees³⁴. One of the most direct methods of shining light on corruption is whistleblowing. We often think about democracy only as a political system where we elect those who will make laws that affect us. Yet everyday decisions that are made in all kinds of organizations impact on us just as much. Therefore we have to know when decisions taken in organizations are going to affect us in ways that differ from the official organizational discourse. Whistleblowing plays a role in providing that knowledge & thus is a means to democracy. From exposing multi-million dollar financial scams to dangerous medical practices; whistleblowers play a crucial role in saving resources and even lives.

In the initial beginning of any corrupt activity, there are some people who don't want to participate in that activity but they are forced, as they are afraid of the consequences of speaking the truth and silence seems to be the best way out, but when those people without thinking about the

33 See, A.J. Brown, *Putting Administrative Law Back into Integrity and Putting the Integrity Back into Administrative Law*, (2007) 53 Australian Institute Of Administrative Law Forum 32.

34 See, Alexander Jonathan Brown (ed). *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organizations* (ANU E Press, 2008).

consequences, tell the truth then, to put in the words of Nobel Laureate, Czeslaw Milosz, “when people unanimously maintain a conspiracy of silence, one word of truth sounds like a pistol shot,”³⁵ for which they are bound to suffer retaliation, of various degrees, in return. They commonly face retaliation in the form of harassment, firing, blacklisting, threats and even physical violence, and their disclosures are routinely ignored.

As blowing the whistle carries high personal risk, particularly when there is little legal protection against dismissal, humiliation or even physical abuse. Controls on information, libel and defamation laws, and inadequate investigation of whistleblowers’ claims can all, deter people from speaking out. Individuals reporting incidents of bribery or corruption faced numerous hurdles, including verbal threats, physical violence, and ostracism. Others encountered workplace retaliation. Confronted with these risks, many potential whistleblowers chose to remain silent. Whistleblowers are less likely to report workplace misconduct when their employers do not provide clear internal reporting channels. And in some settings, whistleblowing carries connotations of betrayal rather than being seen as a benefit to the public. Ultimately, societies, institutions and citizens lose out when there is no one willing to cry foul in the face of corruption.

The purpose of whistleblower protection is to encourage people to report crime, civil offences (including negligence, breach of contract, breach of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against victimization, dismissal and other forms of reprisal. Whistleblowers need to be given adequate legal protection if they are to expose the wrongdoings, to the public or external parties that are occurring in one of the agencies of the government and/or an external organization that is violating the law does regulations of the government.

Legal Development of Whistle Blower Protection System

In India, Mr. N. Vittal, who was the Chief Vigilance Commissioner in 1993, initiated the whistleblower protection legislation. He requested via a letter dated 24/8/1999 to Law Commission to draft a Bill encouraging the disclosure of corrupt practices by public functionaries and protecting

35 Czeslaw Milosz - Nobel Lecture, Available at http://www.nobelprize.org/nobel_prizes/literature/laureates/1980/milosz-lecture.html (last accessed on May 22, 2016).

honest persons making such disclosures. The Law commission headed by Justice, B.P. Jeevan Reddy submitted a report on the “Public Interest Disclosure Bill”, and submitted it on 14.12.2001 to tackle this problem.³⁶

Meanwhile, the absence of legislation on protection for whistleblowers was clearly felt by the entire nation when National Highways Authority of India (NHAI) engineer Satyendra Dubey was killed after he wrote a letter to the office of then P.M. Shri. Atal Bihari Vajpayee, detailing corruption in the construction of highways. In the letter, he had asked specifically that his identity be kept secret. Instead, the letter was forwarded to various concerned departments without masking Dubey's identity. Dubey's murder led to a public outcry at the failure to protect him.³⁷

The GOI passed the Public Interest Disclosures and Protection of Informers Resolution, 2004 designating CVC as the nodal agency to handle complaints on corruption. Over a year later, Manjunath Shanmugham, an IIM graduate and a sales manager of the Indian Oil Corporation was murdered on 19th Nov, 2005 for honestly carrying out his duties i.e., exposing the racket of adulteration of petrol and the mafia behind it. This incident has shocked the entire nation and has shaken the confidence of thousands of aspiring officers. This brought renewed focus on need for a law to protect whistleblowers.

It has taken more than 11 years, after Law commission submitted its report on the subject, for the bill to become, the Whistle Blowers Protection Act, 2011, which was passed on 9 May 2014, after receiving president assent but the irony is, it is yet to come into force.

Whistle Blower Protection Act, 2011

The Act was enacted to provide a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power or willful misuse of discretion against any public servant and to provide safeguards against their victimization.

36 Law Commission of India, 179th Report, at p 2, available at <http://lawcommissionofindia.nic.in/reports/179rpt1.pdf>. (last accessed on May 22, 2016).

37 *India doesn't have a law to protect whistleblower*, March 29, 2010, TIMES OF INDIA, available at <http://timesofindia.indiatimes.com/india/India-doesnt-have-a-law-to-protect-whistleblower/articleshow/5736903.cms> (last accessed on May 22, 2016).

As per §4 any public servant or any other person or non-governmental organization can file a complaint under it. Such a complaint has to be filed to the competent authority. The section further provides that no anonymous complaint will be admitted and it is mandatory for the public servant to disclose his identity. All anonymous whistleblower complaints or complaints that don't indicate the identity of the public servant (accused) will be treated as garbage. This provision has been inserted to avoid frivolous and vexatious complaints. Anonymity has practical consequences for the whistleblower. It protects the weak that are unable to protect themselves from powerful institutions and encourages the exposure of wrongdoing. It is submitted that the anonymous complaints, if accompanied by sufficient evidence, should be taken cognizance of and in that case, it would be easier to protect the complainant. If an anonymous complaint is received by the Competent Authority, and the facts mentioned in the complaint and the supporting documents reveal a prima facie case, the Competent Authority should not reject it only for want of identity of the complainant. Anonymous complaints, if substantiated, would make the task of the Competent Authority easier as it would be less worried on the aspect of protecting the identity of the complainant which is an important objective of the Whistleblower Protection.

The importance of protecting the identity of a whistleblower was also appreciated in the case of *Manjeet Singh Khera v. State of Maharashtra*,³⁸ the apex court observed:

There are many cases, where certain persons do not want to disclose the identity as well as the information/complaint passed on them to the Anti-Corruption Bureau. If the names of the persons, as well as the copy of the complaint sent by them are disclosed, that may cause embarrassment to them and sometimes threat to their life.

The Hon'ble Supreme Court has legitimized the practice of anonymous whistleblowing which is a great boon for anonymous whistleblowers in India, with its 20th November, 2014 order.³⁹

Further, the Act⁴⁰ requires the whistleblower to make a disclosure

38 (2013) 9 SCC 276.

39 Center for PIL v. Union of India, (2015) 2 SCC 362.

40 See, Whistleblower Protection Act, 2011, Section 4.

specifically naming the public servant responsible for or involved in the wrongdoing. The whistleblower is also required to submit supporting documents and other material in support of his or her disclosure. It is submitted that these provisions put the burden on the potential whistleblower that might not have all the data. This will probably mean as if the whistleblower is taking on the role resembling that of an investigating agency or a public prosecutor, for which the State will neither pay him, nor recognize him, nor accord him special status, protection or extent assistance of any kind. It is further submitted, that the above mechanism is inherently contradictory to the main intention of the statute. The complainant is making the disclosure in the public interest; therefore, undue burden should not be placed on him/her to provide proof to substantiate his/her case. Moreover, it would be unreasonable to expect a private citizen, who is the sufferer or at the receiving end having minimal resources at his/her disposal, to place before the Competent Authority proof sufficient to substantiate the complaint. The Competent Authority may have a reasonable expectation from the complainant, i.e., he/she should make out a prima facie case, and subsequently, the Competent Authority should follow up the complaint to its logical conclusion.

Section 5 of the Act provides that the Vigilance Commission shall not reveal the identity of the complainant to the head of the organization except if it is of the opinion that it is necessary to do so. This provision is a virtual death knell for a potential whistleblower. The main concern is that does not specify the conditions under which it may become necessary to reveal the name of the complainant and that it leaves the Competent Authority with wide scope of discretion in this regard. Further, it may make it very difficult to keep the identity of the complainant secret from the person/organization against whom the complaint is filed. The protection of the identity of the complainant is pivotal to the successful implementation of Whistleblowing. In order to make sure that the interests of the complainant are protected, it is submitted that the identity of the complainant should not be revealed by the Competent Authority to the Head of the Department, at least not without the written consent of the complainant.

Under this Act, complaint can be filed against public servants relating to the actual commission or attempt to commit an offence under the Prevention of Corruption Act, 1988 which provides for offences such as acceptance of gratification by the public servant of any amount other than legal

remuneration or doing of any act which they are not otherwise authorized to do. Complaint can also be filed for willful misuse of power or willful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party or for a criminal offence.⁴¹ It is submitted that expression 'willful misuse of power or discretion by a public servant' is vague in itself as misuse of power and discretion can never be unintentional. Further, acts such as 'willful maladministration', 'human rights violations' and wrongdoings that may have adverse effect on 'public health, safety or environment' has been deleted despite the law commission recommendation.

A complaint in writing or electronically can be filed to the designated competent authority under the Act which are the PM/CM for Ministers, Chairman/ Speaker of legislature for MPs/MLAs, High Court in relation to any subordinate judge, Central/State Vigilance Commissions/other designated authority, for employees of Central & State Government organizations or any other appropriate competent authority to be designated for Armed Forces/ forces charged with the maintenance of public order/ any intelligence organization or any person connected with the telecommunication systems for these organizations.

Section 6(4) of the Act prohibits the Competent Authority from questioning, in any inquiry under this statute, any bonafide action or bonafide discretion (including administrative or statutory discretion) exercised in discharge of duty by the employee. It is submitted that no parameters have been provided as to ascertain, whether the alleged action amounts to bonafide action or bonafide use of discretion or not, hence in the absence of which leaves the room for foul play to be committed with malafide intentions.

The Section 8 of the Act which exempts certain matters from disclosure, if such question or document or information is likely to prejudicially affect the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence and the authority to determine as what constitutes "likely to prejudicially affect" the above mentioned grounds is the state and central government itself through the Secretary to the Government of India or the Secretary to the

41 Section 3(d), The Whistle Blower Protection Act, 2011.

State Government, as the case may be. The most astonishing part of this provision is that the decision taken by them as to what prejudicially affect and what does not is, by the reason of statutory fiction is binding and conclusive. Therefore, the government has the authority to determine as to what constitutes sensitive information and what does not and the decisions taken under section 8 are unchallengeable. It is submitted binding and conclusive powers to the Secretary to the Government of India or the Secretary to the State Government, to certify that a document is of the nature specified in clause 8(a) and (b), is inappropriate since the RTI Act clearly states what information can be given.

The Act does not provide a time limit: - (i) for conducting the discreet enquiry; or (ii) for inquiry by the head of the organization/office; 5(2), 5(3) respectively, of the Act, but grants discretion to the competent authority, to provide a time frame for the inquiry. It is submitted that the absence of time limit in the statute, will retard the pace of disposal of cases and thereby defeating the objective of the Act itself. Such provision is essential to ensure the effective implementation of this statute because the malady which presently affects the country's system is not the absence of statutes, but rather their non-effective/lax implementation.

Protections provided by the Act are concealment of identity of complainant and protection against victimization of complainant or anyone who has rendered assistance in inquiry. It also makes provision for police protection for complainant, witness or anyone who has rendered assistance in the inquiry.⁴² However, it also provides for imprisonment of 2 years in case of frivolous and vexatious complaints.

It is submitted that in terms of imprisonment, the bar is too high. In fact, it acts as a big deterrent for anybody to even use the Act. There are lot of applications which are filed in the Supreme Court and the High Courts which are frivolous, which are misconceived, but the court does not send those people to jail. It usually just fines them. Therefore, "Currently the issue, now, is that there are whistleblowers. Maybe, there are not enough whistleblowers, but we do have a lot, I mean lot of corruption." So, the real question is how to make sure that people who find fault with the functioning, in terms of real corruption happening can come forward without fear of victimization or suffering any consequences. And, at the same time, we need to make sure that honest officers are not unnecessarily dragged.

42 Sections 10-14.

That is why a clause to penalize the people for mala fide and knowingly false and misleading complaints is inevitable. The provision for penalizing frivolous/ malafide complainants is acceptable; but the quantum of punishment prescribed in the Act is not at all acceptable. It will not only be a major deterrent for the prospective whistleblowers, but also increase the possibility of misuse of this provision, especially in cases where the accused is high and mighty and is able to influence the decision as to whether a complaint is frivolous/ malafide. There may be a case where the complaint is not proved beyond reasonable doubt or a complaint is not found to be sustainable or a complaint is dismissed for other reasons, it should not be, termed as frivolous/ malafide, it should be expressly mentioned in the act as an explanation. It is submitted that whether a disclosure is frivolous/ malafide or not, the Competent Authority should exercise great amount of caution and give primary importance to the fact whether the complainant, while making the disclosure, had based his/ her action on the documents/ information in his possession/ knowledge. Hence, the focus should be on the intention and not the outcome of the enquiry.

Whistle-Blowers Protection (Amendment) Bill, 2015

It amends Section 4 of the Act and takes away immunity from prosecution of the whistle-blower under the Official Secrets Act and at the same time has also included 10 exemptions in Section 4 (1A), whereby any matter that is certified by it as not being in "public interest" or affecting the "sovereignty and integrity of India" or related to "commercial confidence" or "information received in confidence from a foreign government" will remain outside ambit of inquiry under the law.

The author is of the opinion that instead of imposing such blanket ban the government of India should develop a mechanism to keep such disclosures and inquiry confidential.

Suggestions

The Whistleblower Protection Act, 2011 took almost 4 years to pass, as it was first introduced on August 26, 2010, and finally fully ratified on May 12, 2014, but still the Act lacks teeth and therefore needs to be vigorously debated in the public and thoroughly revised so that it doesn't become yet another cosmetic exercise.

The Act should provide for specific and exhaustive definition of the term "Victimization". The protection against victimization should be more

specific and exhaustive. The Clause detailing punishment for frivolous disclosures ought to be removed. This clause is a clear deterrent to those making Public Interest Disclosures and the human rights defenders, specifically. The Act does not provide an adequate definition of "frivolous disclosures" which leaves things open to manipulation. The Act should provide for cash rewards. The term "Complainant" should not be used as it reflects narrow thinking and prejudice against a person making the disclosure. Instead, the term "Whistle Blower" may be used.

The names of the whistle blowers should not be revealed even to the head of Government Department. By seeking to make the identity of the whistleblower a secret, the Act inadvertently creates conditions wherein anybody with that privileged information. Thus, the Act perversely endangers the Whistleblowers and sets the stage for various kinds of attacks and retributions.

There should be a specific mechanism for moving trials on a fast track. The action taken by the Competent Authority should be put in public domain. On receiving complaints, the Competent Authority should give a complaint number. The complainant should be apprised of the development and action completed at each stage so that he may be able to point out the deficiencies. The time limit as provided in Clause 5(3) of the Bill should be removed. The scope of disclosure should be widened to include complaints relating to illegal acts performed by contractors/suppliers directly or through their employees and/or hired persons. In Clause 10(1) of the Bill after the words "Central Government" and before the word "shall" the words "and the State Governments" may be inserted.

The CVC is not suitable to be the Competent Body under this Bill for the following reasons:-

- It has to seek permission to initiate enquiries.
- It does not have jurisdiction over politicians.
- It does not have resources and thus will need to outsource investigation.
- It only has advisory powers & thus cannot mandate enforcement of its own recommendation.
- The Appointment procedure for a CVC is non-transparent, and as seen from the past controversy over the present incumbent's appointment, may also lack moral authority.

- There are no provisions for transparency and accountability of the CVC in the CVC Act, or for the Competent Authority in this Bill.

Lack of timeline for investigation may be used to shield corrupt public servants. Further, long drawn investigation will render whistleblower protection (if needed) irrelevant. The burden of proof to prove victimization is on the whistleblower. In case of grievous hurt to the whistleblower, a special task force under the Competent Authority should investigate issues being probed by the whistleblower.

The act provides for an arbitrary exemption in favour of judges of Supreme Court and judges of High Court and there is no mechanism to report against the acts of Prime Minister and Chief Minister. The author is of the opinion that no doubts it necessary to protect the integrity of such offices but if true and honest complaints have been filed against them same should be admitted. Truth should prevail in all circumstances. However, extra care should be taken in such cases to make sure that details of such complaint don't come in public domain.

Further, whistleblower must be provided an opportunity for rebuttal in case a complaint is closed based on preliminary investigation. Moreover the Act does not specify as to who will be 'Public Authority' under the Act, who is responsible for taking action against the complaint of the whistleblower.

Conclusion

The national motto - 'SatyamevaJayate' drawn from the Mundaka Upanishad is a noble principle anyone can aspire to be, but the irony is people of this country don't feel sufficiently emboldened to speak out, and those who did speak out have paid with their lives.

The Government and their agencies are duty bound to respect this motto. The conclusion is that whistleblower law assures to the people of this country, that high-placed government officials do not abuse the power of their positions. This would be a major breakthrough if the concept of independent counsel is included as a special prosecutor position, this position could be used to investigate individuals holding or formerly holding certain high positions in the government and rich businessmen, industrialists. Effective whistleblowing arrangements are a key part of good governance. Significant informer incentives and fraud deterrence ensure

whistleblower's continued vitality. Thus far, history has shown this to be a dynamic combination in combating fraudulent activities against the government.

A strong whistle-blower protection law in India would expose corruption, illegal and unethical activities in a way that reinforces faith in the system and also in ethical business practices.

Hence, author would like to sum up the conclusion by using the words the great Abraham Lincoln, metaphorically used, "the people can save their nation, if the government will allow them".

* * * * *

ROLE OF PIO UNDER THE RTI ACT, 2005: BOTTLENECKS IN GOOD GOVERNANCE

Dr. G. Shaber Ali*

“Openness fosters the fair administration of justice and like a watchdog, protects citizens from arbitrary state action”

Marie Deschamps¹

Abstract

Right to information is a tool in the hands of public to bring good governance in government administration. To achieve transparency, accountability in government administration our Indian Parliament introduced a new legislation, RTI Act, 2005. This Act, 2005 is a munificent legislation which imposes duty on the Public Information Officer to provide information to the informant. The PIO is directly connected with the public in providing information. It is through him we can achieve the idea of good governance and transparency in administration. PIO performs his regular duties besides providing information whenever requested. He is liable to pay penalty in case if he fails to provide information. But there is no such liability imposed on appellate or his superior authority who is the main administrator of the department. The author being a PIO, highlights the difficulties faced in providing information due to various reasons, as a result of which, the object of good governance is defeated. Indian Citizens, who are well aware of the Act, try to misuse it for vested interests, personal benefit or to harass the opponent. There is a need to prevent such misuse. Submission of vague requests for information by complainants is one such problem. Further these complainants never collect the information requested. All these hindrances defeat the object of the Act and wasting the valuable time of PIO. The author outlines the need to remove these hurdles to make the Act more efficient in practice, to help the PIO in bringing real transparency, accountability, and good governance.

Introduction

The most neglected right in democratic countries is the right to information. This right has been disregarded for a long time. In the last few decades, freedom of information¹ has been recognized as an internationally protected human right and all societies across the world have moved away

* Associate Professor, Head of the Department, LL.M., & Research Coordinator, VM Salgaocar College of Law, Panaji, Goa.

1 Writing for the majority in *Canadian Broadcasting Corp v. Canada* (Attorney General) (2011) SCR 19, put up in <http://www.freedominfo.org/resourcecs/freedominfo-org-list-quotes-freedom-information/> (last accessed on May 5, 2016).

from opaque and secretive administrative system to open and transparent system.²

Informed citizens are need of the society. Information is essential that all men and women, in all social and cultural environments, should be given the opportunity of joining in the process of collective thinking thus initiated, for new ideas must be developed and more positive measures must be taken to shake off the prevailing sluggishness. The greater the access of the citizen to information, the greater would be the responsiveness of government to community needs. Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government and its officials are ‘trustees’ of the information for the people³. Being the trustee they have a duty/obligation to preserve the information and provide the citizens whenever they request for information, but they have no right to destroy or damage such information.

In the present Indian scenario the governance problems have been aggravated and accentuated by fracturisation of political parties which are more individual based and less ideology founded. Further no moral scruples, rank opportunism among the political leaders as well as rank and files has dictated the course of politics for decades, now leading to government instability, administrative mess, policy paralysis and programmatic cardiac arrest. Today’s politics and politicians have combined to put good governance of the country in an intensive care unit – sick, disabled and mentally and physically handicapped.⁴ In order to correct and keep the politics and politicians within their limits, and to achieve the idea of good governance right to information is a weapon and instrument in the hands of public.

To achieve the object of good governance in government administration there is a need for access to information to all the citizens. Informed citizens can take part in government functioning and decision making. Once the government activities are open, transparent, accountable, accessible, such government show the way towards good governance in its

2 Kumar Niraj, *Handbook on Right to Information Act, 2005* (Bharat Law House, New Delhi, 3rd Ed. 2011) at 82.

3 Ibid., at 96.

4 Baghel CL, Kumar Yogendra, *Good Governance Concept and Approaches*, (Kanishka Publishers, New Delhi, 2006) at 61.

administration. Good governance is the essence of every democratic set up. The concept of right to information flows from the law of the land in our country that is the Constitution of India.

Constitutional aspects of Right to Information

India is one of the most important and true democratic countries in the world. One of the features of true democracy is providing information to the public in the administrative set up of the government at all level that is National, State, District and Village levels.

‘Democracy is based essentially on free debate and open discussions, for that government action in a democratic set up should be corrective. Democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential’.⁵ The Preamble⁶ of the Indian Constitution lays emphasis the principle of ‘democratic’ which is the basic to the constitution. The term ‘democratic’ signifies that India has adopted a responsible and parliamentary form of government which is accountable to an elected legislature. The Supreme Court has declared ‘democracy’ as the basic feature of the Constitution.⁷ The term accountable indicates obligation on the part of elected member to provide information in its operation and functioning.

Information as a tool to empower the public is explained by several traditional scripts and international associations. Information is the basis for knowledge that provokes thought and it leads to expression of their opinions. Freedom of expression is the running theme of democratic government.⁸

In *Dinesh Trivedi, MP and Others v. Union of India*,⁹ the Supreme Court dealt with right to freedom of information and observed ‘in modern

5 Bhagwati J, in *Maneka Gandhi v. Union of India* (AIR 1978 SC 597) has emphasized on the significance of the freedom of speech and expression under Ar.19 (1)(a) of the Indian Constitution.

6 Preamble to the Indian Constitution: We the people of India solemnly resolved to constitute India in to Sovereign, Secular, Socialistic, Democratic Republic.....

7 *SR Bommai v. Union of India* AIR 1994 SC 1918.

8 Kumar Niraj, *Supra* note 2 at. 48.

9 (1997) 4 SCC 306.

constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare'. Further the court observed "Democracy expects openness and openness is concomitant of a free society and the sunlight is the best disinfectant"

Information is currency that every citizen requires to participate in the life and governance of society. In a democratic country greater the access, greater will be the responsiveness, and greater the restrictions, greater the feeling of powerlessness and alienation.¹⁰

Right to information or providing information to the citizens is also incorporated as a fundamental right under Part III of the Indian Constitution. Fundamental rights are basic rights which are recognized and guaranteed as the natural rights. The expression 'freedom of speech and expression' in Art. 19(1)(a) has been held to include right to acquire information and disseminate the same. The right of citizens to obtain information on matters relating to public acts flow from the Fundamental Rights enshrined in Art. 19 (1)(a). Right to information is a facet of the right to freedom of speech and expression. Thus it is indisputably is a Fundamental Right.¹¹

In *People's Union for Civil Liberties*, the Supreme Court dealt with this aspect of the freedom elaborately and held that securing information on the basic details concerning the candidates contesting for elections for Parliament or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Art. 19 (1)(a).¹²

The Supreme Court has given a broad dimension to Art. 19 (1) (a) by laying down that freedom of speech involves communication, receipt of information both. Communication and receipt of information are the two sides of the same coin. Right to know is a basic right of the citizens of a free country and Art. 19(1) (a) protects this right. The right to receive information springs from the right to freedom of speech and expression. Without adequate information a person cannot form an informed opinion.¹³

10 Ibid.

11 Jain MP, *Indian Constitutional Law*, (Lexis Nexis Butterworth Wadhwa, Nagpur, Reprint, 2011) at. 1081.

12 PUCL v. Union of India AIR 2003 SC 2363.

13 Jain MP, *Supra* note 11 at. 1083.

In *State of Uttar Pradesh v. Raj Narain*,¹⁴ the Supreme Court held that Art.19(1)(a) not only guarantees freedom of speech and expression, it also ensure and comprehends the right of citizens to know, the right to receive information regarding matters of public concern. The Supreme Court has underlined the significance of the right to know in democracy in the words “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 bearings. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one way, when secrecy is claimed for transactions which can at any rate, have no repercussion on public security”.

After Indian independence, the Constitution of India indirectly incorporated right to information within the ambit of democracy. Right to know or right to information is made as an integral part of fundamental right. There was no separate Central Legislation to deal with this concept. Some of the States in India made state level legislation to provide right to information to the public.¹⁵

There was an urgent need to provide easy access to information held by bureaucrats in the name of executive governments by making an effective enactment replacing the draconian Official Secrets Act, 1923, to make the government transparent and democracy meaningful. Further it was necessary to access government records to enlighten and entitle the people to fight the corruption and bring in peaceful progress.¹⁶ Meantime the Central government passed Freedom of Information Act, 2002. Finally the national Right to Information Act, 2005 received the assent of the President of India on 15th June, 2005. The Act formally came into force on 12th October, 2005. Various Rules¹⁷ and Regulations are made under this

14 AIR 1975 SC 865, 884.

15 State level legislations on Right to Information: Tamil Nadu and Goa passed their own acts in 1997, Rajasthan, Karnataka in 2000, Delhi in 2001, Maharashtra, Assam in 2002, Madhya Pradesh in 2003, and Jammu and Kashmir in 2004.

16 Supra note 2, at. 68, 69.

17 The Right to Information (Regulation of Fee and Cost) Rules, 2005, The Central Information Commission (Appeal Procedure) Rules, 2005, The Central Information Commission (Management) Regulations, 2007.

Act. The Act covers all Central Governments, State Government and local bodies as well as some private bodies.

Right to Information Act, 2005

RTI Act, 2005, the sun shine Act that gives tremendous power to the ‘aam aadmi’ to know where their hard earned money collected by government agencies through various means¹⁸ goes. Whether it is used in productive manner or not, has to meet its noble intentions.¹⁹ Making law is no use unless people are aware about this legislation. It is the duty of the government, social nonprofit organizations, and social activist and legal literates to create awareness and importance of this legislation in achieving the object of good governance in administration.

Preamble to the RTI Act, 2005 lays down that whereas the Constitution of India has established democratic republic, and where as democracy requires an informed citizenry and transparency of information. These are the vital for the functioning of democracy and to hold the government and its instrumentalities accountable to the governed.²⁰ Preamble of the Act indicates informed citizens and transparency are the vital for democratic country.

Salient features of the Act

The RTI Act, 2005 is a small piece of legislation, unique in many aspects. It consists of Four Chapters, divided in to thirty sections and two schedules.²¹ The RTI Act, 2005 basically has two parts that, is substantive law, and procedural law. Sec. 3 coupled with other provisions Sec.8, 9, 18, 19 and 20 of the Act deals with substantive law while Sec.6²² along with other provisions like Sec.7²³ of the Act deals with procedural law. Thus the Act is complete code in itself.²⁴

18 Like direct and indirect taxes etc.,

19 Supra note 2 at 127.

20 Barowalia JN, *Commentary on The Right to Information Act* (Universal Law Publishing, New Delhi, 3rd Ed. 2012) at. 20.

21 Schedule I deals with Form of Oath and Schedule II deals with Intelligence and Security Organizations established by the Central Government.

22 Sec. 6 of RTI Act 2005: Request for obtaining information.

23 Sec. 7 of RTI Act 2005: Disposal of request.

24 Supra note 2 at. 540.

The core enactment is that the citizen can obtain information he needed from public authorities. It is mandate of Sec. 3²⁵ and Sec. 4²⁶ of the Act to provide information to all the citizens.

Obligation is imposed on public authorities to maintain records, publish necessary information and also disseminate information suo motu to the public at regular intervals.

To provide information to the public from public authorities, the Act provides for designation of Public Information Officer (PIO) in each of the public authority institution at different level.²⁷ Similarly APIO²⁸ has to designate in every division and sub division of the administrative unit. Officers are appointed by designation among their existing staff.²⁹

The citizen seeking information may send the application to the APIO who will transmit it within 5 days to the PIO. The application so transmitted shall be attended to and disposed³⁰ of by the PIO within 30 days of its receipt. If entire information is not available he must make available so much information as is available with him and transmit within 5 days the rest of the application to the concerned PIO for disposal. If the information is partly made available and the rest is rejected, the PIO shall state the reasons thereof. The most important feature of this Act is that the information can be obtained within a fixed time of 30 days and if information relates to life or personal liberty then it can be obtained within 48 hours.

There are certain limitations or exceptions under Sec. 8 and 9 of the Act. This Act precludes the citizen getting such information as per these provisions. Sec. 24³¹ of the Act provides that nothing contained in this Act shall apply to the intelligence and security organizations specified in the Second Schedule to the Act. As a result, subject to these limitations, it is the

25 Sec. 3 of RTI Act, 2005: Right to Information: Subject to the provisions of this Act, all citizens shall have right to information.

26 Sec. 4 of RTI Act, 2005: This section deals with obligations of Public authorities, it also imposes duty on the authority to disclose information suo motu dissemination of information.

27 Sec. 5 of the RTI Act, 2005.

28 Assistant Public Information Officer.

29 Ibid.

30 Disposal means real and substantial disposal.

31 Sec. 24 of RTI Act, 2005: Act not to apply to certain organizations.

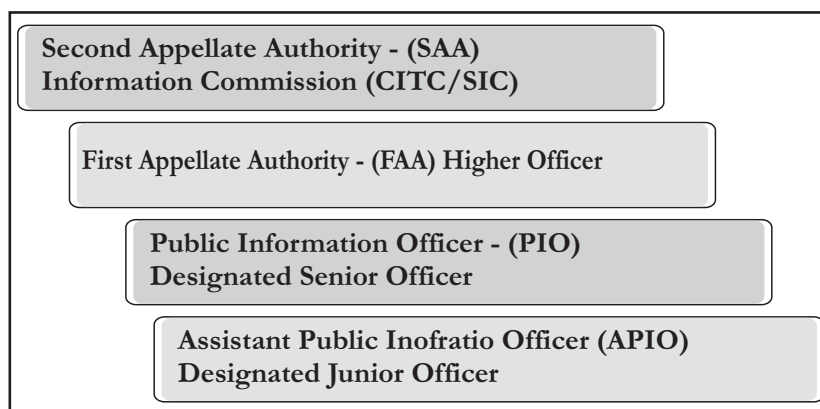
obligation of every public authority to provide information on request by the citizens.

The Act made provisions for the Constitution of Central Information (CIC)³² and State Information Commissions (SIC)³³ for the respective States as the appellate authorities and for monitoring the proper working of this Act.

Any unsatisfied applicants can prefer an appeal before the officer higher in status over the PIO. This appeal before the higher officer is called First Appeal. The higher authority is known as First Appellate Authority (FAA).³⁴

The next stage is Second Appeal that is the third stage. Second appeal is filed before the CIC/SIC. Information Commissioners powers are very extensive.³⁵ If the appeal is allowed commission may direct the PIO to furnish information or finds the PIO is at fault, the commission may levy on him heavy penalty³⁶ and also direct initiation of disciplinary proceedings³⁷ against him by the original Appointing Authority.

The mechanism created for making the information available to the citizen is four tiered commencing from APIO, above him PIO, then higher officer (FAA) and finally the Information Commission (second appeal). Refer the flow chart.



32 Sec. 12, 13 and 14.

33 Sec. 15, 16 and 17.

34 Sec. 19 of RTI Act, 2005.

35 Ibid.

36 Sec. 20 (1) of RTI Act, 2015.

37 Sec. 20 (2) of RTI Act, 2015.

The Commission while disposing of the complaint may in addition to grant the reliefs as applied for, may further issue general orders for rectifying the deficiencies in the system complained against by the citizens. The Commissions have power to supervise the work of Information Officers and call them the reports.

PIO and Bottlenecks in Administration

Public Information Officer (PIO) plays an important role in the implementation of RTI Act, 2005. He is the first person comes into contact with the public in providing information. Without him it is difficult to achieve good governance in government administration. The idea of good governance should start at this point. If PIO performs his duties and provides information to the public, it would lead to openness in the administration, promotes transparency in the government, and make the officers accountable to the public. Informed citizens can achieve the goal of good governance in administration. The RTI Act, 2005 contains various bottlenecks in the functioning of PIO. Due to this it is difficult to achieve the idea of good governance. The following are hindrances in the functioning of the PIO.

1. ***Designation of PIO and APIO:*** The Act provides for designation of PIO and APIO but not appointment. There should be one PIO in each public authority institutions at different levels. Similarly APIO has to be designated in every division and sub division of the administrative units. PIO and APIO are designated by public authority.³⁸ Almost all the administrative units, senior most officer of the department is designated as PIO. Besides performing his regular duties he has to provide information under the RTI Act, 2005. Senior most officers are not entitled for any monetary or other benefit for his designation as PIO. Further he fails to provide or reject to provide information liable for penalty under this Act. In order to avoid penalty majority of the times designated officer searching for information and fail to perform his regular duties. This may hamper the regular administration in the administrative setup.

38 Sec 5 of RTI Act, 2005: Designation of Public Information Officer: (1) Every public authority shall, within one hundred days of the enactment of this Act, designate as many officers as the Central Public Information Officers or State Public Information Officer, as the case may be, in all administrative units or offices under it as may be necessary to provide information to person requesting for information under this Act.

2. ***First Appellate Authority:*** PIO is working under the guidance and control of the Higher Authority (FAA). Higher Authority is incharge of the department or the institution. In case of non availability of information, records are not maintained, records are destroyed or information is not maintained, the PIO is liable and penalized by the appropriate authority. The RTI Act, 2005 does not impose any penalty on the Higher Authority (FAA) under whose control the PIO is working. This leads to injustice, indifference and inappropriate against the PIO. There is a need to relook at these provisions under the Act.
3. There is a need to designate a separate person who can take the responsibility in providing information to the applicant under the Right to Information Act, 2005. Further it is a necessary to prepare separate rules and regulations governing the administration of APIO's and PIO's (qualifications, disqualifications, leave, and other service conditions).³⁹
4. ***Concept of substantial interest:*** The Act failed to define the term 'substantial interest' as mentioned under Sec.2 (h)⁴⁰ while defining the term 'public authority'. This term should be defined in order to avoid any kind of misinterpretation by the advocates or judges.
5. ***Lack of Infrastructure available to information officer:*** This is an obstacle at present in which the various information officers suffer. Specially if the unit is small, and as they have their usual duties and do not have personnel as well as technical facilities, they are at disadvantage. It should be the concern of government. To make the RTI Act workable to provide facilities and infrastructure for the

39 Ali Shaber. G, *Right to Information Act, 2005 and its Ramification* Legal News and Views, (New Delhi) February 2009, at.6.

40 Sec. 2 (h) of Right to Information Act, 2005: Public Authority means any authority or body or institution of self government established or constituted –

- (a) by or under the Constitution
- (b) by any other law made by Parliament
- (c) by any other law made by State Legislature
- (d) by notification issued or order made by the appropriate Government, and includes any –
 - i. body owned, controlled or substantially financed
 - ii. Non-government organization substantially financed, directly or indirectly funds provided by the appropriate Government.

Public Information Officers.

6. ***Harassment of Public Authorities:*** One of the hurdles has been the use of RTI to promote revenge, ego booster, projection of NGO work and so on which causes the harassment of authorities. This is due to the ease with which an RTI application can be moved. There are chronic information seekers which is a hurdle in the effectiveness of RTI Act.
7. ***Question method can be tedious:*** Question- answer method has been used successfully by scholars and thinkers right from Ancient times. It has an unlimited potential. Studies on Parliamentary Questions after Independence bring out this special feature. But just providing the instrument of questioning to every Tom, Dick and Harry, irrespective of his character, motive can endanger the nation too. To ask a question without assigning any motive, reason etc. which though commendable theoretically acts as a hurdle. The bureaucrat is left to wonder as to all the possibilities and so will attempt to answer as to evade as much as possible and reveal the least. There may be a need to rethink and strike a balance on this point. There are bureaucrats who are willing to shed information easily but not under RTI Act. There is a need to relook at this hurdle and make it user friendly.
8. ***Quantum of Information:*** There is a charge that a single person moved a thousand of RTI applications. Though per se it is not a drawback, it shows that individuals may clog the system, depriving others and which may result in the collapse of the system. An individual in this technological age can copy-paste similar applications to numerous institutions.
9. ***Massive exercise:*** Sometimes an RTI application may require a massive exercise and massive man power. Providing information for the last twenty years by the applicant is massive exercise. Besides this now a days the researchers, project people are using the RTI provisions in collection of empirical data for their thesis/project/assignment. This may obstruct the objective and purpose of the present Act.

10. ***Cumbersome Exercise:*** RTI can be a cumbersome exercise in practice though theoretically it is merely at the tip of a pen. The cumbersome procedures that may be required to finally extract information may leave a genuine information seeker disgusted and discouraged. The system of appeals can be a deterrent for ordinary information seeker without expertise, determination, will to fight and penetrate the thick bureaucratic shell.
11. ***Collection of Information:*** After obtaining the information as requested by the applicant, if the applicant fails to come and collect the information or if the applicant comes to collect the same information after one or two years. No provisions are available under the Act whether to provide the information or refuse to do so. Further there is a need to fix time limit within which the applicant can collect the information.
12. ***Instrument in the hands of NGOs, Mass Media and Activists:*** The course travelled by the Act shows that it is an instrument in the hands of NGOs, Mass media and activists for getting information. While it has created tremendous dynamism and jurisprudence as a result of such activism, it is an evident that transparency and information do not come as a rule but has to be cracked using a legislative and judicial hammers created under the RTI jurisprudence. The Act has not found favour with ordinary information seeker at grass root levels. The legal history of the living law points to this bottleneck.
13. ***Antagonized Bureaucracy:*** RTI Act 2005 witnessed flooding of applications to obtain information, the bureaucracy has been antagonized. They look on it as weapon or as a personal attack on them. Psychologically the question method used by RTI applicants may cause antagonism in the person who is responsible to give access to information.
14. ***Politician and Bureaucrat nexus:*** The inherited past culture is not fostering accountability especially due to political interferences. The political manipulations and politicians and bureaucratic nexus have developed loopholes in the administration system there is a need to be plug the loopholes and bring legal reforms, which unfortunately India has failed to develop even after its Independence.

15. ***Collusion between Bureaucracy and Applicant:*** Sometimes RTI applications may start coming as a result of collusion between applicant and official for their own personal purposes. This may also lead to giving some information in the wrong hands for ulterior motives and benefits which are not at all helpful to public interest.
16. ***Request for Information that appears to hide a suspicious motive:*** Sometimes though the RTI application may be innocent, the purpose may appear suspicious which cause hesitancy in the authorities. For instance the names and addresses of women students passed from an institution over the last twenty years.
17. ***Missing Files:*** Since our system of filing has several loopholes, the missing files have been a device used by bureaucrats to avoid cumbersome answers. This problem was highlighted by NGOs from time to time.
18. ***Passing the Buck:*** after receiving the application the Public information officer try to pass the buck to other subordinate authorities or to the other related department to provide information. The application may move from pillar to post from one table to other table to avoid access to information.
19. ***Failure to develop Government Culture on Transparency:*** The RTI over the last one decade have failed to lift the veil from the Government. There are hardly any programmes to orient bureaucracy to pro active role in providing information. The accumulated culture of the past on secrecy is deep rooted in Government servants, which the new recruits acquire in a brief period of time. Just by providing a Chakra to penetrate the hard shell of centuries of inherited bureaucratic culture is not sufficient to make bureaucracy friendly and helpful towards RTI applicant. More programmes are needed for those who are cast with the duty to provide access to information.
20. ***Dawn of Accountability:*** One of the possible bottlenecks is the failure of law to bring about Accountability. This appears to be one of the bottlenecks at present. But given the course, it may be too early to rule out that bureaucrats may develop culture of

accountability out of fear rather than oppose it due to their antagonism or ingenuity to bypass the law. There is a need to relook at accountability in the near future rather than expect it to develop automatically.

21. ***Practical Regime:*** RTI claims that it is an Act to provide for setting out the practical regime of right to information for citizen. However the law does not seem to cater to a practical regime. It seems to assume that as a consequence of those provisions a practical regime will evolve, which may be a far off cry.

There is no doubt that the public having a right to avail information from the public authorities, certain times due to the above hurdles genuine information seekers are not in a position to access or avail the information. In order to implement the Act in letter and spirit, there is a need on the part of the law makers to verify the hurdles in implementation and bring suitable changes or amendments to make the Act more effective and efficient in application. In 2013 a Bill was introduced in the Parliament to exclude political parties under the purview of this Act.⁴¹ Fortunately the Bill was lapsed. We have to wait for the role of lawmakers and judiciary in this respect.

Conclusions

After independence Indian citizens are denied in providing information for a period of sixty five years. Right to Information Act is a step towards sharing and passing on information to the citizens. Citizens can take part in

41 The Right to Information (Amendment) Bill, 2013 was introduced in the Lok Sabha on August 12, 2013. The Bill amends the Right to Information Act, 2005. In June 2013, the Central Information Commission held six political parties to be public authorities under the RTI Act and hence subject to the transparency and information requirements under the Act. The amendment Bill removes political parties from the ambit of the definition of public authorities and hence from the purview of the RTI Act. The amendment will apply retrospectively, with effect from June 3, 2013. The Statement of Objects and Reasons of the Bill states that there are already provisions in the Representation of People Act, 1951 as well as in the Income Tax Act, 1961 which deal with transparency in the financial aspects of political parties and their candidates. It also adds that declaring a political party as public authority under the RTI Act would hamper its internal functioning and political rivals could misuse the provisions of the RTI Act, thus affecting the functioning of political parties. For more details refer to [http://www.prsindia.org/uploads/media/RTI%20\(A\)/RTI%20\(A\)%20Bill,%202013.pdf](http://www.prsindia.org/uploads/media/RTI%20(A)/RTI%20(A)%20Bill,%202013.pdf).

government decision/policy making. The right to information offers an invaluable tool, which every person in India can use to find out information that can make their lives better and valuable.

This Act leads to openness in the administration as the citizens would get information about various issues and would, thus promote transparency in the government, increasing the efficiency of the government by making officers accountable and ultimately reducing the corruption.⁴²

Right to information Act is well conceived. It is seen to be of great assistance to the people in the present context of administrative deficiencies and deviations coming for open debate, discussion or condemnation.

There is theoretical awareness of law among legal and academic circles, it has failed to produce a mass based effective awareness at the grass root level. The common men due to mass media projections especially through TV coverage may be aware of its usage in huge scams and scandals, but RTI law lacks awareness of how it can be effectively used at the rural level. Greater effort is needed to make it rural centred. For better and efficient implement of the Act at the grass root level there is a need to create awareness among the masses. As the Act has set a trend and acquired some dynamism, it is necessary to undertake an Audit of the Act to check its course, implementation and to identify obstacles. It is high time to verify the obstacles and to bring appropriate changes or amendments to make the law in effective implementation.

Law cannot function in vacuum. If sections of the society are deprived the benefit of law and are treated as second class citizen as if the law does not protect the liberty of individual, then it would be meaningless to say the rule of law prevails.⁴³

Right to information Act is the voice of so called voiceless in our society. It is necessary that everybody should to keep in mind that one should not be crazy about rights only and one should also be mindful about ones duties. Rights and duties are the two sides of a coin. Keeping in view the importance of duties the NGO's, mass media, activist and politicians should not misuse or use the act for their ulterior motives. If the Act is used properly it will achieve its objectives and it becomes a reality.

* * * * *

42 Supra note 2 at 537.

43 Ibid., at. 546.

RIGHT TO INFORMATION V/S INDEPENDENCE OF THE JUDICIARY: A RELOOK

Dr. Sairam Bhat*

Abstract

Transparency of public authorities, especially the 'Judiciary' is a key feature of good governance and an indicator of whether a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticizing those who govern it, and open to the enlightened participation of informed citizens in matters of public interest. The right to access official documents is also essential to the self development of people and to the exercise of fundamental human rights. Information is indispensable for the functioning of a true democracy. The citizens of a democratic country have the right to be kept informed about the country's current affairs and broad issues inclusive of political, social and economic issues. Free exchange of ideas and free debate are essentially desirable for the Government of a free country. A government which owes its legitimacy to the will of the people surely has a duty to be open about the information it chooses to use (or not use) in taking decisions on behalf of the population at large. The government's requirements in relation to taking private decisions need to be set against the wider rights of the public to information. Explosion of information and exclusion from information are two competing trends in the cosmos of human rights and democracy versus Governance by secrecy. In a developing continent like Asia, India has brought the Right to Information Act, 2005 [RTI] to make available access to information as a matter of 'right' and also to simplify access to information through a process. The Act in India is now more than ten years old. While no right is absolute, restriction on the right to information must be strictly scrutinized, the law is equal and hence neither the Judges nor the Judiciary can claim exception to the general rule of disclosure and transparent administration. Administration of 'justice' cannot be isolated from the political and social context in which it operates. In this view, the Judiciary needs to adjust their operation, fostering the right to public information and transparency, especially given the facets that in India, 'Judges are appointing themselves'. If the courts have to rid themselves of corruption, transparency should be the rule and secrecy the exception. Cases of disproportionate assets have nearly resulted in the impeachment of one Judge, and another Judge reluctantly resigning. This has resulted in curiosity and inquiry through the lens of RTI – with applications for information sought from the Apex Court. Of late, the Judges have refused to disclose their 'assets'; Judiciary has refused to disclose the appointment and transfer procedures and also has insisted that the Supreme Court rules prevail over the RTI Act/Rules. The issue of judicial accountability is now the priority of all discussions and debates. Unless the institution corrects itself- by ensuring maximum transparency- the independence of the Judiciary, which is the cornerstone of democratic values, will be eroded and the justice delivery mechanism will fail. Highlighting, the above issues

* Associate Professor of Law, National Law School of India University, Bengaluru.

and challenges, the paper attempts to discuss the right to access judicial information so as to ensure judicial accountability.

Introduction

Judiciary is one among the three organs of the State as envisaged in the scheme of our Constitution and has a unique role to play in comparison to the executive and the legislature, which are the other two organs of the State. Under the scheme of any Constitution, judiciary is assigned the role of acting as an arbiter of disputes not only in respect of the disputes arising between citizens, but also in respect of disputes arising between the state and the citizens. For this purpose, the judges of the superior courts have been conferred with the power and jurisdiction to review both the executive actions and the legislative actions of the state on the touchstone of the constitutional provisions and relevant statutory provisions.

The Office of Chief Justice of India is an important constitutional office and the Indian judiciary has been made an independent institution¹ under the Constitution. The role of judiciary has been assigned the role, as the custodian of the Constitution and the other laws and for that purpose to ensure and encourage transparency and accountability of public institutions. India enacted the Right to Information Act [RTI] in the year 2005, so as to enable the people and the media to keep watch over the functioning of the government institutions and its officials. For this purposes it is expected that the judiciary will uphold and assist the citizens in enforcing the right of the people seeking information from the government organizations. The judiciary is a public institution, its members being paid from public exchequer, having accountability to the people and responsibility to perform the functions for which it has been created. During recent times the Judiciary, especially in relation to the RTI Act, has been on a denial mode. The main thrust of this paper will be to question whether or not Judiciary, in the name of judicial independence, is correct in denying the public, access to matters relating to the appointment, functioning and assets of its members?

While the law is equal to all, the judiciary seems to create an exception for itself. When it comes to the implementation of the twin principles of the RTI Act, 'Transparency and accountability', the judiciary seems to have

1 See Zemans, Dr. Frances Kahn, *The Accountable Judge: Guardian of Judicial Independence* 72 S CAL L REV 625 (1999).

shown itself as the most uncomfortable of all public institutions. It seems the judiciary is trying to misuse its independence and hide the vital information about its members that will reveal its misdeeds and expose it to public scrutiny.² Thus, the question remains that if people want and can get information from other government institutions, then why not from judiciary?

The need for transparency from the Judiciary

The architects of the Indian Constitution were conscious of the very significant and special role assigned to the judiciary in the scheme of the Constitution. It was envisaged as the organ for protecting the rights of the citizens, guaranteed under the Constitution. There was the recognition that Judges, particularly the judges of the superior courts, who have been given the power of judicial review of administrative and legislative actions, should function without fear or favour and that the judiciary should remain totally independent and fully insulated from any external interference.³ This has been ensured through appropriate constitutional protections, among which is a definite and assured tenure of office to every judge of the superior courts of this country. When once a judge assumes office, till he lays down the office on attaining the age of retirement as indicated in the Constitution itself, he/she is insulated from any outside interference in his/her duties. The tenure of office of a judge of the superior court can be put to a premature end only when he/she is impeached by a resolution of the Parliament, supported by not less than two-third of the combined membership of each house of Parliament, in the same session. Further, an impeachment requires that the motion for impeachment⁴ be based on

2 Keshri Shahi, *Right to Information and Judiciary*, Nov 27 2009, available at <http://keshrishahi.instablogs.com/entry/right-to-information-and-judiciary/> (last accessed on May 27, 2016).

3 J Bhagwati had once stated that 'Concept of independence of the Judiciary is not limited to independence from executive pressure, it is a much wider concept.....it has many dimensions, namely, fearlessness from the other power centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong'. See *S P Gupta v. President of India*, 1981 Supp SCC 1987.

4 Articles 124 and 218 of the Constitution deal with the removal of judges in cases of proved misbehaviour or incapacity but contain no provisions for any other form of disciplining. The Judges (Inquiry) Act, 1968 only dealt with provisions for inquiry against a judge and his removal for proved misbehaviour or incapacity.

proved misbehaviour and/or incapacity on the part of the judge concerned.⁵

There is no dichotomy between the public and private life for a judge. The conduct of a judge should be impeccable, should be one inspiring confidence in the litigant public and the people of this country, be it in the course of his/her judicial functioning or outside the court. Every judge of the superior court is also a public servant and accountable to the citizens of this country like any other public servant. They have no immunity except for acts done in 'good faith' either under the Judicial Officer's protection Act, 1850⁶ or the Judges [Protection] Act, 1985⁷.

There is an inalienable relationship between efficacy and openness. Efficacy of our courts is due to the open conduct of court proceedings. Judges function in open courts and the proceedings of a court can be watched by any member of the public and is open to scrutiny. Transparency is the hallmark of our judicial system. That is partly the reason why the decisions of courts are generally accepted. In such a system, there can never be any reluctance or hesitation on the part of the judges to disclose their asset particulars; and there should not be. Transparency in judicial functioning necessarily implies transparency in the matter of acquisition of assets by the

5 Justice D. V. Shylendra Kumar, Judges and the Right to Information Act; Who are the judges afraid of; What are the judges afraid of, Aug 24, 2009, <https://sites.google.com/site/justdvskumar/judges-rti> (last accessed on May 27, 2016).

6 The Judicial Officers' Protection Act, 1850 contains only one section and is aimed at providing protection to the judicial officers acting in good faith in their judicial capacity. Sec. 1 of the 1850 Act reads as under---"Sec. 1--- Non liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders—No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

7 Parliament passed The Judges (Protection) Act, 1985 to provide certain more protections to Judges and Magistrates in addition to what was already available to them under the Judicial Officers' Protection Act, 1850. See Sec. 3 and Sec. 4.

judges as much as in the functioning of a judge inside the court. Such transparency is expected from all other public servants holding high public office in the other two organs of the state, namely, the executive and the legislature. When such is the case, members of the judiciary cannot plead immunity or claim exception from being accountable to the people. On the other hand, it is imperative that the judiciary should conduct itself in such a manner that judicial functioning becomes more transparent and more accountable, without which people may not indefinitely continue to retain the faith, trust and confidence that they have reposed in the courts and judges of our country.

Why is access to judicial information crucial for transparency and good governance? Of late, in India, the Judiciary has had its increasing share of controversies; the Rs 7 crore Ghaziabad provident fund scam; the impeachment proceeding against Justice Soumitra Sen of Calcutta High Court for alleged misappropriation of funds; the contentious issue of disclosure of judges' assets, and the row over the move to elevate Justice P.D. Dinakaran.⁸ All these cases have raised the issue of judicial accountability and transparency, thus forcing the Government to moot the idea of passing a Judicial Accountability law. In addition to promoting public confidence in the judiciary, allowing the public to access judicial proceedings and records would require judges to act fairly, consistently and impartially, and enable the public to 'judge the judge'.⁹

Access to the judicial records and to information about the Judiciary is an important, yet often overlooked, aspect of transparency and access to information. Three categories of information are relevant to judicial transparency. The first concerns the adjudicative work of the courts—including transcripts, documents filed with the court [pre and post-trial], trial exhibits, recordings, settlements, opinions, and dockets. This information may be further categorized, for example, based on whether the proceeding is criminal or civil in nature, whether minors or adults are involved, or whether information of a private or intimate nature is involved. The next category is information of an administrative nature, like court

8 The Judiciary sought to protect its Judges in matters of criminal prosecution by stating in *Ravichandran Iyer v. Justice A. M. Bhattacharjee* [1995 (5) SCC 457] that prior permission of the CJI is necessary before criminal prosecution could commence on a Judge.

9 See Sharon Rodrick, Open Justice, *The Media and Avenues of Access to Documents on the Court Record*, 29, U.N.S.W.L.J., 90, 93-95; 2006.

budget; personnel and human resources; contracts between the court and third parties and organizational matters. The third and most crucial set of information relates to information about salaries, assets and liabilities, appointments, transfers, and disciplinary matters of Judges.¹⁰

Disclosure of Assets and Liabilities

An important element of the efficient and fair administration of justice is to have the judiciary independent from both other areas of government and also private influences. The growing trend towards requiring financial disclosure by Government Officials does help in combating corruption¹¹ and in improving public confidence. Anti-corruption regulations screen assets and liabilities of public servants to detect unjustified wealth as an indicator of corrupt behaviour.¹² While the rule of 'conflict of interest'¹³ is applicable in all Offices, it is of special significance to the Judiciary.¹⁴ Financial and business interest of public officials and employees, including those of their spouses and unmarried children can have large ramification on judicial fairness and propriety.¹⁵

When citizens can access assets details of legislature and executive; why not of Judges? The epoch-making decision on the point is that of Union of India v. Assn. for Democratic Reforms,¹⁶ wherein, after taking resume of all the previous decisions, the Supreme Court unequivocally upheld the fundamental right of the voter under Article 19(1)(a) of the Constitution to know the antecedents of a candidate. The Supreme Court highlighted and

10 Report on Access to Judicial Information, March 2009; Open Society Justice Initiative.

11 See Alvaro Herrero and Gaspar Lopez, *Access to Information and Transparency in the Judiciary*, World Bank Institute, Governance Working Paper Series, 2010, p. 11.

12 Supra note 8 at p 41.

13 First case of Judicial Conflict of Interest is *Dimes v. Proprietors of Grand Junction Canal* 1852 3 H.L. Cas. 759 by the House of Lords. The case covers the point that "Judges must not appear to be biased or impartial". Lord Cottenham, the judge, had sat over a previous case in which a canal company brought a case in equity against a landowner. Lord Cottenham was later discovered to have had shares in the said company.

14 For more see Diana Woodhouse, *Politicians and Judges: A Conflict of Interest*, OXFORD JOURNAL, Parliamentary Affairs, 1999, Vol. 40 Issue 3, pp. 423-440.

15 For more see Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM LAW REVIEW; 1996, Issue 1, Article 10, pp 71-129.

16 (2002) 5 SCC 294.

declared that the ‘right to know’¹⁷ the antecedents, including criminal past of the candidate contesting election for Member of Parliament or Member of Legislative Assembly, as much more fundamental and basic for survival of democracy and to maintain the purity of election and in particular to bring transparency in the process of election’.¹⁸ A couple of years later and after the enactment of the RTI Act, as a matter of utmost paradox the Chief Justice of India¹⁹ expressed apprehension for the safety and security of the judges of the superior courts by saying that revealing the particulars of assets of the judges and throwing open the information to public domain may result in harassment to judges and in turn prevent the judges from performing their duties without fear or favour. He has expressed his fear that this may impair the independence of judges and affect their functioning.²⁰ In a television interview the Chief Justice expressed his views by stating that “Judges do declare their assets at the time of taking oath. All their details are with the Registrar. There is no need for the assets to be disclosed before the public as that would send a wrong message to litigants.”²¹ It was also contended that the Judges of the Higher Judiciary were declaring their assets to the CJI in a fiduciary capacity²² and hence under the exemptions of the RTI Act 2005, the same were not discloseable.²³ Members of the Judiciary differed on the stance taken by the CJI and Hon’ble J. Shylendra Kumar of the Karnataka High Court wrote an

17 September 28 of every year is celebrated as ‘Right to Know’ [RTK] day. Internationally, RTK Day began on September 28, 2002, in Sofia, Bulgaria at an international meeting of access to information advocates who proposed that a day be dedicated to the promotion of freedom of information worldwide. The goal of RTK Day is to raise global awareness of individuals’ right to access government information and to promote access to information as a fundamental human right.

18 Dr. Smt S.S. Phansalkar Joshi; Right to Information—A Judicial Perspective; The Practical Lawyer; Eastern Book Company; February 21st, 2012.

19 Hon’ble Justice K G Balakrishnan.

20 Supra note 5.

21 Read more: *Judges don't need to make assets public*: CJI TIMES OF INDIA <http://timesofindia.indiatimes.com/india/Judges-dont-need-to-make-assets-public-CJI/articleshow/4730210.cms#ixzz0zh0BChJM>. (last accessed on May 1, 2016).

22 Under Sec. 8(1)(e) of the RTI Act 2005 information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information, may exempted such information from being disclosed.

23 Sec. 8(1)(j) of the RTI Act, which exempts ‘personal information’ from being disclosed.

open letter,²⁴ seeking transparency amongst the Judges in disclosure of their assets. Many Judges then slowly moved toward voluntarily disclosing their assets.²⁵

The matter was first taken up through a writ petition filed at the Delhi High Court by the Registrar General of the Supreme Court who felt aggrieved by the Order of the Central Information Commission. A single Judge of the Delhi High Court,²⁶ Hon'ble J. Ravindra Bhat, who, notwithstanding the enormous pressure surrounding the case, gave the most sensible and logical verdict in favour of transparency and accountability. Later the decision of the single Judge was challenged and the matter was heard by three Judges of the Delhi High Court. The Court²⁷ fully agreed with the conclusion of the Single Judge and declared that the 'information' as held by the CJI could not get blanket exemption under the RTI Act and where 'public interest outweighs protected interest' the same should be disclosed.²⁸ The matter was later posted before the Apex court to finally decide on the issue.

In the past, the Supreme Court of India, in its own terms of its judgment²⁹ has upheld the high moral principle, that the rule of law should operate uniformly; that the Constitution is above every one; that rights of citizens guaranteed under Article 19(1)(a)³⁰ of the Constitution of India, i.e. right of expression, should outweigh the personal difficulties and hardships that can be pleaded by persons occupying high positions and serving as public

24 Supra note 6.

25 For more on this controversy see the Press Note Issues by the High Court of Karnataka issued on 13/5/2010. On the 33 Judges on the High Court of Karnataka, nineteen Judges disclosed their assets, six Judges did not want their assets to be disclosed in the official website of the High Court, some Judges also contended that such information must be kept in sealed cover and one Judge refused to disclose without a legislative requirement to do so. For more visit <http://karnatakajudiciary.kar.nic.in/assets-liabilities-PRESS-NOTE.pdf>.

26 W.P. (C) 288/2009.

27 Led by Chief Justice A.P.Shah in L.P.A. No. 501 of 2009 decided on 12 January 2010.

28 For more see Sairam Bhat, *Right to Information*, Eastern Book House, Guwahati, 2012.

29 *People Union for Civil Liberties v. Union of India* AIR 2002 SC 2112J.

30 Under Art. 19(1)(a), the Supreme Court in a number of cases has held that right to free speech and expression also includes the 'right to know'. See *Benett Coleman v. Union of India* AIR 1973 SC 106; *State of U.P v. Raj Narain* AIR 1975 SC 515; *L K Koolwal v. State of Rajasthan* AIR 1988 Raj. 2; *M C Mehta v. Union of India*, AIR 1992 SC 382; *R Rajagopal v. State of Tamil Nadu* AIR 1995 SC 264.

servants. It must be remembered that the Supreme Court had emphatically ruled that no immunity can be claimed by any person, including one holding a constitutional position on the ground of any possible exposure to harassment and consequential difficulties if the particulars of the assets held by persons in such high public positions are revealed and made public. As is well known, the Right to Information Act was enacted with the object to provide for setting out the practical regime of right to information for citizens³¹ by, ensuring access to information on any given issue.

The Preamble of the RTI Act indicates it as a tool to effectively check corruption in our democratic system which comprises of three wings; namely judiciary, legislature and bureaucracy. If legislature and bureaucracy are subjected to RTI provisions, then why create unnecessary controversy on including non-judicial aspects of judicial administration under RTI Act? After all judges, also come from the same society which consists of both honest and dishonest persons. How can the Chief Justice of India, mentioned as 'Competent Authority',³² escape from the purview of RTI Act when other concerned public-authorities respond to communications addressed to competent authorities like President of India and Chief Information Commissioner?

Using RTI, a petition was filed in the Supreme Court of India,³³ for file-notings³⁴ on documents regarding resolution by all Supreme Court judges on wealth-declaration and the reply reveals that reason of Central Public Information Officer (CPIO) in the Supreme Court was got approved by Chief Justice of India and the Appellate Authority also. Does Appellate Authority's endorsement on CPIO's reply not contradict the Competent authority, thereby nullifying any role for the first Appellate Authority?³⁵

31 While the freedom of information under Art 19(1)a) is available to the citizens of India, under Sec. 3 of the RTI Act, 2005, also, only a citizen of India can access information under this legislation.

32 See Sec. 2(e)(ii) of RTI Act, 2005.

33 Right to Information Act provides a right to every citizen to file an application to seek information from public authorities. For more see Sec. 6(1) of the RTI Act, 2005.

34 See *Union of India v. R S Khan* 2010 [173] DLT 680. The Court held 'unless file notings are specially excluded from the definition of Sec. 2(f), there is not warrant for proposition that the word 'information' under Sec. 2(f) does not include file notings.

35 Subhash Chandra Agrawal, *My Experiences on RTI and Judiciary*, available at <http://cic.gov.in/CIC-Articles/RTI-Judiciary-SC-Agrawal.pdf> (last accessed on May 30, 2016).

All the above rigid positions held by the Judges are set to change. A new law on judicial accountability is proposed in India.³⁶ The Judicial Standards and Accountability bill 2010, requires under Sec. 4, the mandatory declaration of assets and liabilities of Judges. Such declaration shall be available to the public as a matter of record and complaints can be invited from the public on any Judge who may possess disproportionate assets. For this purpose there was a proposal to establish a Judicial Oversight Committee.³⁷ The accountability bill was passed by the Lok Sabha in 2012, but lapsed. The present government has put off re-introduction of Judicial Standards and Accountability Bill, which was meant to deal with complaints against judges, till the notification of the National Judicial Appointments Commission (NJAC). This notification has been delayed by a petition in the Supreme Court challenging the NJAC.³⁸

Information on Appointment of Judges:

Arrangements for appointment of judges are intimately related to the principle of judicial independence.³⁹ The use of transparent and open processes contributes to keeping judges isolated from undue external influences that may be exerted by the other branches of government or from various interest groups. Likewise, transparency helps in selecting candidates that meet the requirements and qualifications in professional standing, technical experience and a commitment to uphold democratic values and political, economic and social rights.

Historically appointments of Judges have had their share of controversies and have raised questions on the whether such appointments are fair and

36 For more see Avijit Mani Tripathi, *Acknowledging Accountability*, INDIAN LAW INSTITUTE REVIEW, New Delhi, 2010, p. 196.

37 The 67th Constitutional (Amendment) Bill, 1990 proposed the creation a National Judicial Commission composed of serving judges headed by the CJI for judicial appointments. The Bill was not passed but the Supreme Court in *Supreme Court Advocates-on-Record Association v. Union of India* (1993 (4) SCC. 441) mandated the creation of such a commission and stated that the President had to consult the serving judiciary alone in appointing judges.

38 Pradeep Thakur, *Judicial accountability bill hits National Judicial Appointments Commission roadblock*, TIMES OF INDIA (February 21, 2015), available at <http://timesofindia.indiatimes.com/india/Judicial-accountability-bill-hits-National-Judicial-Appointments-Commission-roadblock/articleshow/46319248.cms>.

39 Independence of the Judiciary is also recognized as a basic feature forming an indestructible part of the basic structure of the Constitution pursuant to the decision in *Keshavananda Bharti case*, AIR 1973 SC 1461.

non-arbitrary. In 1973⁴⁰ and in 1976,⁴¹ the Government of India, in justifying a Law Commission recommendation⁴² deviated from the well-established convention of appointing the senior-most Judge as the Chief Justice of the Supreme Court. After realizing this mistake the Government in order to avoid any suspicion on tampering with Chief Justice's appointment has always taken the seniority rule for such appointments. The question that remains is whether the same rule is followed in appointment of Judges to the Supreme Court or High Courts as well. Would not the Judiciary help the cause of good governance, in disclosing the much needed information about how and what criteria are followed in making such appointments?

It has been argued that the question of selection and appointment of Judges is crucial to the maintenance of independence of the judiciary. Any executive role will subvert this independence.⁴³ In *SC Advocates on Record case*⁴⁴ the Supreme Court held that the process envisaged in Art 124(2) for appointment of Judges emphasizes that the provision of consultation with the Chief Justice⁴⁵ would ensure that absolute discretion would not be with the executive, thus eliminating political influence. Secondly, the primacy of the opinion of the Chief Justice is formed collectively after taking into account the views of four senior colleagues who are required to be consulted by him for the formation of his opinion. *Inter se* seniority among Judges in their High court and their combined seniority on all Indian basis should be kept in view and given due weight while making appointments from amongst High Court Judges. The appointment, transfer, discipline and all other service conditions of the judiciary is placed entirely in the hands of

40 In the appointment of Hon'ble Justice A. N Ray.

41 In the appointment of Hon'ble Justice Beg.

42 1958 Law Commission criticized the practice of appointment of the senior-most Judge of the Supreme Court as the Chief Justice and suggested that such appointments should take into consideration not only the experience of the Judge but also his competence as an Administrator.

43 M P Jain, Indian Constitutional Law (6th edition, LexisNexis Butterworths, Nagpur) at p 203.

44 AIR 1994 SC 268-Public Interest Litigation was considered by a bench of nine Judges. The majority judgment was delivered by J S Verma.

45 Article 124(2): Clause (2) of Article 124, inter alia, says that: "every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted."

the judiciary; the executive is expected to make or issue formal orders only.⁴⁶ To mention the least, such a practice, howsoever justified breaches the rule of separation of power and creates a situation where Judges appoint themselves.

With the passing of the RTI Act while executive appointments and Legislative elections are disclose able, should not appointment of Judges also be made public?

A five-member bench of Supreme Court headed by the then Chief Justice of India, Mr Justice P. N. Bhagwati in the matter *S. P. Gupta v. Union of India*,⁴⁷ had opined to disclose opinions of members of Supreme Court collegium constituted for appointment, promotion and transfer of judges⁴⁸ of higher courts even much before RTI Act came into existence. Even though this particular aspect has never been over-ruled by later judgments on appointments of judges, opinion of members of Supreme Court collegium are not being made public despite the verdict by Central Information Commission (CIC).⁴⁹ RTI activist Subhash Chandra Agarwal, filed an RTI petition to the Registry of the Supreme Court seeking details of appointment and transfer of Judges. It was contended before the Central Information Commission that the material (information) held by the CJI was kept under fiduciary relationship and should be exempted from being made public under Section 8(1)(e)⁵⁰ of the RTI Act. He opined that this case requires serious interpretation of some substantial questions of law, like whether Right to Information Act needs to be read keeping in mind the important constitutional principles of judicial independence?⁵¹ The CIC

46 Consultative Paper on Superior Judiciary, National Commission to Review the Constitution, Justice Jeevan Reddy, Justice H R Khanna, available at <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (last accessed on May 30, 2016).

47 (1981) Supp SCC 87.

48 On the promotion and transfer of Executive Officers see *Dev Dutt v. Union of India* [2008] 8 SCC 725, the Supreme Court mandated communication of not only all entries in ACR but even whether the entry of a grade in an ACR, in comparison to the previous years' entry resulted in the lowering of the grade.

49 Central Information Commission is a quasi judicial body which in second appeal decides any denial of information under the RTI Act, 2005.

50 Information available to a person in his fiduciary relationship is exempted under the RTI Act, 2005.

51 In United Kingdom; Paragraph 3 of Schedule 7 of the Data Protection Act, provides that: Personal data processed for the purposes of— (a) assessing any person's

ordered that the said information be made available.⁵² The order of the CIC became highly contentious and hence the matter of information on appointment and transfer was posted before the Apex Court for final hearing. As this case raises the crucial question of judicial independence, a Supreme Court bench of Justices B S Reddy and S S Nijjar in November 2010 hearing this matter, reserved its orders on whether the said question should be referred to a larger bench or is to be decided by a two judge bench.⁵³

Interestingly, if one notes the provision of the RTI Act, 2005, one will find that even though the Supreme Court may claim exemption of such information because it is held in a fiduciary capacity, can the same information be withheld for a lifetime? RTI Act in Sec 8(3), states that while such exemptions that the appointment are made in fiduciary capacity etc; can be claimed the same section in the Act provides that such exempted information should be available after 20 years. This would suggest that even though one assumes that the stance of the Supreme Court is correct; such non-disclosure can be there for only 20 years, after which they must necessarily be disclosed. On this argument, should not selection of judges which pertain to the years prior to 1990s be made public now? On a counter argument whether such records or documents are available and retained for such period or such old records are available or not, the answer

suitability for judicial office..., are exempt from the subject information provisions. The following data are processed for the purpose of assessing a persons suitability for judicial office, and will therefore not be provided to candidates:

- Candidate's qualifying test scripts;
- Candidate's scores and position in the qualifying test;
- Notes made by Panel Members at interview or individual assessments of performance at interview;
- Recordings (including audio, video or transcripts) of interviews and role plays
- Minutes of Selection and Character Committee meetings;
- References received in connection with candidacy for judicial appointments
- Candidate's positions on selection lists.

52 "The procedure of appointment of judges or any proposal for modifying that procedure should necessarily be available in the public domain so that the citizens know what is transpiring among the major stakeholders, in this case, the Government of India and the CJI, in respect of such a vital matter as the appointment of judges to the High Courts and Supreme Court of India," Chief Information Commissioner Mr. Satyananda Mishra said in the order.

53 Supreme Court's no to Information on Judges' Appointments; Indian Express; 18.11.2010.

would lie in the minimum duty to maintain such files under the Public Records Act, 1993.⁵⁴

To conclude this part, every single appointment to the Supreme Court or a High Court is a highly significant act. This will decide the quality of the justice delivered by the system. Without a fair, transparent and merit based appointment of Judges, governance cannot be improved. The same was emphasized in the majority opinion in *K. Veeraswami case*⁵⁵ wherein it was said: “A single dishonest judge not only dishonors himself and disgraces his office but jeopardizes the integrity of the entire judicial system...a judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof”.

Access Records from the Judiciary under the Right to Information Act, 2005

In the most dramatic twist in the transparency rule, the Supreme Court of India decided to give prominence to its own Rules to access judicial records over the right of the citizens to seek the same said information under RTI Act. In *R S Misra v. CPIO, Supreme Court of India*,⁵⁶ an application was filed under the RTI Act, seeking inspection of certain judicial records. The Public Information Officer [PIO] of the Supreme Court dismissed the applicant's request and asked her to apply under Order 12 of the Supreme Court Rules 1966 and insisted that she also pay fee as per the Court rules and not the fee as required by the rules under RTI Act. The Public Information Officer [PIO] maintained that inspection of judicial records can only be done under Supreme Court Rules, as the Rules were in existence, prior to the passing of the RTI Act. If one reads the provision of the RTI Act, the decision of the PIO is highly unreasonable. Under Sec. 22,⁵⁷ the RTI Act has a clear overriding power over all legislation which may be inconsistency with the object and the purpose of the legislation. Sec. 22,

54 Sec. 3 of this Act states the duty of Central Government in maintaining records. Also Sec. 12(2) of the Public Records Act, 1993 states that subject to conditions; any record creating agency may grant access to such records in a prescribed manner.

56 1991 (3) SCC 655. K Veeraswami: the former Judge of the Madras High Court was found guilty under the Prevention of Corruption Act. The apex Court in a later judgment held that a sanction from the CJI was necessary before criminal case could be registered against a judge.

57 CIC/2011-12-10.

RTI Act, is a non-obstante clause, which states that RTI Act shall have effect notwithstanding anything inconsistent with any other law for the time being in force. Despite such a clear provision, the PIO refused to give the applicant the right to seek information under the RTI Act. Instead the PIO directed that the citizen apply for the said information under the Supreme Court Rules. It was argued by the PIO that there was no inconsistency between the Supreme Court Rules and RTI Act, rather both laws allow for access to information. Hence the PIO contended without inconsistency, RTI Act cannot be given prominence over the Supreme Court Rules.

The PIO in this case admitted that the only difference between the two is in the procedure to access information and also the fee structure to get the information. Further the PIO argued that RTI Act is a general law and Supreme Court Rules are special, thus under the canons of interpretation, the general law; though a later in time; must give way to the special law.⁵⁸

By this stance- if every department/Ministry/Organization in the Government, both State and Central, have their own rules, will not the majesty of the RTI Act get eroded by such rigid positions? Also, Public authorities have come into existence prior to the RTI Act and have made their Rules prior to the RTI Act; should then all citizens be asked to seek information under those rules? Being a country where rule of law and rule of men operate and in a country that has recognized a fundamental right to information,⁵⁹ these questions need the urgent attention of policy makers for the following reasons:

Firstly, Sec. 3 of the RTI Act, which is a special non-obstante legislation, states that all citizens have a right to information, whereas the Supreme Court Rules does not provide a general right to 'all' citizens to access the said information.⁶⁰ Further, in the RTI Act, the information should be provided within a timeframe of 30 days, whereas the Supreme Court Rules

58 Sec. 22 RTI Act: Act to have overriding effect — The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923) and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

59 Under Art. 19(1)(a) of the Indian Constitution.

60 The Hon'ble Apex Court in *R.S. Raghunath v. State of Karnataka* [AIR 1992 SC 81] are pertinent: "The general Rule to be followed in case of conflict between the two statutes is that the latter abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied.
(i) The two are inconsistent with each other.

do not have such a time frame. There is penalty of delayed supply of information or denial of information, i.e. Rs 250 per day of delay to a maximum of Rs 25,000 per case; under the RTI Act, whereas under the Supreme Court Rules no such accountability is ensured on delay or denial of information. Also, denial of information under RTI is to be as per its provision under Sec 8 or Sec. 9; this obligates the Public Information Officer to justify or reason out, any such denials. What can be considered to be a landmark order to set the transparency tempo in the higher Judiciary, Mr. Shailesh Gandhi, the Central Information Commissioner, held that Right to information is a separate, independent and fundamental right, and hence the citizen should have the discretion in the exercise of his right and MAY apply under the RTI Act or under the Supreme Court Rules whichever is convenient. When an application is put under RTI Act, it is duty of the PIO to deny the information as per only that Act and not as per Supreme Court rules. Finally, the CIC concluded that let the citizen decide what is convenient to him.

The issues in this case raise interesting legal questions. What is the inconsistency between the Court Rules and Information Act? On examination of Order 12 of Supreme Court Rules, it states that only a party to any cause or appeal or matter shall be allowed to search, inspect or get copies. Secondly, the Rules state any person who is not a party; on application should show 'GOOD CAUSE' on which he/she may be allowed to search or inspect or obtain copies on payment of fee. It is argued here that Order 12 is directly inconsistent with RTI Act and hence is liable to be read down, under Sec. 22 of the RTI Act. Secondly, the second part of Order 12 asking the Applicant to show 'good cause' is also inconsistent with the RTI Act. Under Sec 6(2) of the RTI Act, a citizen need not provide any reason for seeking information. Hence if one is made to seek information under Supreme Court Rules; he may have to prove good cause, hence may be denied the same information, though a right to information exists under the 2005 Act.

This case projects the higher judiciary of India in poor light, and their high handedness on allowing access to judicial information. Such instances in no

(ii) There is some express reference in the later to the earlier enactment.

If either of these two conditions is fulfilled, the later law, even though general, would prevail."

way help improve the image of and confidence in the institution, which plays a pivotal role in improving the governance structure in the country.

Other major issues of transparency required from the Judiciary include for examples, how cases and work are distributed amongst the Judges. The existence of a website must be used extensively to disseminate information about the functioning of the Judiciary. Publishing and updating of ruling and regulation; publishing of statistics on cases filed, resolved and pending; publishing of the Court's agenda; Budget, salaries, background assets and income, and finally publishing bidding and procurement information for contracts are things commonly found of websites of the Judiciary.⁶¹ All these do not ensure compliance of the RTI Act. Although sec. 4(1)(b) of the RTI Act, requires to provide for proactive disclosure, the compliance of the same by the Judiciary has been the most disappointing. The website of the Supreme Court of India and the High Courts do not comply with several requirements of the proactive disclosure rule, including the norms set for discharging functions of public servants. Secondly, if the Office of the Chief Justice is involved in administrative functions, there is no disclosure of the norms for the discharge of these administrative functions or for the officers that work in the Courts in their administrative capacity. Thirdly, Sec. 4(1)(d), states that transfer policy must be expressly laid out and followed to ensure maximum transparency in such matters. The Judiciary seems to have forgotten these obligations completely.

Access to administrative information is another crucial aspect that is missing, for example; how budget is allocated, how the cases in the docket are distributed among the Judges; how administrative notices and resolutions on appointments and promotions, procurement, dismissals, extraordinary leave and sanctions are made; statistics of the work of a Judge. If the Judiciary is more forthcoming with such information, it would only increase the faith and stature of the institution designed to uphold the Constitutional ideals and principles.

Balancing the Right to Information with the Rights of the Judiciary not to disclose

Often it is quoted that 'sunlight is the best disinfectant';⁶² contrarily it is also

61 Supra note 9 at p. 5.

62 Mr. Shailesh Gandhi; Information Commissioner once stated that *Sunlight is the best disinfectant, and darkness is the friend of the corrupt and the criminal*. [K P Muralidharan Nair v. Reserve Bank Of India CIC/SG/A/2011/002841/16732].

argued that ‘too much exposure to sunlight may not be good’. Hence with any access to information regime, the concept of information sharing must be balanced with the interest of protecting certain categories of information, especially of the judiciary. For example; documents of pending criminal cases; cases involving minors/juveniles or cases which invade the privacy of those concerned, personal information of Judges; information that may implicate security concerns for the personal safety of the Judge in question and like. Thus, any system that permits information access from the Judiciary must ensure that the process does not interfere with the independence of the Judiciary and does not impede the process of fair administration of justice, because, an independent judiciary⁶³ is critical to protecting individual rights, preserving rule of law and preventing unwarranted concentration of power in the executive.⁶⁴

With regard to privacy and security concerns, three sets of concerns must be recognized: first, those of the honourable members of the Judiciary, second, those of parties to a proceeding and finally of others who may be affected by the institution of Judiciary. International instruments such as ICCPR have stressed the need for a balance, between need for information and concerns for protecting the information. For instance, Article 14 of the International Covenant on Civil and Political Rights⁶⁵ attempts to balance the interest in openness as against privacy and security concerns.⁶⁶ In one such instance, the US Supreme Court in *Nixon v. Warner Communications, Inc.*,⁶⁷ recognized the common law right to access judicial records, but held that ‘every court has supervisory power over records and files and can deny access when it would be used for improper purposes’. The RTI also in Sec. 8(1) exempts information from being disclosed on the grounds of security

63 For more see, Susan Rose-Ackerman, *An Independent Judiciary and the Control of Corruption*, available at <http://democracy.ubc.ca/fileadmin/template/main/images/departments/CSDI/conferences/CorruptionConfRose-Ackerman.pdf> (last accessed on May 30, 2016).

64 The Suspension of Chief Justice Iftikhar Chaudhry of Pakistan by the Country’s President in 2007 and later his reinstatement is a point on this matter.

65 In addition to the UDHR and the ICCPR, the UN has set forth a set of standards known as the ‘Basic Principles on the Independence of the Judiciary’. Also ‘The Beijing Principles on the Independence of the Judiciary, 1997’ adopted at Manila by the Chief Justices of the Asia Pacific Region; and ‘The Bengaluru Principles of Judicial Conduct, 2002’ are two such documents needing particular mention.

66 Supra note 8 at p iv.

67 435 U.S. 589 [1978].

of the State, privacy, information held in fiduciary capacity, confidential, trade secrets, communication with foreign government; information that impede the process of investigation etc. In the case of the Judiciary, it is here argued that any such sensitive information may follow the rule as laid down in the Nixon case. It must be emphasized at this stage that any such decision to exempt from disclosure of information must be based on judicious reasoning and not for the purposes of jealously protecting information of their own institution; that the Judges must deny such information that may be of public interest or purpose.

The next question that arises is to the immunity of Judiciary from the scope of RTI Act. There is nothing either under the Constitution or under any statutory enactment, including RTI Act, which exempts the judiciary from making the required administrative disclosures. However, when it comes to 'judicial matter', some leverage must be given to it. For instance, if a court is trying a case where the identity of the victim is not to be disclosed, then none can ask for the same or any information related to it, either during the pendency or even on completion of the judicial proceedings.

Besides the RTI Act, there may be other statutes also under which information may be withheld from a citizen. For instance, the report of an inquiry made against of Judge of the High Court under the provisions of the Judges Enquiry Act, 1968,⁶⁸ may be withheld from the public by the Chief Justice of India. In *Indira Jaising v. Registrar General, Supreme Court of India*,⁶⁹ an inquiry report was made by the Committee to the CJI in respect of alleged involvement of sitting judges of the High Court of Karnataka in certain incidents. The petitioner sought the publication of the inquiry report. The Supreme Court held that it is not appropriate for the petitioner to approach the court for relief or direction for release of the report, for what the CJI has done is only to get information from peer Judges, of those who are accused and the report made to the CJI, by the Committee, is fully confidential. The Court however opined that in a democratic framework free flow of information to the citizens is necessary for proper functioning, particularly in matter, which form part of public record. The right to information is however, not absolute. There are several areas where such information need not be furnished. The inquiry ordered and the report

68 It is an Act to regulate the procedure for the investigation and proof of the misbehavior or incapacity of a Judge of the Supreme Court.

69 (2003) 5 SCC 294.

made to the CJI being confidential and discreet, is only for the purpose of his information and not for the purpose of disclosure to any other person. The court thus rejected the contention to release the said report. The Court, however, made it clear that if the petitioner can substantiate that any criminal offence that has been committed by any of the judges mentioned in the course of the petition, appropriate complaint can be lodged before a competent authority for taking action by complying with requirements of law.

Finally, a word of caution has already been issued on the over/mis-use of the right to information in all spheres of public life. The Supreme Court in *Central Board Of Secondary Education v. Aditya Bandopadhyay*⁷⁰ warned that 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 work of collecting and furnishing information. The Court held that '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, tranquillity 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 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. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties.'⁷¹

Conclusion

Reform in the Judiciary to ensure transparency, must be a comprehensive process of change in the management of justice delivery systems, in the behaviour of judges and in the relationship of the Judiciary with society.⁷² The expectation from the judiciary is indeed very high in view of the nature

70 Civil Appeal No. 6454 of 2011.

71 See para 37 of the Judgment. Ibid.

72 Supra note 9 at p 36.

of its role under the Constitution. The independence of the judiciary is meant to empower it to be the guardian of the rule of law. It is not merely for its honour, but essentially to serve the public interest and to preserve the rule of law. Judicial accountability is a facet of the independence of the judiciary in a republican democracy. There are, therefore, recognized norms of judicial behaviour expected from the judges.

Enabling citizens to access and, in some cases, comment upon government-held information enhances respect for the government, encourages compliance with the law, empowers the public to participate more effectively in governmental processes and engenders public trust in the government. Ensuring transparency and implementing a right to information has inevitable administrative and other cost implications; that argument is by far outweighed by the improvement in the Governance mode of the State.

In any case, there still remain gaps related to the identification of the obstacles and barriers for the implementation of transparency reforms in relation to the judiciary. Harmonious interpretation of Statutes dealing with the right to privacy and the right to information, is significant for the success of the transparency movement. Thus, the RTI Act cannot be read in isolation and a holistic interpretation is the need of the hour.

* * * * *

ENHANCING ADMINISTRATIVE TRANSPARENCY AND ACCOUNTABILITY THROUGH RIGHT TO INFORMATION

Dr. Sairam Bhat*

Abstract

Information in a democratic setup is a national resource which must be granted as a matter of right to all citizens. It is significant that any restrictions on information or expression regarding security matters must designate in law, only the specific and narrow categories of information absolutely necessary to protect a legitimate national security concern. Transparency in governance is necessary in light of ensuring that justice is not only done, but is visibly done. The judiciary has played an active role by ensuring transparency through its judgments. To ensure transparency, the country does not need good laws, but rather right-minded men to implement the laws. In order to ensure transparency, the need is to bring about larger public awareness of the use of RTI and to drastically change the characteristic mindset of civil servants. The efficiency in government must be measured in terms of policy efficiency, service efficiency and administrative efficiency. The lack of information weakens the effectiveness of the public sector. This article traces the shaping up of better transparency measures in Indian political and legal history, which has eventually enhanced governance through various modes of ensuring better access to information.

Introduction

The term “Information” is born of the Latin words ‘Formation’ and ‘Forma’, which means ‘giving shape to something’ and ‘forming a pattern’, respectively.

Information is indispensable, especially for the functioning of a true democracy. People have to be kept abreast about current affairs, issues as varying and encompassing as political, economic, social and environmental. Free exchange of ideas and free debate are essentially desirable for the government of a free country, more so to better the governance.

In this age of information, its value as a critical factor in political, economic, socio-cultural and environmental development is being very acutely experienced. “India as of today” - a nation strategically poised to take-off as a superpower - not only needs information, but needs that information swiftly, reliably, consistently and in a simplified form. This is important because every developmental process depends on the availability of information.

* Associate Professor of Law, National Law School of India University, Bengaluru.

No democratic government can be the owner of all information. The right to know is also closely linked with other basic rights such as freedom of speech and expression and right to education. Its independent existence as “perspective” an attribute of liberty cannot be disputed. Viewed from this “angle”, information or knowledge becomes an important resource. An equitable access to this resource must be guaranteed. Information adds dimensions and shapes to our awareness and dispels the vagueness of ideas. “Too often” “Often but not”, governments treat official information as their property, rather than something which they hold and maintain on behalf of the people. Information is “necessary” “sought” from the government simply because in a democracy, the government is merely a trustee, acting for the benefit of the people governed. Since governmental information is generated for purposes related to the legitimate discharge of their duties of office and for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of input or another) fund the institutions of government and the salaries of officials, it follows that the government and its officials are ‘trustees’ of this information for the people. As a trustee, the government is bound to act and use all information to enrich the nation by empowering its citizens. Thus, ‘information’ in a democratic setup is a national resource which must come as a matter of right to all citizens.

Information is the lifeblood of democracy. If people do not know what is happening in their society, if the actions of those who rule them remain unknown, then they cannot possibly have a meaningful role in managing the affairs of that society. But information is not just a necessity for people, it is an essential part of a good government. Bad government needs secrecy to survive. Such secrecy often shrouds inefficiency, wastefulness and corruption. Such inadequacy and lack of knowledge leads to superiority of few; manifests itself into an economically divided society, creates islands of political clout and questionable equations of power.

Demystification of rules and procedures, complete transparency and proactive dissemination of this relevant information amongst the public are very strong potential safeguards against corruption. Ultimately, the most effective systemic check on corruption would be where the citizen herself or himself has the right to take the initiative to seek information from the state, and thereby to enforce transparency and accountability.

It is in this context that the movement for right to information is so important. A statutory right to information would be in many ways the

most significant reform in public administration in India in the last fifty years. This is because it would secure for every citizen the enforceable right to question, examine, audit, review and assess government acts and decisions, to ensure that these are consistent with the principles of public interest, probity and justice. It would promote openness, transparency and accountability in administration, by making government more open to continuing public scrutiny.

The public's right to know is an intrinsic part of informed public debate, which has traditionally been dependent on the freedom to receive and impart information without government interference. However, it may also be argued that this does not mean a right to receive just about any type of information from the government. It is of paramount importance that any restrictions on information or expression regarding security matters, must designate in law, only the specific and narrow categories of information absolutely necessary to protect a legitimate national security concern. A threat to national security can be defined as 'any expression or information that is intended to incite imminent violence, or is likely to incite violence'. In addition, there must be a direct and immediate connection between the expression and the likelihood/occurrence of such violence. The public interest in having information at all times must remain a priority consideration in any freedom of information Act, and that any denial of this right be subject to independent review.

Along these lines, in a seminal judgment in 1982, the Indian Supreme 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 ... 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."¹

The Process to Achieve Transparency in Governance: an Evolution in Indian Democracy

The passing of the Right to Information Act, 2005 has brought about a new found anticipation and curiosity among the common Indian person. Anticipation that the country will be governed more democratically, and curiosity as to how much the sharing of information will help reduce corruption. The impact and outcome this one legislation will have on the

1 S. P. Gupta v. President of India and Others AIR1982SC 149.

manner and method in which governance in this country is done shall slowly but surely unfold. At this point in time, it would be very myopic to overlook the relevance of the Right to Information Act in the new LPG (Liberalized, Privatized and Globalised) India. If India is to match the strides of the developed nations, then this Act was most definitely long overdue.

The Indian legal system has been inherited through a long and historical colonial past. Many of the laws have deep colonial history and have thus left an erosive mark on the administrative system of the country. The Indian Penal Code, 1860, the Indian Evidence Act, 1890, the Indian Contract Act etc. were made to ensure that the State regulates the activities of its citizens through a strict 'command and control regime'. The establishment of the Indian Civil Services in the early 1920s went on to create an elite force of Executives who were trained and structured to serve the State as 'Government servants'. The legal system flourished under the veil of secrecy with the passing of the Official Secrets Act, 1923 and this ensured that the 'government servants' would have unbridled, unguided discretion to decide the confidentiality of information that could be shared with the citizens. The legal system in India thus grew on the principles of Rule of Law, which was hardly guided with the rule of use of discretion in governance.

The Independent Government also ensured that it continued with its draconian laws like the law on land acquisition which refused to create any kind of faith in the functioning of the Government. The Land Acquisition Act, 1894 was probably the biggest and most singular reason for demanding a more transparent government. The Act did not provide any obligation of the Government to substantiate any reason for acquisition of land for 'public purpose'. This law was an antithesis to the topic on right to property. Probably no democracy in the world would have taken a step in eliminating one of the fundamental rights from the Constitution. India not only lost the fundamental right to property, but also the right to challenge the legislative policy towards acquisition of land and the development of a project like a dam on it. Neither does this law provide the citizen with the right to challenge the amount of compensation to befit the market value. With more land needed for Special Economic Zones and globalisation on the minds of all so called developmentalists, more Nandigram-like incidents are the natural outcome one may face. The Act ensures wide and unchallengeable power to the administration to acquire land with least sense of accountability to the citizens.

Further the country could not control the population bubble coupled with an unsound and deficient educational policy which has resulted in a high illiteracy rate of over 40%. Add to this statistics like - India ranks 74th in the least corrupt nations' status study by the Transparency International Report of 2015 (this despite the adulation of being a Nuclear power), 6th biggest economy and the largest democracy in the world. Are these not indicators enough to justify the passing of the RTI Act?

There is hardly only doubt for the need for transparency in governance, especially in a democratic country. Transparency in governance is necessary in light of ensuring that justice is not only done, but is visibly done. With increasing differences between the rich and the poor, and the gap between the urban elite and rural neglected, increasing with the farmers suicides on the rise (blamed on crop failures or should it be man-made systems' failure), can the country achieve 8% growth rate? The need becomes further imperative as the phenomena of globalisation has ensured that the Government is not only answerable internally to the Parliament, but also externally, not only so as to get aid from World Bank and Asian Development Bank, but also to make sound policies to attract FDI.

The above may suggest the possible reasons for the timely passing of the RTI Act, 2005 and the possible hope that it may change the legal system and governance in the country. But historically, over the past sixty six years of Indian Independence, one may note that ensuring transparency and good governance was one of the main aims and goals of the country's lawmakers. The Judiciary must take the sole credit for reforming governance through the expansion of the principle of *locus standi* by encouraging the use of Public Interest Litigation to ensure social, political and economic justice. The addition of un-enumerated rights in Article 21 of the Constitution, along with the meaningful interpretation of various provisions of the Constitution gave a new beginning to the concepts of justice, equity and fairness. Whenever the Legislature failed and the Executive lacked the sensitivity towards the problems of the common man, creditable Chief Justices like Krishna Iyer, Bhagwati and others took the Judiciary to new heights and respect. Over-activism was necessary to ensure that the other two organs of the Government function, in the true spirit of democratic governance - of the people, by the people and for the people. The power of the Judiciary is felt in many landmark decisions of the Apex Court in ensuring that another '1975 emergency-like' situation does not occur without proper rule of law. The Indian Judiciary today has achieved a

distinction enough to be quoted, with its judgments referred to in American Law School textbooks.

“Laws are as good as the men who implement the same”. The next big step on transparency came from one man who inherited the same old set of laws, rules and regulations, but ensured that with right intention, they would be meaningful and justifiable. Mr. T N Sheshan brought about a sense of maturity and responsibility amongst the political parties. He single-handedly brought respectability to the Election Commission of India and ensured that there would be the least political influence and there would be free and fair elections in the country. The Election Reforms have ensured that aspirants for MP/MLA elections are today forced to file affidavits declaring their assets, including those of their spouses, before filing Election Nomination papers. Thus, vital information today is available with the citizen about his representative whom he/she wishes to vote for. This has also led to the passing of the Anti-Defection Law which reduces the possibility of an MLA switching parties for monetary gains. T N Sheshan showed that, to ensure transparency, the country does not need good laws but rather right-minded men to implement the laws. The opening up of airwaves for private television news channels and broadcasters has also increased the exposure of many tainted Ministers and Executive officers of the Government. Broadcasting through the medium of the Lok Sabha and Raj Sabha channel gives the citizen an opportunity to audit the MP/MLA and their involvement in nation-building. This coupled with the efforts to compulsorily file tax returns has given a new vista to ‘development’.

All this followed with the codification of one branch of Tort law into the Consumer Protection Act, 1986. For the first time after the MRTP Act, citizens were ensured about their right to be protected against hazardous goods and deceptive trade practices. Consumers were empowered with the *right to be informed* about the quality, quantity, purity, standard etc. of the goods which they bought. The Act also introduced the concept of deficiency in services which went about to bring in a new era of rights protection in the country. The consumer today is provided with all the necessary information he wants so as to make a rational judgment on whether or not he wants to buy the product or hire a service.

The year 1992 saw the passing of the 73rd and 74th Amendment to the Constitution of India, which introduced Panchayat Raj System. The idea was to establish decentralised governance so as to empower the local

community to manage and govern its state of affairs. This step was important to bring real and practical value to democracy and the ideal of 'Ram Raj' or people's governance. Though Panchayat elections are conducted in all States, not many State Governments have devolved powers on to the Panchayat to govern subjects and matters as enlisted in the Constitution.

Moving ahead with growth, development and industrialisation, the world woke up to some hard but practical realities of exploitation of Mother Nature. The world environment was at threat due to industrial activity. The occurrence of the worst industrial disaster in Bhopal took the nation by surprise and revealed the nation's unpreparedness to handle the legal and social issues arising from it. The Government under the Environmental Protection Act, 1986, brought about a Notification making it mandatory for all industries in the country to, prior to their establishment, conduct an Environmental Impact Assessment (EIA) [2006 Notification]. This Notification give vital information about the proposed industry, its setup, the activity to be carried on, the nature of danger it may pose to human health and environment etc. A summary of the EIA report is made public for people to assess and raise concerns. The EIA report must also conduct a Public Hearing [2006 Notification under EPA, 1986]. The public are thus informed about activities in their locality and thereby involved in the decision-making process. To a large extent the grievances of the people are being heard, proper safety precautions adopted and only then permission is being granted for setting up industrial activities.

However, in practice, the overwhelming culture of the bureaucracy remains one of secrecy, distance and mystification, not fundamentally different from the colonial times. In fact, this preponderance of bureaucratic secrecy is usually legitimised by a colonial law, the Official Secrets Act, 1923, which makes the disclosure of official information by public servants an offence.

The evolution of e-Governance and the publication of Annual Reports by Departments and Ministries has also brought a lot of information about the activities, budget and plan of action in various governmental functions into public purview. All this strengthened the people's movement to force the Government to pass a Central law in 2002 through the Freedom of Information Bill. Unfortunately, the Vajpayee Government did not bring this law into force and the Manmohan Singh Government took the credit of passing one of the landmark laws, i.e. the Right to Information Act in 2005.

What is the difference between 'Right' and 'Freedom'? It is believed that a 'Right' connotes 'onus of maximum disclosure on the government'. Further, 'right' is more assertive than the word 'freedom', and right operates as correlative 'duty' cast upon the Government to respect and honour such rights of the citizens. Comparatively, 'freedom' implied a mere lack of interference.

The 'Felt Need' for Strengthening the Process of Transparency

The right to information is expected to improve the quality of decision-making by public authorities in both policy and administrative matters by removing unnecessary secrecy surrounding the decision-making process. It will enable groups and individuals to be kept informed about the functioning of the decision-making process as it affects them, and to know the kind of criteria that are to be applied by Government agencies in making these decisions. It is hoped that this would enhance the quality of participatory and inclusive political democracy by giving all citizens further opportunity to participate, in a more full and informed way, in the political process. By securing access to relevant information and knowledge, the citizens would be enabled to assess Government performance and to participate in and influence the process of government decision-making and policy formulation on any issue of concern to them.

The cumulative impact on control of corruption and the arbitrary exercise of power, on the availability of such information to the citizen, would be momentous. Just passing of another law like the RTI may not achieve the aim, purpose and object of transparent government. Probably the need is to strengthen the existing mechanism of governance with more openness and public accountability. The need is also to bring about larger public awareness of the use of RTI, especially for the effective implementation of all the poverty alleviation programmes. Above all, the need to drastically change the attitudinal and characteristic mindset of the Civil Servants has to be more emphasised. Furthering the development of an effective information management system coupled with regulatory and enforcement machinery will be needed to force the goal and purpose of passing the Right to Information Act, 2005.

Administrative Efficiency & Right to Information

Although efficiency in the private sector may be judged solely in economic terms, it cannot be so simplistically evaluated in the public sphere of

Government. Unlike the business community, the purpose of Government is not to generate profits. Government has many duties towards society including the allocation of scarce resources and the provision of social services, such as healthcare, and its efficiency must be evaluated in broader and more comprehensive terms than profits and losses. Furthermore, Government is constrained by the public in terms of what is desired and what will be tolerated in ways that agents of the private sector are not. The Government is accountable to the people and, therefore, goals cannot be set by the Government alone; Government has to keep the citizens satisfied or at least pacified.

Hon'ble Justice Y K Sabharwal in one of his speeches mentioned that there are three definitions of 'efficiency' in relation to Government - *administrative efficiency, policy efficiency and service efficiency*.

Administrative efficiency, the most important of the three, comprises of conducting the administration without unnecessary delays or ulterior or corrupt motives and giving reasons while passing various orders. It refers to the effective management of the political system. It encompasses good organisation and efficient productivity. At the same time, wherever required or implied, principles of natural justice have to be observed.

Policy efficiency represents the idea of making the right political decisions. It involves the selection of appropriate programmes to achieve Government objectives.

Service efficiency is manifested in the effective provision of services to the public, responsiveness to public opinion and so on.

Thus, the efficiency in Government must be measured in terms of all the three facets of efficiency.

Public Accountability & Right to Information

The Former Chief Justice YK Sabharwal also stated that 'Public Accountability' is a facet of administrative efficiency. Publicity of information serves as a corrective instrument for the probable oversight of citizens. By the same token, it suggests that law could become a means for fighting corruption. Therefore, a Government which produces a trustworthy flow of information creates greater certainty and transparency. This is especially appreciated by those who intend to invest in the country. International experience shows that countries that allow citizens access to

public information have seen a reduction in indicators of corruption and consequently, substantial increases in administrative efficiency.

‘Public Accountability’ is a part of governance. It is the Government that is accountable to the public for delivering a broad set of outcomes but more importantly it is the public service consisting of public servants that constitutes the delivery mechanism. Therefore, the accountability and governance arrangements between Government which acts as the principal and the public service which is its agent, impact and affect the Government’s ability to deliver and its accountability to the public. The challenge lies in ensuring that the public service is geared to meet the expectations of the Government of the day, and that public service is neutral, whichever party is in power. When a Government department translates a Government’s policy into programmes, the success of that translation is very much dependent on a clear understanding of, and commitment to, the outcomes that are sought. It is not surprising that the history of accountability and governance within the public service has shifted from measuring “inputs” to measuring “outputs”, to matching outputs, and identifying outcomes. The key factor which weakens accountability or effectiveness of the Government or of the public sector, is the lack of information.

RTI and its relationship with Good Governance

“Good governance” means efficient and effective administration in a democratic framework. It involves a high level of organisational efficiency and effectiveness corresponding, in a responsive way, to attain the predetermined desirable goals of society.

The basic premise behind the right to information is that since Government is ‘for the people’, it should be open and accountable and should have nothing to conceal from the people it purports to represent. In a responsible Government, like ours, where all the agents of the public must be responsible for their conduct, there can be no secrets. The right to know, though not absolute, makes citizens wary when secrecy is claimed for the common routine business of administration. Such secrecy is hardly desirable. Information is an antidote to corruption. It limits abuse of discretion, protects civil liberties, provides consumer with information, provides for people’s participation and brings awareness of laws and policies and is the elixir of the media.

Currently, the words “governance” and “good governance” are being increasingly used in development literature. “Bad governance” is being increasingly regarded as one of the root cause of all evils within our societies. Major donors and international financial institutions are increasingly basing their aid and loans on the condition that schemes to ensure “good governance” are undertaken. Governance means the process of decision-making and the process by which decisions are either implemented, or where the failure in implementation is acknowledged and remedied. Governance includes national governance, international governance, corporate governance and local governance. Government is one of the actors in governance and so is the public sector. All actors other than the Government, the public sector and the military, constitute “civil society”.

Conclusion

The right to information will be an important aid in ensuring transparent administration of public affairs, and will help expose and thereby control corruption and nepotism to ensure a clean administration. It will strengthen the mechanism of accountability of those using public funds and exercising public power. The media, the social activist groups, the Lokpal and the judiciary will all be able to discharge their duties as watchdogs of the society effectively. This will also strengthen and make the working of the democratic regime in the country efficient.

It is now widely recognised that openness and accessibility of information to the people about the Government’s functioning is a vital component of democracy. In all free societies, the veil of secrecy that has traditionally shrouded activities of governments is being progressively lifted and this has had a salutary effect on the functioning of governments. In most democratic countries, the right of people to know is a well-established right created under the law. It is a right that has evolved with the maturing of the democratic form of governance.

Democracy is no longer perceived as a form of government where the participation of people is restricted merely to periodical exercise of the right of franchise, with the citizens retiring into passivity between elections. It has now a more positive and dynamic content with people having a say in how and by what rules they should be governed. Meaningful participation of people in major issues affecting their lives is now a vital component of

democratic governance, and such participation can hardly be effective unless people have information about the way a Government transacts. Democracy means choice, and a sound and informed choice is possible only on the basis of knowledge.

Modern democracy embraces a wider and more direct concept of accountability. The trend is towards accountability in terms of standard of performance and service delivery of public agencies to the citizens they are obliged to serve. Such accountability is possible only when the public has access to information relating to the functioning of these agencies. Finally, transparency and openness in functioning have a cleansing effect in the operation of these agencies. As such, it has been aptly said that sunlight is the best disinfectant.

* * * * *

RIGHT TO ENVIRONMENTAL INFORMATION

Dr. Sairam Bhat*

Abstract

"I am convinced that information on ecology cannot be kept a secret. Environmental openness is an inalienable human right. Any attempt to conceal any information about harmful impact on people and the environment is a crime against humanity."

The common man must be instructed on his role in environmental conservation. A vast portion of India's population resides in rural areas, necessitating conservation at the microcosmic level. Lack of proper appreciation of environmental information may often lead to decisions going against the interest of the general public. The Environmental [Protection] Act, 1986 and the Rules thereunder, especially the EIA Rules of 1994 provide for public consultation and disclosure in various circumstances. The author seeks to examine how the establishment of a public participation mechanism can improve the capacity for acquiring baseline information and underlying information for the team engaging in EIA studies. The general obligation to exchange information is found in one form or another, in virtually every international environmental agreement. The Right to Information Act 2005 has added to the existing Constitutional and environmental access to ecological information. The current article traces the interplay between right to information and various environmental legislations. The article also observes the march of law concerning the right to information with respect to the environment from the Indian and international perspectives.

Introduction

Global knowledge management is crucially dependent on public access to information – in particular, information on environmental risks. Yet, most existing systems of governance favour administrative or corporate secrecy, thereby monopolizing environmental information in the hands of governmental authorities or private stakeholder.² Improving the availability of information on the state of the environment and on activities which have adverse or damaging effects are well established objectives of

* Associate Professor of Law, National Law School of India University, Bengaluru, India

1 Alexander Nikitin in 1997. Mr. Alexander is a Russian environmentalist who work on Toxic and Nuclear contamination. See <http://www.goldmanprize.org/node/139>.

2 Peter H. Sand, The Right to Know: Environmental Information Disclosure by Government and Industry, paper presented at the Conference on 'Human Dimensions of Global Environmental Change: Knowledge for the Sustainability Transition, Berlin, 7 December 2002.

international environmental law. Information is recognized as a prerequisite to effective national and international environmental management, protection and co-operation. The availability of, and access to, information allows preventative and mitigation measures to be taken, ensures the participation of citizens in national decision making processes, and can influence consumer behavior. Information also allows the international community to determine whether states are complying with their legal obligations.

The Citizenry are the ultimate beneficiaries [or victims] of policy. Thus their cooperation is vital to the success of any policy. Unfortunately, the hierarchical structure of our society, coupled with the inadequate information, has alienated the common man from the government. In order to secure their cooperation it is imperative to seek it first. The common man must be instructed on his role in environmental conservation. India lives in her villages and conservation must take place at the microcosmic level. Only if the common man feels relevant will he assist. To feel relevant he must be convinced that the policy will not be inimical to his interests. More importantly, he must be convinced that the myopic, immediate interest must be subordinated to the long term interest. This is sustainable development, which includes in its ambit pollution control.³

Right to know strengthens participatory democracy also as armed with information on government programmes, citizens may influence decision making through representation, lobbying and public debate.⁴ Public access to government information enables citizens to exercise their political options purposefully. A government that conceals its actions and policies

3 Public participation is a very important part of the 1990 U. S Clean Air Act. Throughout the Act, the public is given opportunities to take part in determining how the law will be carried out. For instance, you can take part in hearings on the state and local plans for cleaning up air pollution. You can sue the government or a source's owner or operator to get action when EPA or your state has not enforced the Act. You can request action by the state or EPA against violators. The reports required by the Act are public documents. A great deal of information will be collected on just how much pollution is being released; these monitoring (measuring) data will be available to the public. The 1990 Clean Air Act ordered EPA to set up clearinghouses to collect and give out technical information. Typically, these clearinghouses will serve the public as well as state and other air pollution control agencies. See the list at the end of this summary for organizations to contact for additional information about air pollution and the Clean Air Act.

4 State of U. P v. Raj Narain, AIR 1975 SC 865.

from the people who are affected by such actions and policies cannot be judged by the people and cannot be held accountable for its misdeeds. Moreover, governments in modern welfare states exercise vast powers that affects economic interests and impinge on citizen's liberty. These powers are susceptible to misuses by the executive for private gains. Thus, the right to be informed of public acts can help check the abuse of executive power. Likewise, access to government records, can better equip a public spirited litigant, particularly environmental groups to fight cases of environmental degradation and clearly establish where does public interest lie.⁵

Lack of proper appreciation of environmental information may often lead to decisions going against the interest of the general public. Consequently, priority is given to developmental activities aimed at short term benefits over conservation oriented actions with a long term perspective of sustainable benefits.⁶

Environmental Impact Assessment⁷ [EIA] is one important technique for acquiring environmental information. EIA⁸ is also one of the tools of decision making which provides a space for people's participation. There are numerous reasons for involvement of the public in decision making processes. From a human rights perspective people have the right to be involved in decisions that affect them and their environment. Public participation seeks to ensure that members of the public have the opportunity to be notified, to express their opinions and ideally to influence the decisions regarding projects, programmes, policies and regulation that

5 G. S Tiwari, *Conservation of Biodiversity and techniques of people's activism*, JOURNAL OF THE INDIAN LAW INSTITUTE, April-June 2001 Vol 43 No. 2 at p. 216.

6 Prasad, *Silent Valley Case: An Ecological Assessment*, 8 COCHIN UNIVERSITY LAW REVIEW 128 [1984].

7 In India, the EIA notification is the principal regulation through which 32 categories of industries need to seek environmental clearance for the construction of a project before proceeding with the same. These projects need to have an investment of above Rs 100 crore.

8 EIA is a mechanism for the production of information which influences the decision making process relating to permits to Industrial activity and land use. It achieved statutory recognition in India when under sec. 3 of the Environmental Protection Act 1986, Ministry of Environment and Forest passed a notification in 1994 and it applies to large projects which are believed to have potentially significant impacts of the environment. Though frequent amendments to the 1994 notification have diluted the importance of EIA, the lessons for right to information are enormous.

could affect them. Public participation is the privilege of citizens. More often than not, the local communities are the ones that are adversely affected by development activities. As direct casualties, the local inhabitants are more sensitive to the changes in environmental quality than anyone else. Therefore, the establishment of a public participation mechanism can improve the capacity for acquiring baseline information and underlying information for the team engaging in EIA studies.⁹

International agreements and practice have developed other techniques for ensuring that states and other members of the international community are provided with information on the environmental consequences of certain activities.¹⁰

No fewer than four of the Rio Declaration's twenty-seven Principles are concerned with improving the provision of, and access to, environmental information. The Rio Declaration calls for exchange of knowledge [information]; individual access to environmental information; public awareness; notification of emergencies; and prior and timely notification on certain potentially hazardous activities. Chapter 40 of agenda 21, entitled 'Information for decision-making', recognizes that the need for information arises at all levels, from senior decision-makers at international levels to the grass roots and individual level, and to that end calls for the development of two programme areas: to bridge the 'data gap' and to improve information availability.¹¹

Information exchange

Environmental governance is plagued by uncertainty, with regard both to bio-geophysical processes and to socio-economic costs and benefits. Some of those uncertainties are exogenous, often incalculable, and we simply have to cope with them as risks and unknown. Other information deficits

9 Sunita Dubey, *Weakening the Enviro-Clearance Process*, available at <http://www.india.together.org/2004/aug/env-eiaweakn.htm> (last accessed on May 30, 2016).

10 Principle 2 of the Stockholm Declaration called for the 'free flow of up to date scientific information and transfer of experience'. The 1982 World Charter for Nature broadened the scope and extent of obligations relating to information, calling for the dissemination of knowledge of research, the monitoring of natural processes and ecosystem, and the participation of all persons in the formulation of decisions of direct concern to the environment.

11 Agenda 21, para 40.1.

however are manifestly endogenous, home-made—manufactured uncertainty’ or ‘smokescreen uncertainty’.¹² The sad reality is that we are all too often kept in the dark—through neglect or by design, by public officials or private stakeholders.¹³ Lessons from Bhopal disaster—beyond the dangerous process in use—was the failure of Union Carbide to adequately inform the Indian government, its workers and the surrounding community of the dangers. In order to avoid stringent safety regulations, Union Carbide hid information about the toxicity of the chemicals used at the plant. The price of this failure to disclose critical information as ultimately paid in thousands of lives. What happened in Bhopal is not unique, many more cases¹⁴ around the world demonstrate the urgency of providing critical information about a company’s operations in order to protect the environment and the lives and human rights of local communities and workers.

The general obligation to exchange information is found, in one form or another, in virtually every international environmental agreement. ‘Information exchange’ can be characterised as a general obligation of one state to provide general information on one or more matters on an ad hoc basis to another state, especially in relation to scientific and technical information. ‘Information exchange’ may be distinguished from specific obligations to provide regular or periodic information on specified matters to a specified body [reporting] or to provide detailed information on the occurrence of a particular event or set of events, such as an accident or emergency or proposed activity. ‘Information exchange’ of a general nature is endorsed by Principle 20 of the Stockholm Declaration and by Principle 9 of the Rio Declaration, which supports exchange of scientific and technical knowledge as a means of strengthening ‘endogenous capacity-building for sustainable development by improving scientific

12 Stanford Lewis, *The Precautionary Principle and Corporate Disclosure*, Good Neighbor Project, 1998, <http://gnp.enviroweb.org/precaution.htm>.

13 *Supra* note 2.

14 For instance, in 1986, a nuclear power station located 10 miles northeast of the city of Chernobyl, exploded and released massive amounts of radiation into the atmosphere. For a period of time, people in the Soviet Union were kept in the dark on the potentially damaging health effects of the accident. Much of the information related to Chernobyl was classified as ‘secret’. Yet, if local residents had access to information about the radiation levels in the surrounding areas and the potential damages to their health, they might have been able to take more effective action to safeguard their health.

understanding’.

Under environmental treaties, the obligation of exchange information can be a requirement between states, between states and international organizations, and between international organizations and non-governmental actors.¹⁵

Information exchange can be required in respect of general and undefined matters or in relation to specific matters. Examples of the former include the obligation to exchange information: on general scientific, research and technical matters; on helping ‘align or co-ordinate’ national policies;¹⁶ on research results and plans for science programmes;¹⁷ on appropriate technologies;¹⁸ on relevant national records;¹⁹ on national legislation; on implementation;²⁰ on relevant national authorities and bodies; and even on the availability of professors and teachers.²¹ Examples of more specific requirements include information exchange on: aspects of pests of pest and plant diseases;²² the conservation of species of wild flora and fauna;²³ and the conservation and sustainable use of biological diversity.²⁴

In recent years several conventions have established more detailed rules on the type of information to be exchanged. The 1982 UNCLOS requires exchange of scientific information and other data relevant to conservation of fish stocks, on marine scientific research, and on marine pollution.²⁵ Article 8 of the 1979 LRTAP Convention requires the exchange of ‘available information’, through an Executive Body and bilaterally on emission data at

15 The 1993 London Convention requires information exchange on the adoption of certain implementation measures, including import and export. [Art. 8(6), 9 and 12(1).

16 1982 Benelux Conservation Convention, Art. 2(2) .

17 1959 Antarctic Treaty, Art III (1)(a) and (c); 1973 Polar Bears Agreement, Art. VII.

18 Under Agenda 21, UNEP is to facilitate ‘information exchange on environmentally sound technologies’ including legal aspects’. Para 38.22 (j).

19 1952 North Pacific Fisheries Convention Art VIII.

20 1958 Danube Convention, Art. 12 (3); Cartagena Oil Spills Protocol, Art. 4.

21 1959 Plant Protection Agreement, Art. IV (3).

22 1951 European Plant Protection Convention, Art. V(a)(5).

23 1979 Berne Convention, Art 3(3).

24 1992 Bio diversity Convention, Art. 17 (1). Art 17 (2) provides that information exchange shall include ‘specialised knowledge and indigenous and traditional knowledge’ and shall also, where feasible, include repatriation of information.

25 Arts. 61, 143, 200 and 244.

periods of time to be agreed upon of certain air pollutants; major changes in national policies and general industrial development; control technologies for reducing air pollution; the projected cost of the emission control; meteorological and physico-chemical data relating to processes and effects; and national sub regional and regional policies. Art. 4 of the 1985 Vienna Convention requires the exchange of 'scientific, technical, socio-economic, commercial and legal information', as further elaborated in Annex II to that Convention, as well as information on alternative technologies. The 1987 Montreal Protocol calls for information exchange on best technologies possible alternatives to controlled substances and products and costs and benefits of relevant control strategies.²⁶

A wide spread concern about the limited effectiveness of the traditional language on information exchange is evident from the language adopted in more recent conventions. Increasingly, parties are being called upon to provide inventories or statistics of their natural and cultural resources²⁷ and to report on their emissions and discharges and their consequences. The 1992 Climate Change Convention, for example, calls on parties to promote and co-operate in 'the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change and to the economic and social consequences of various response strategies'.²⁸

1992 Climate Change Convention illustrates the extent to which reporting requirements have become increasingly onerous. Reporting, which is described as 'the communication of information related to implementation', is a central technique for ensuring implementation of the Convention. All parties must publish and make available to the conference of the parties 'national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the 'Montreal Protocol', and communicate to the conference of the parties 'information related to

26 Art. 4(1)(h).

27 1972 World Heritage Convention, Art. 11 (2) [property forming part of the cultural and natural heritage]; 1979 Bonn Convention, Art VI (2) [migratory species of wild animals]; 1983 ITTA, Art. 27(1) and (2) [tropical timber]; 1992 Bio Diversity Convention, Art. 7 (a) and (b), 1992 Climate Change Convention, Art. 4(1)(a).

28 Art. 4(I)(h). it remains to be seen whether this form of language can influence the willingness of states. And the private sector, to improve flows of information. it will always be difficult to gauge the effectiveness of general obligations to exchange information.

implementation’.²⁹ These reports must include a general description of steps taken or envisaged to implement the Convention and ‘and other information the party considers relevant to the achievement of the objective of the convention and suitable for inclusion in its communication, including, if feasible, material relevant for calculations of global emission trends’.³⁰

Prior Informed consent:

The Obligation to consult is closely linked to the Principle of ‘prior informed consent’.³¹

Prior informed consent is the principle that international shipment of a chemical that is banned or severely restricted in order to protect human health or the environment should not proceed without the agreement, where such agreement exists, or contrary to the decision, of the designated national authority in the importing country.

The prior informed consent procedure, which requires the formal obtaining and disseminating of the decisions of importing countries on whether they wish to receive further shipments of chemicals which have been banned or severely restricted, has been used in UNEP³² and FAO³³ no binding instruments and integrated into the legal binding arrangements for international trade in hazardous waste established by, for example, the 1989 Basel Convention,³⁴ the 1991 Bamako Convention,³⁵ and the 1993 EC Regulation.

The body of international rules on improving the availability of environmental information is now extensive, and information is now rightly a central technique for the implementation of environmental standards set

30 Art. 12(1)(b) and (c).

31 In 1983 the General Assembly adopted a resolution which provided the basis for the principle of ‘prior informed consent’, declaring that: ‘products that have been banned from domestic consumption and/ or sale because they have been judged to endanger health and the environment should be sold abroad by companies, corporations or individuals only when a request for such products is received from an importing country or when the consumption of such products is officially permitted in the importing country...’

32 UNEP London Guidelines 1989.

33 1985 FAO Pesticides Guidelines.

34 Chapter 12, 504-6.

35 Chapter 12, 507-8.

by treaties and other international agreements. Citizen's access to environmental information will have to be developed in practice and further guidelines developed to ensure that natural resources and equitable managed.

Indian Ecological Perspective of Right to know

In India secrecy is the normal rule, openness an exception. This is more strictly followed by government authorities responsible for pollution control and 'development' issues. Lack of information and the extremely uncooperative attitude of the concerned government authorities is the stumbling block in environment cases. Groups, especially those fighting major projects and development areas are faced with extremely hostile government authorities.

Public participation in environmental decision-making can be meaningful and effective only if people have right to know. This is imperative in environmental matters because, for example, government decisions to site dams and large projects may displace thousands of people and deprive them of their lifestyles and livelihood. It has been stressed by the Court in the *Doon Valley* case that the question involving issues relating to environment and ecological balance brings into sharp focus the conflict between development and conservation and serves to emphasize the need for reconciling the two in larger interest of the people residing within the area and the country.³⁶ The reconciliation of conflict between development and conservation can be served better if the facts, basis and reasons for decision that affect health, life, liberty and livelihood of people are known to those whose interest and rights are affected. This becomes all the more important because in a developing society large segments of the populations are illiterate or unaware of their legal rights. The massive development projects leading to socio-economic transformation result in depletion of vast resources including wild flora and fauna, which are linked with the questions of life, liberty and livelihood of people. Therefore, desirability or otherwise of accelerated development can be decided only in the context of its socio-economic impacts particularly those concerning local people. Right to know becomes important from this perspective.³⁷

36 Supra note 5 at p 215.

37 The Consumer Protection Act, 1986, sec. 6 gives the consumers the right to be informed about the quality, quantity, potency, purity, standard and price of goods [or services] so as to protect the consumer against unfair trade practices.

In pollution cases, the problem is more of collusion of the government authorities with the polluters. Under the prevailing special environmental enactments the concerned citizens or activists have no right to information. Even when the government authorities undertake investigation on a complaint by the concerned citizen or activist the said activist or citizen does not have the right to the investigation reports. There is more disabling legislation in this regard. Government authorities have used Sec. 5 of the Official Secrets Act to declare documents and even areas³⁸ as 'secret' and therefore inaccessible. In addition to this the government claims immunity from producing documents in court under sec. 123 of the Evidence Act.

The right to information is considered a fundamental right in many countries. Special Acts have also been enacted to facilitate right to information.³⁹ The Air Act 1981⁴⁰ and the Water Act 1974⁴¹ were amended to allow private citizen access to information on polluting industries, if they were complaining about them.⁴² As usual they also had a proviso allowing withholding of the information of the officials thought the interest of the public would not be served.⁴³ In India the right to information has been read into the fundamental rights to free speech and expression. This has been done in cases that raised wide constitutional problems. As early as in 1975 in the case of *State of Uttar Pradesh v. Raj Narain*,⁴⁴ the apex Court derived the right to information from freedom of speech. They said that the accountability of the Government could be safeguarded with information as a check against corruption. Later in *S. P Gupta v. Union of*

38 Eg: The Submergence zones of the Narmada Dam was initially put under the 'secret clause' and later due to public outcry was made available to the citizens.

39 United States; The Freedom of Information Act 1966.

40 Sec. 16 of the Act provides for the functions of the Central Board among which collection and dissemination of information in respect of matters relating to air pollution is one. But the section fails to specify to whom this information and what is the nature of this information; is to be disseminated.

41 Sec. 25(6) provides for citizens right to inspection of the register maintained by the State Board. This register contains particulars of the conditions imposed on industries. Any interested person can access it.

42 Sec. 3(2)(xii) of the Environment Protection Act 1986 provides the Central Government with powers to take measures for collection and dissemination of information relating to environmental pollution. It appears that the central Government has forgotten about this power.

43 See Sec. 25 of the Air Act 1981.

44 AIR 1975 SC 865, 884.

India,⁴⁵ popularly known as Judges Case, Justice Bhagwati recognized the right to know to be implicit in the right to free speech and expression.

The first observation of any court regarding right to information in environment cases is found in *L. K Koolwal v. State of Rajasthan*,⁴⁶ wherein the decision is based on tenuous legal logic and right to information is merely an observation in the ratio decidendi. In this case, PIL was filed for the issue of Mandamus against Jaipur City Municipal Corporation to provide better sanitation facilities.⁴⁷ The Court opined that the citizen has a right to know about the activities of the State. The privilege of secrecy does not survive now to a great extent. Under Art. 19(1)(a) the right to freedom of speech is based on the foundation of the right to know. But this right is limited, particularly in the matter of sanitation. Every citizen has a right to know how the state is functioning in such matters because maintenance of health preservation of the sanitation and environment falls within the preview of Art. 21 of the Constitution as it adversely affects the life of the citizen and it amounts to slow poisoning, if not checked.⁴⁸

In *Bombay Environmental Action Group*,⁴⁹ the court upheld the right of a citizen's group to inspect documents of Government agency; the Poona Cantonment Board; which was habitually suppressing information regarding illegal structures. The Court categorically held that it was not any Tom Dick and Harry asking for information but a group acting in public interest that required information and thus should have full access to it. However, the right to information in both these cases was read into fundamental right to

45 AIR 1982 SC 149; also see *Dinesh Trivedi v. Union of India*, 1997 (4) SCC 306.

46 AIR 1988 Raj. 2. This case was a PIL seeking directions to the Municipal Corporation of Jaipur to improve the sanitation of the city and remove filth, garbage and dirt from the city.

47 Jaipur had bad sanitation facility. This caused inconvenience to the citizens and environmental hazard due to accumulation of filth, rubbish, night soil, odour etc.

48 Under Chapter 6 of the Rajasthan Municipalities Act, 1959, the Municipality is under a duty to maintain the city clean. Chapter 6 deals with three duties of the Municipality namely primary, secondary and special duty. Cleaning public streets, places, sewers and all such spaces, and removing off rubbish, filth is the primary duty of the municipality. It is for the municipality to see how to perform the primary duties and how to raise resources for the performance of that duty. In the performance of primary duty no excuse can be taken and can be directed also as it is primary, mandatory and obligatory duty to perform the same.

49 *Bombay Environment Action Group v. Poona Cantonment Board*. [Unreported] writ petition of 1986 in the Mumbai High Court.

free speech and expression and both these decisions pertain to the times prior to the Courts observation that the right to clean air and water and wholesome environment is part of Art. 21. It would be useful to advocate the argument that right to clean air, water and environment also includes the right to information that is absolutely necessary to exercise this right. Thus it can be argued that the state cannot suppress information which is vital to exercise of a fundamental right. The argument has not been used in any environment case, but is a promising one. If the right to information is achieved in this manner it will facilitate the exercise of right to life in all its aspects, including the right to a clean environment.

In *M.C. Mehta v. Union of India*,⁵⁰ Mr. Mehta filed this application in the public interest, asking the Supreme Court to: (1) issue direction to cinema halls that they show slides with information on the environment; (2) issue direction for the spread of information relating to the environment on All India Radio; and (3) issue direction that the study of the environment become a compulsory subject in schools and colleges. Petitioner made this application on the grounds that Article 51A(g) of the Constitution requires every citizen to protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures. To fulfil these obligations to the environment, the Petitioner argued that people needed to be better educated about the environment.

Comparatively,⁵¹ information that relates to the environment is very widely interpreted in UK Freedom of Information Act 2000 to include the dead state of flora and fauna. This therefore is a rather unique extension of right to information because it makes it easier to get information relating to 'human conditions in the aftermath of a disaster'. The existing Regulation of 1992 works under the assumption that it intends to cover information not accessible otherwise through specific statutory provisions. This provision in the Regulation is not to restrict the applicability of the regulation but on the other hand seems to be an indication that it is expected of specific legislations that they will allow for a procedure of accessing information. Environmental information in UK is usually recorded in registers by respective agencies and departments.⁵² European

50 Writ Petition (Civil) No. 860 of 1991.

51 The EU Directive No. 313 of 1990 on Freedom of Access to Information on the Environment mandated the enactment of transparency legislation in all EU members countries.

52 Reg. 2(4).

Union decided in July 2000, to establish a mandatory European Pollutant Emission Register to be operated by the European Environmental Agency on top of national inventories. In India, PCB have no statutory duty to maintain registers and whatever reports they maintain from inspections they undertake are meant purely for the benefit of legal proceeding if any are initiated.

However despite of how much ever one may provide for the right to information not every person in society will know what information is available and accessible. In light to this problem it has been expressed that there is a need to compile the list of routinely used environmental information and the places/sources from which the same can be obtained. The final dimension of securing information is that it should be in an understandable form.⁵³

Right to Information Act 2005 and Environment

The Right to Information Act 2005 has added to the existing constitutional and environmental access to ecological information. Information relating to research, testing and studies of a number of GM crops was held to be in public interest. The Central Information Commission [CIC]⁵⁴ upheld the right of Piyush Mohapatra⁵⁵ of Gene Campaign who wanted information about the GM crops and their studies in relation to allergy/toxicity. The CIC rejected the contention of the Department of Biotechnology and ordered that toxicity, allergenicity data that determine the safety of Genetically Engineered rice, mustard, okra and brinjal be made public under the RTI Act.⁵⁶

Further, the Commission held that the MoEF and Department of Biotechnology and both public authorities such information should be made available within sec. 4(1) of the RTI Act.⁵⁷ Further the CIC has held⁵⁸

54 CIC is the second Appellant Authority to decide whether or not the Information sought by the citizens is to be disclosed or not.

55 CIC/WB/C/2006/00063.

56 CIC/WB/A/2006/00548.

57 Sec. 4 states the obligation of Public Authorities. Sec. 4(2) States: It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.

58 CIC/WB/A/2006/00599.

that EIA for all mega constructions also falls within the definition of sec. 4(1) which reads as follows: 'publish all relevant facts while formulating important policies or announcing the decisions which affect the public'. Thus the access to the EIA now is made easier and also mandatory on MoEF to make routine disclosure of the same. When Ms. Misha Singh applied to MoEF seeking information regarding environmental clearance [EC] and other parameters of the Maheshwar Hydro Electric project, Madhya Pradesh in reference to the 1994 environmental clearance given to the NDVA and its follow up, she was informed that the information sought by the applicant cannot be located. It was reported that the whole almirah and files concerning the project are untraceable. The CIC held that all these documents are held by the Government in 'public trust' and intraceability is not an adequate excuse. The CIC direct the MoEF to lodge a FIR to initiate criminal action against those responsible for the theft/loss.⁵⁹

Conclusion

Global knowledge management is crucially dependent on public access to information, in particular, information on environmental matters. Yet most existing systems of governance favour administrative or corporate secrecy, thereby monopolizing environmental information in hands of governmental authorities or private stakeholders. The Right to Information Act 2005 in India aims to provide for freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest in order to promote openness, transparency and accountability in administration. This definition is missing the dynamisms of the right which must include the right of the citizen to demand all information pertaining to any of the state's actions, and the right to participate in an question decision etc. it does not include the right of the citizen to demand proactive, *suo motu* and mandatory public participation from government and its agencies and others under its control and supervision. Further, most of the provision are very generally framed, which leaves much room for confusion. Likewise it leaves too much room for administrative discretion, defying its very purpose.

India is a democratic country. Political democracy empowers its citizens to demand that its need to be fulfilled by the elected government. Democracy allows demonstration, campaigns and gherao to achieve these demands.

59 CIC/WB/C/2006/00102.

Courts may not be the proper forum for directing the executive to comply with the law.⁶⁰ Judicial action would be subverting the political democratic process, which is more effective. Information is the oxygen of democracy. If people do not know what is happening in their society, if the actions of those who rule them are hidden, then they cannot take a meaningful part in the affairs of that society. But information is not just a necessity for people – it is an essential part of good government.

* * * * *

60 Almitra H. Patel v. Union of India, 2000 2 SCC 679.

RTI CONSTRICTED

*Shailesh Gandhi**

Abstract

The denial of information under the RTI Act can only be based on Sections 8 and 9. In a democracy all information held by government ultimately belongs to the citizens, but some information may be denied to protect certain interests. The Indian Parliament intended that Section 8(1)(j) of the RTI Act be used sparingly, as it was aware that there are a number of fraudulent transactions and declarations made by people to get unjust benefits. It is imperative that when any denial of information is made on the basis of Section 8(1)(j), a comment must be included in the decision recording that the information would also have been refused to the Parliament or a State Legislature. The proper interpretation of Section 8(1)(j) upsets sections of society that do not deem it to safeguard their interests and appears to be contrary to the prevailing notions in a few Western democracies. The current paper analyses the legal nature of the various kinds of information which have been expressly excluded from the ambit of the RTI Act. More importantly, the author considers the core issue of whether a constriction of the fundamental right of citizens should be allowed to continue.

Introduction

The first landmark pronouncement on citizen's Right to Information in India was made by Justice Mathew in *State of Uttar Pradesh v. Raj Narain*¹ wherein he stated,

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.

*Former Information Commissioner with the Chief Information Commission.

¹ (1975) 4 SCC 428, Para 74.

Effectively he signalled that the only bar on information should be one which would impact public security. Repeated pronouncements were made in *SP Gupta v. Union of India*,² *Rajagopal v. State of Tamil Nadu*,³ *Union of India v. Association for Democratic Reforms & Another*, 2002 (ADR),⁴ and many other cases reiterating this ideology and principle and recognising the right to information as a fundamental right under Article 19 (1) (a).

Parliament recognised and codified this fundamental right available to citizens in 2005, in which it is clearly laid out that there would be ten exemptions instead of one as suggested by Justice Mathew. These exemptions are in line with the reasonable restrictions which can be placed on this right as per Article 19 (2). The Indian RTI Act of 2005 has been rated as one of the best in the world. Justice Ravindra Bhat of Delhi High Court captured the spirit of the RTI Act in his judgement in the *Bhagat Singh v. CIC*,⁵ in which he stated:

13. Access to information, under Section 3 of the Act, is the rule and exemptions under Section 8, the exception. Section 8 being a restriction on this fundamental right, must therefore be strictly construed. It should not be interpreted in manner as to shadow the very right itself. Under Section 8, exemption from releasing information is granted if it would impede the process of investigation or the prosecution of the offenders. It is apparent that the mere existence of an investigation process cannot be a ground for refusal of the information; the authority withholding information must show satisfactory reasons as to why the release of such information would hamper the investigation process. Such reasons should be germane, and the opinion of the process being hampered should be reasonable and based on some material. Sans this consideration, Section 8(1)(h) and other such provisions would become the haven for dodging demands for information.

14. A rights based enactment is akin to a welfare measure, like the Act, should receive a liberal interpretation. The contextual background and history of the Act is such that the exemptions,

2 AIR1982 SC 149.

3 1995 AIR 264.

4 2002 AIR 2112.

5 WP (c) no. 3114/2007, Para 13.

outlined in Section 8, relieving the authorities from the obligation to provide information, constitute restrictions on the exercise of the rights provided by it. Therefore, such exemption provisions have to be construed in their terms; there is some authority supporting this view.⁶ Adopting a different approach would result in narrowing the rights and approving a judicially mandated class of restriction on the rights under the Act, which is unwarranted.

The denial of information under the RTI Act can only be based on Sections 8 and 9 which are reproduced below:

8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
- (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
 - (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
 - (c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
 - (d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
 - (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
 - (f) information received in confidence from foreign government;
 - (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of

⁶ See *Nathi Devi v. Radha Devi Gupta*, 2005 (2) SCC 201; *B. R. Kapoor v. State of Tamil Nadu*, 2001 (7) SCC 231 and *v. TULASAMMA v. Sesha Reddy* 1977 (3) SCC 99.

information or assistance given in confidence for law enforcement or security purposes;

- (h) information which would impede the process of investigation or apprehension or prosecution of offenders;
- (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:

Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:

Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

- (j) 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:

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

- (2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interests in disclosure outweighs the harm to the protected interests.
- (3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under this section.

Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the

decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

9. Without prejudice to the provisions of section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.”

In a democracy all information held by government belongs to citizens but some information may be denied to protect certain interests. These have been given in Sections 8 and 9 of the RTI Act inline with Article 19 (2) of the Constitution of India. One of the most frequently used exemptions is Section 8 (1) (j). PIOs have often claimed this exemption to deny information relating to individuals as well as Institutions. Unfortunately the Information Commissions and the Supreme Court appear to have expanded the scope of this exemption far beyond the words in the law. They have not been considering some of the vital elements of this provision. The focus of this paper is on the 87 words in Section 8 (1) (j), and will seek to prove that the provision has been arbitrarily truncated. Most denials under Section 8 (1) (j) are based on norms of denial of personal information which are arbitrary or not in consonance with the law.

The CIC orders and the Supreme Court’s judgment appear to be reading the law as exempting:

(truncated j) information which relates to personal information 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:

instead of the original provision in the law:

(j) 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:

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

A careful reading of the CIC orders and the Supreme Court judgment in the Girish Ramchandra Deshpande⁷ case shows that they are based on, truncated j,- mentioned above. Out of the original provision of 87 words, it appears that only 40 words have been taken into account. Besides earlier Supreme Court pronouncements have not been taken into account. The exemption has been applied merely because it is ‘personal information.’

As per the wording of the law, the issue of establishing public interest will only arise when it is first established that the information is exempt. It is to be noted that this section is specifically concerned about “personal information which has no relationship to any public activity” or may cause “unwarranted invasion of the privacy of the individual”. It cannot be applied when the information concerns institutions, societies, organizations or corporates. This shows that privacy could only be maintained by an individual and no other body could display this characteristic.

The CIC⁸ in May 2009 in one of the few orders rejecting the claim for denial of information under Section 8 (1) (j) stated, *“Words in a law should normally be given the meanings given in common language. In common language we would ascribe the adjective ‘personal’ to an attribute which applies to an individual and not to an Institution or a Corporate. From this it flows that ‘personal’ cannot be related to institutions, organisations or corporates. (Hence we could state that Section 8 (1) (j) cannot be applied when the information concerns institutions, organisations or corporates.).”*

In a similar vein the US Supreme Court⁹ in 2011 held that, *“We reject the argument that because ‘person’ is defined for purposes of FOIA (Freedom of Information Act) to include a corporation, the phrase ‘personal privacy’ in Exemption 7 (c) reaches corporations as well. The protection in FOIA against disclosure of law*

7 Girish Ramchandra Deshpande v. Central Information Commissioner & Ors. [Special Leave Petition (Civil) No. 27734 of 2012 (@ CC 14781/2012)] <http://judis.nic.in/supremecourt/imgs1.aspx?filename=39615> (last accessed on May 2, 2016).

8 Decision No. CIC/SG/A/2009/001990/5042 for details see http://www.rti.india.gov.in/cic_decisions/SG-06102009-14.pdf, Pg 3, (last accessed on May 2, 2016).

9 Federal Communications Commission v. AT&T inc. No.09-1279 of 1 March 2011, Pg1.

enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.”

Section 8 (1) (j) applies to an individual, not to any Institution or Corporate. However many decisions of the CIC and other Commissions violate this simple principle as they apply this exemption arbitrarily.

In M/s Sanitex Chemicals case¹⁰ the CIC ruled: *“It has been the consistent view of this Commission in several of its decisions that ITRs, being personal information, are exempted from disclosure in terms of section 8(1)(j) of the RTI Act. Even the modified request of Shri Shetty, for all practical purposes, amounts to disclosure of ITRs filed by M/s. Sanitex Chemicals. I, therefore, find no infirmity in the orders passed by CPIO and Appellate Authority that the information requested for by the Appellant is not disclosable. Hence, the appeal is dismissed.”* A decision by the Patna High Court also accepts denial of information under Section 8 (1) (j) for information regarding a private agency which conducted an examination for posts of sessions judges.¹¹

A plain reading of Section 8 (1) (j) shows that information may be considered exempt under the following two circumstances:

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

Most of the information available with government departments is likely to be information relating to a public activity, and hence condition a) described above will usually not apply. The RTI Act has not defined the words ‘public activity’ or ‘privacy’, hence we could look at earlier Supreme Court judgements for this. It would be worthwhile to consider the Supreme Court

10 M/s. National Film Development Corporation Limited v. Commissioner of Income Tax, Appeal No. CIC/AT/A/2008/00896, para 7.

11 Joint Registrar (Judicial) cum Public Information Officer v. State Information Commission and Others, Patna High Court [CWJC No. 15814 of 2009], decision date 28/07/2010.

judgement in *R.Rajagopal and Anr. v. State of Tamil Nadu*¹² where the *ratio decidendi*¹³ says:

We may now summarise the broad principles flowing from the above discussion:

- (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone." 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. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.
- (2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including Court records. This is for the reason that 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 interest 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 offense should not further be subjected to the indignity of her name and the incident being published in press/media.
- (3) There is yet another exception to the Rule in (1) above - indeed, this is not an exception but an independent rule. 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

12 *Rajagopal v. State of Tamil Nadu*, 1994(6) SCC 632 , para 26.

13 *Ratio decidendi* is Latin for "the reason" or "the rationale for the decision". It is "the point in a case which determines the judgment" (Black's Law Dictionary, page 1135 (5th ed. 1979)).

respect to their acts and conduct relevant to the discharge of their official duties.

Thus as per point (1) in the above case, matters relating to privacy are generally those relating to family, marriage, procreation, motherhood, child bearing and education among others. This is not an exhaustive list but is indicative. However as per point (2) even publication based upon public records would normally be considered unobjectionable, unless it violates decency. Since the judgment does not define 'public records' it would be reasonable to accept the definition of 'public records' given in the Public Records Act. Public records are defined by the Public Records Act as any record in any form with a government agency. Based on this understanding, there would be very little information which could). Public authorities like NGOs and substantially financed private organizations would have 'personal information' which would not be labeled as 'public records' and hence could claim this exemption. Similarly records relating to a private activity of an individual which may have come into the possession of a government agency like telephone transcripts of private conversations obtained during authorized interception of telephone conversations would be exempt. However any disclosure which can be construed as an unwarranted invasion of privacy could be denied as per condition (2)). In many other Supreme Court judgements delivered before the advent of the RTI Act, it has been stated that matters of privacy relate to actions and activities within the house of a person, apart from the matters mentioned in point (1) in the Supreme Court judgement quoted above. As one example the medical records of an individual which may be held by a public hospital would be considered exempt and only if a larger public interest is established would they be disclosed as per the law.

Information available in 'public records' when applying for a ration card, government job, license, permit, authorization or passport is not covered by this exemption even though it is personal information, since it relates to a public activity. Information regarding performance of a public servant will also have to be disclosed. Disclosure cannot be considered an unwarranted invasion of privacy unless it relates to matters relating to an individual's activities at home, or relating to her body, marriage, sexual preferences, child bearing, etc.

Indian Parliament intended that Section 8 (1) (j) would be used sparingly, as it was aware that there are a number of fraudulent transactions and

declarations made by persons to get unjust benefits. Affidavits filed by elected representatives have been found to be false, even in matters of their degrees and educational qualifications. It is common knowledge that many people use fake degrees, caste and income certificates and many other false statements even on oath to get government jobs and other benefits. It is widely known that many persons selected for government jobs obtain these through bribery. It must be remembered that the preamble of the Act has categorically mentioned ‘containing corruption’ to be one its objectives. This is not the objective for all laws worldwide and this must be kept in mind when interpreting the provisions of the Act. That there is widespread corruption in various activities is accepted. Most people when seeking such information are expecting to unearth some wrong doing based on hearsay or suspicion.¹⁴ Realising that there may be some confusion in such a matter amongst Public Information Officers (PIOs), Parliament went further and provided an acid test just for this exemption when it said:

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

This was to indicate to PIOs that only in very rare cases could information be denied under Section 8 (1) (j). This proviso requires that before denying information on grounds of Section 8 (1) (j) the person denying the information would make a subjective assessment that he would deny it to Parliament. If disclosing the information would cause an unwarranted invasion to the privacy of an individual, it should not be given to Parliament. Exemptions are provided in the RTI Act, to deny information to citizens based on a harm perception to some interest. If personal information which causes unwarranted invasion to the privacy of an individual is disclosed in Parliament it would become public knowledge and harm an individual. If that is the case, it should be denied to Parliament. Hence, before denying information to a citizen on grounds of Section 8 (1)(j) a PIO, first appellate authority, information commissioner or judge should consider, if in their opinion the information would be denied to Parliament.

14 As a Commissioner the author witnessed the unravelling of many illegal acts through RTI applications. For instance it was brought to attention that some of the doctors in government hospitals had fake degrees and yet Delhi Government continued their services. For details see www.rti.india.gov.in/cic_decisions/SG-23072009-04.pdf (last accessed on May 2, 2016).

It is observed that most Information Commission and many Court judgements often reject information without addressing this proviso when allowing refusal of information based on Section 8(1)(j). Given this proviso, it is imperative that when any denial of information is made on the basis of Section 8 (1) (j), a comment must be included in the decision recording that the information would have been refused to Parliament or State Legislature.¹⁵ The satisfaction for denial of information in Section 8 (1) (j) has been set strictly in the law, which is being arbitrarily neglected. Many decisions upholding the exemption under Section 8 (1) (j) have either claimed that it would make the exemption irrelevant or that Parliament has its own rules for giving information. Both these positions are untenable, as it is a well-known principle that no words in a law can be neglected or considered irrelevant.

Section 8 (2) of the Act states *“Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.”* It is important to note that only if it is established that an exemption applies is there any need to consider whether a larger public interest in disclosure exists. Many decisions mechanically state that there is no larger public interest in disclosure of information if they come to the conclusion that the information is personal information, without establishing that the exemption applies and the information would be denied to Parliament by them. It is clear that there is no need of any public interest to be established if no exemption is established.

The broad principles concerning the law of privacy were summarized by the apex court in the case of *Rajagopal v. State of Tamil Nadu* which stated that the claim for privacy could usually not be made for public records. It also laid down that in the case of public servants very rarely can the right to privacy be claimed. A similar principle is expressed in the ADR/PUCL¹⁶ judgements when the Supreme Court had ruled that all citizens have a right to know about the assets of those who want to become public servants.¹⁷

15 If a query from Parliament requires disclosures which would be an unwarranted invasion on the privacy of an individual, or would be transcripts of private telephone conversations, or details of sexual preferences, or a rape victim it should be denied to Parliament and the citizen.

16 People's Union for Civil Liberties v. Union of India, Writ Petition (civil) 490 of 2002.

17 Union of India v. Association for Democratic Reforms & Another, 2002.

As a consequence of this decision all candidates standing for elections have to declare their assets.

However the decision of the Supreme Court in the *Girish Ramchandra Deshpande v. Central Information Commissioner & Ors*¹⁸ has created a situation where most personal information is being denied across the nation without adequate consideration to the law. Deshpande had sought information about an Enforcement Officer working in the Regional Provident Fund Commissioner's office regarding his service records in terms of memos and punishments awarded to him, gifts received by him on his son's wedding as also his assets and liabilities. Relevant excerpts from the case are given below. In the CIC ruling it was stated:

5. Advocate Wachasunder has made a strong plea for disclosure of information on the remaining paras. His first and foremost submission is that information has been wrongly denied in terms of clause (j) of section 8(1) as information can be denied only when it has no relationship with public activity or interest. Shri Lute, being an Enforcement Officer, has been vested with the authority to prosecute employers for alleged violation of law and, therefore, his actions fall in the domain of 'public activity' and evoke public 'interest'. He has also assailed the denial of information on the ground of 'unwarranted invasion of privacy'. It is his plea that a true meaning needs to be assigned to this expression. As Shri Lute is an Enforcement Officer, the society expects him to be of transparent integrity and conduct, and therefore, information sought by the Appellant cannot be construed as unwarranted invasion of privacy.
6. He would further submit that as per clause proviso appended to clause (j), any information which cannot be denied to the Parliament or a State Legislature, the same cannot be denied to the Appellant. His poser is: can this information be denied to the Parliament or a State Legislature? He answers this in the negative and pleads for disclosure.

After recording the above the CIC however, denied the information on the following ground:

18 Special Leave Petition (Civil) No. 27734 of 2012.

13. The question for consideration is whether the aforesaid information sought by the appellant can be treated as 'personal information' as defined in clause (j) of section 8(1) of the RTI Act. It may be pertinent to mention that this issue came up before the Full Bench of the Commission in Appeal No. CIC/AT/A/2008/000628 (MilapChoraria Vs. Central Board of Direct Taxes) and the Commission vide its decision dated 15.06.2009 held that "the Income Tax returns have been rightly held to be personal information exempted from disclosure under clause (j) of section 8(1) of the RTI Act by the CPIO and the Appellate Authority; and the appellant herein has not been able to establish that a larger public interest would be served by disclosure of this information. This logic would hold good as far as the ITRs of Shri Lute are concerned. I would like to further observe that the information which has been denied to the appellant essentially falls in two parts - (i) relating to the personal matters pertaining to his service career; and (ii) Shri Lute's assets & liabilities, movable and immovable properties and other financial aspects. I have no hesitation in holding that this information also qualifies to be the 'personal information' as defined in clause (j) of section 8(1) of the RTI Act and the appellant has not been able to convince the Commission that disclosure thereof is in larger public interest.

It may be noted that there is no discussion about the law and there is only an opinion that the information is 'personal information' and hence must be denied, unless a larger public interest can be established. It is interesting to note that the Milap Choraria case¹⁹ on which the above decision was based, did not discuss the wording of Section 8 (1) (j). It is also an irony that in that case the issue did not even relate to a public servant. Yet it became the basis for the CIC decision in this case. The Commission made no attempt to consider whether information being sought about a public servant would be subject to a different standard from that of an ordinary citizen. The decision did not state that it had applied the proviso and came to the conclusion that this information would not be provided to Parliament, nor did it explain how public interest was not likely to be served by disclosing the information in the case of a public servant.

19 Available at <http://www.incometaxindia.gov.in/Documents/RTI%20Case%20Laws/RTI%20Judgments/Shri-Milap-Choraria-RTI-Judgments.pdf> (Last accessed on May 2, 2016).

Girish Deshpande approached the Supreme Court ultimately in SLP (C) no. 27734 of 2012. The Supreme Court after recording the facts of the matter and its history reproduced para 13 of the CIC order, given above. In para 11 of the judgement the Court reproduced Section 8 (1) (e), (g) and (j) of the RTI Act, but did not mention the proviso to Section 8 (1) (j) when it stated:

11. We are, however, in this case primarily concerned with the scope and interpretation to clauses (e), (g) and (j) of Section 8(1) of the RTI Act which are extracted herein below: "8. Exemption from disclosure of information.- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
 - (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
 - (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
 - (j) 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.
12. The petitioner herein sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer and also details viz. movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he has also sought for the details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds a place in the income

tax returns of the third respondent. The question that has come up for consideration is whether the above-mentioned information sought for qualifies to be "personal information" as defined in clause (j) of Section 8(1) of the RTI Act.

13. *We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8 (1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right.*
14. *The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8 (1) of the RTI Act, unless it involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information.*
15. *The petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8 (1) (j) of the RTI Act.*
16. *We are therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, we are not inclined to entertain this special leave petition. Hence, the same is dismissed."*

Firstly, the Court assumes that 'personal information' has been exempted from disclosure in Section 8 (1) (j). It is important to note that personal

information is exempt only if its disclosure has no relationship to public activity or interest' or 'was an unwarranted invasion of the privacy of an individual'. Neither the CIC decision, nor the Court had given any reasoning whether it was related to 'public activity' nor whether it was an unwarranted invasion of privacy. They did not rule that memos, show cause notices and orders of censure/punishment, had no relationship to any public activity. The need for justifying public interest comes only when an exemption applies. CIC as well as the Court have only referred to the first five words of Section 8 (1) (j) and not really gone beyond these, which is very unfortunate.

Equally significantly the proviso to Section 8 (1) (j) has not been mentioned. The Court appears to have forgotten to mention it when quoting the law. The Girish Deshpande judgement has given no reasoning for its decision. It is based on accepting the CIC decision which ironically relied on an earlier CIC decision wherein the issue was not related to personal information about a public servant at all. Neither the CIC order nor the Supreme Court judgement have given appropriate reasons based on Section 8 (1) (j) of the RTI Act, nor did they record that in their opinion the information sought would be denied to Parliament. They did not decide whether filing of a Income tax return is a public activity, or that activities relating to the work of a government officer did not relate to a public activity. They did not give any reasoning how that revelation of information would cause unwarranted invasion on the privacy of an individual. Most critically they did not consider the R. Rajagopal decision of the Supreme Court nor the ADR/PUCL judgements before deciding on the matter of disclosure of details of a public servant and whether there was a larger public interest in disclosure.

The Supreme Court's statement, that the issue is between and employer and employee, fails to recognise the vital detail that the employer is the government on behalf of 'we the people'. Its statement that the petitioner cannot claim the information as a right is incorrect. The petitioner was exercising his legal right, and rejection should have been based on the law. This significant tool for exposing corrupt officials and those who have obtained jobs and various benefits by fraudulent methods will be blunted if Section 8 (1) (j) is given this meaning and it would thwart one key objective of the RTI Act of 'containing corruption'. In the first few years the law had

started worrying those who submit various false statements and fake certificates.

It may be useful to refer to the Privacy Bill proposed in 2014 to understand what may be considered unwarranted invasion of privacy. It defines 'Sensitive Information,' which could be called unwarranted invasion of privacy, thus:

Sensitive personal data : Personal data relating to: (a) physical and mental health including medical history, (b) biometric, bodily or genetic information, (c) criminal convictions (d) password, (e) banking credit and financial data (f) narco analysis or polygraph test data, (g) sexual orientation. Provided that any information that is freely available or accessible in public domain or to be furnished under the Right to Information Act 2005 or any other law for time being in force shall not be regarded as sensitive personal data for the purposes of this Act.

It mentions certain specific areas and yet qualifies this by saying that it would not apply to what is accessible under the Right to Information. The Information Commissions and Courts have completely misread the exemption provision of Section 8 (1) (j). The Girish Deshpande judgment has already been taken as the law in force by PIOs, First Appellate authorities, Commissions and High Courts. The Supreme Court has also taken it as the law in civil appeal no. 3878 of 2013.

The proper interpretation of Section 8 (1) (j) upsets sections of society that feel it does not seem to safeguard their interests and appears to be contrary to the prevailing notions in some Western democracies. It may be argued that the wording of the RTI Act in India is appropriate and would benefit the nation by reducing corruption. The harm to a small section would be negligible, unless they were indulging in wrongdoing.

This is a matter constricting a fundamental right of citizens, which is not in consonance with the RTI Act made by Parliament. When Government attempted to amend the RTI Act on three occasions, citizens protested strongly and the government retracted. There is now a need to discuss this flawed interpretation of the law. To summarise:

1. The Girish Deshpande judgement cannot be said to have laid down the law, since no legal reasoning or discussion has been

given. It appears only 40 words of the 87 word provision have been considered.

2. The R.Rajagopal judgement has a ratio decidendi which must be taken into account.
3. The import of the ADR/PUCL judgement must be considered.
4. The Supreme Court must resolve the clearly contradictory position of the Girish Deshapande judgment and those mentioned at point 2 and 3.
5. The important proviso in the law must be given its importance, and not brushed aside or forgotten.

If this is not done, an important aspect of the law and its capacity to curb widespread wrongdoing and corruption would be lost. More importantly, should a constriction of the fundamental right of citizens be allowed to continue? There should be a wider discussion on this matter and after the provisions of Section 8 (1) (j) have been discussed and debated the nation should take a correct call on this matter. The Supreme Court must be respected but when citizens feel a law concerning their fundamental right is being effectively amended by courts, they must be vigilant and highlight this.

* * * * *

NEED FOR DEFINING 'AN INTELLIGENCE OR SECURITY ORGANISATION' UNDER RIGHT TO INFORMATION ACT, 2005

M.G. Kodandaram*

Abstract

Under Article 19 of the Constitution of India, the 'right to information' is guaranteed to every citizen. With a purpose to bring in a practical regime and secure access to information from Public Authorities to the citizen, Indian Parliament enacted the Right to Information Act, 2005 which came into force from 12th October 2005. One of the objectives for bringing in such a regime is to promote transparency and contain corruption, by holding the Government and every Public Authority accountable to the governed, thereby strengthen the Democracy. It is always true that an informed citizenry and transparency of information are vital for effective and successful functioning of any Republic. However it was felt that all the information available with the Public Authorities cannot be shared as it may hurt the interest of the Nation as well as the rights vested with the other person. Therefore the information which is found to be impacting the sovereignty and integrity of the nation is forbidden to be published by any court of law, when the same pertains to commercial confidence, trade secrets or intellectual property, third party, endangers the life or physical safety of any person or identifies the source of information, maintains privacy etc, restrictions have been imposed under Section 8 of the Act. In addition to the above exceptions, under Section 24 of the Act, certain 'intelligence and security organisations' of the Central Government, duly specified in the Second Schedule, have been kept out of the obligation to provide information under the Act. However if the information is concerning the allegations of 'corruption and human rights violations', exception has been carved out by mandating such organisation to provide such information. Further, the Central Government has been empowered to include or omit in second schedule, any of its 'intelligence or security organisation' from providing requested information, by issuing a notification. Using the aforesaid enabling provision the GOI has issued notifications. As of date there are twenty five organisations mentioned in the second schedule of the RTI Act. For classifying an organisation as an 'intelligence or security organisations', there is neither a strict definition nor specific guidelines laid down to determine its eligibility for inclusion in the second schedule. As no such standards are prescribed, notifications so issued by the Government are always legally challenged/disputed. It is alleged that the Central Government is exploiting this legal ambiguity / arbitrariness as a tool to cover up or to hide the corrupt practices in such organisations, which defeats the very purpose which RTI Act aims to achieve. In this paper an attempt is made to evaluate the norms to be adopted, so that the objectives of the RTI Act are restored. Efforts are also made to emphasise the criteria to be

* Faculty, Superintendent of Excise & Customs, National Academy of Customs, Excise and Narcotics (NACEN), Bengaluru.

adopted in classifying an organisation as 'an Intelligence or security organisation' so that the spirit of RTI Act remains intact. The above study is taken up with specific reference to an investigating organisation i.e., CBI's inclusion in the second schedule which is being contested.

RTI – the objectives

A democracy can be briefly defined as a political system for choosing the government through free and fair elections with the active participation of the people. For this to happen, the protection of the human rights of all citizens and the protection of the 'rule of law', due to which the laws and procedures apply equally to all citizens is desirable. Also the citizens need to be informed about how they are being governed. In this regard the article 19 of our Constitution provides its citizen the protection of certain rights regarding freedom of speech etc., which are essential for a healthy democracy. The Supreme Court (SC for short), during 1974, in *State of U.P. v. Raj Narain*¹ held that the 'right to know' is a right inherent in fundamental right to freedom of speech and expression guaranteed under article 19(1)(a) of the Constitution. Later in a plethora of cases the right to information was recognized as a right implicit in the article 19(1) (a) and in article 21 (fundamental right to life and personal liberty). Again the Supreme Court in *Peoples Union for Civil Liberties v. Union of India*², observed that the right of information is a facet of the freedom of 'speech and expression' as contained in Article 19(1)(a) of our Constitution. Right of information is, thus, unquestionably a fundamental right which has been asserted and recognized by the judiciary.

It is always true that an informed citizenry and transparency of information are vital for effective and successful functioning of any Republic. For proper enjoyment of freedom of speech and expression that includes the Right to Information, it is imperative that such information is made available to all the citizens in a fair and time bound manner. It is not possible for a citizen to approach the judiciary every time and on every occasion, for obtaining such information from the government as the same would consume both time and cost. Further, the judiciary cannot handle huge volume of requests by citizens which could arise pertaining to accessing information. Therefore to bring in a self-regulated regime wherein a citizen can access information from the government and its

1 AIR 1975 SC 865.

2 (2004) 2 SCC 476.

related functionaries in a practical and definitive way and to secure access to information from such authorities in a time bound manner, Indian Parliament enacted the Right to Information Act, 2005 ('RTI Act' for short) which came into force from October 12, 2005.

RTI declares that sovereignty is vested in the citizen. As per the Act³ all citizens shall have the Right to Information. It is a powerful tool that can deliver significant social benefits, provide a strong support to democracy and promote good governance, by empowering the citizen's ability to participate effectively. It has also served to be an effective watchdog ensuring all those coming in to the purview of the Act to work in accordance with rules and regulations, without any irregularities. The Chief Information Commissioner Vijay Sharma described that the RTI Act has upgraded the transparency and accountability of the system since its enactment in 2005.⁴ Explaining the journey so far he stated, *"It has brought us to a position where we have also enabled the use of technology for easily accessing information. We are today able to access information, much more easily than what we did in past. The biggest contribution of the RTI Act is that it has been a game changer in changing the attitudes"*.

RTI – the exemptions

However it was felt that all the information available with the public authorities cannot be shared with the citizens as it may hurt the security and economic interests of the nation as well as the rights vested with the others. Therefore in the Constitution itself reasonable restrictions have been recommended in article 19, relevant parts of which are as follows: *"Article 19. Protection of certain rights regarding freedom of speech etc (1) All citizens shall have the right, (a) to freedom of speech and expression; (b) to (g) ... (2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause 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."* Therefore in respect of such issues reasonable restriction could be imposed by the way of proper enactments. No right can be an absolute

3 Section 3 of RTI Act 2005.

4 Available at <http://www.deccanherald.com/content/491828/it-good-idea-debate-exempted.html> (last accessed on May 2, 2016).

right and so also the right to information, wherein reasonable restrictions are necessary as detailed in the Constitution itself.

Therefore, in respect of information impacting the sovereignty and integrity of the nation, the same is forbidden to be published by any court of law, and the same includes information pertaining to commercial confidence, trade secrets or intellectual property, third party, endangering the life or physical safety of any person or identifying the source of information, maintaining privacy etc; restrictions have been imposed under Section 8 of the Act. In respect of the information regarding issues listed in section 8, it is mandated⁵ that the public Authorities shall be under no obligation to give such information to any citizen.

The RTI Act exempts⁶ ten categories of information from disclosure, but all exemptions are subject to the greater public interest. However the final mandate to be adopted in all these matters is that the information, which cannot be denied to the Parliament or a state legislature, shall not be denied to any person. The Act further empowers the public authorities to reject an application if disclosure will infringe upon the copyright⁷ of a third party other than the state. It is further laid down in the Act⁸ that a record may contain both exempt and non-exempt information and non-exempt information contained in such records may be disclosed upon request.

RTI Act: Section 24

In addition to the above exceptions, under Section 24 of the Right to Information Act (RTI Act), certain 'Intelligence and Security organisations' (hereinafter 'I&S organisation' for brevity) of the Central Government, duly specified in the Second Schedule, have been kept out of the obligation to provide information under the Act. The Section 24(1) of the RTI Act stipulates inter alia that nothing contained in the RTI Act shall apply to 'I&S organisation' specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government. However, if the information sought is pertaining to the allegations (i) of corruption and (ii) of human rights such organisations are bound to provide information. In respect of

5 Sec.8(1) of RTI Act 2005.

6 Sec.8 of RTI Act 2005.

7 Sec.9 of RTI Act 2005.

8 Sec. 10 of RTI Act 2005.

allegations of human rights violations, the applicant shall be provided necessary information on approval of the Central Information Commission (“CIC”) within 45 days. From the above it can also be concluded that the excluded organisations need not obtain such approval from the CIC to disclose the information pertaining to the allegations of corruption. The Department of Personnel & Training (“DOPT”) issued a circular no 1/24/2007-IR⁹ on 14 November 2007 advising all the organisations specified in the Second Schedule to designate Central Public Information Officers (CPIO) and First Appellate Authorities within the organisations and publish the details immediately as stipulated under RTI Act. Similar powers are delegated to state governments by virtue of section 24 in clause (4) and (5) of RTI Act.

RTI Act – the second schedule

Further, Section 24(2) of the RTI Act inter alia provides that the Central Government may, by notification in the Official Gazette, amend the Second Schedule by including therein any other I&S organisation established by that Government and on the publication of such notification, such organisation shall be deemed to be included in the Second Schedule. The Second Schedule¹⁰ of the RTI Act contains twenty five ‘I&S organisations’ established by the Central Government. The second schedule in the original Act consisted of only 18 Organisations. There have been several notifications issued including /omitting /substituting some organisations. For brevity I am listing only such organisations wherein there is an impact of the notification so issued.

Second schedule

No.1. Intelligence Bureau to no.14. Assam Rifles. - No changes; 15. Special Services Bureau; 16. Special Branch (CID), Andaman and Nicobar; 17. The Crime Branch-C.I.D. - CB, Dadra and Nagar Havel; 18. Special Branch, Lakshadweep Police.”

The first of the amendment effected was vide Notification GSR No. 347 dated 28.09.2005 issued by DOPT, by which the following changes were effected: (i) the name at no 15. Special Services Bureau was substituted with

9 Available at <http://www.rtifoundationofindia.com/dopt-825> (last accessed on May 2, 2016).

10 Sec. 24(2) RTI Act 2005.

the name *Sashastra Seema Bal* (ii) four organisation were added viz., 19. *Special Protection Group*. 20. *Defence Research and Development Organisation* 21. *Border Road Development Board*. 22. *Financial Intelligence Unit, India*. The Second amendment was by issue of notification No. GSRNo. 235 (E) dated March 28, 2008, by which (i) the following organisations were omitted from the Second Schedule: “16. Special Branch (CID), Andaman and Nicobar. 17. The Crime Branch-C.I.D. - CB, Dadra and Nagar Haveli. 18. Special Branch, Lakshadweep Police.” (ii) the following organisations were added to the list: “16. *Directorate General of Income-tax (Investigation)* 17. *National Technical Research Organisation*”. The next amendment was vide GSRNo726(E) dated 8.10.2008 by which the organisation ‘National Security Council Secretariat’ was added. The Fourth amendment was by issue of notification vide No.GSRNo442 (E) dated 9 .6.2011 in which the three organisations namely “23. *Central Bureau of Investigation*, 24. *National Investigation Agency*, 25. *National Intelligence Grid*”, have been included in the schedule, that has caused the present controversy.

The Controversy

From the above analysis of section 24 of RTI Act and the schedule made thereunder, it can be concluded that the inclusion in the schedule is available only to an organisation which is classifiable as an ‘I&S organisation’. The regular changes and additions that are occurring appear to have diluted the very classification of an organisation to be termed as an ‘I&S Organisation’. It is pertinent to mention here that the term ‘I&S Organisation’ has not been defined in the RTI Act. Certain police organisations and investigating organisations which were in the original act in 2005 have been omitted¹¹, whereas during later period an investigating agency viz., CBI has been included. Therefore, prima facie it appears that there is no standard approach followed by the executive to decide what constitutes an ‘I&S Organisation’ under the Act.

The main purpose of RTI Act is to fulfill the fundamental rights guaranteed under Article 19 (1) of the Constitution to the citizens. Unfortunately, certain organisations which are not functioning as ‘I&S organisation’ are attempting to gain or gained entry into the second schedule thereby defeating the objectives enabled through RTI Act. The limitations and restrictions set out in the RTI Act¹² are sufficient for sensitive and classified

11 GSR235 (E)(March28, 2008).

12 Sec. 8 and 9, RTI Act.

information of any organisation to be protected. The act of some organisations, especially CBI, seeking shelter under section 24 as an 'I&S organisation' has invited a lot of criticism from the citizens as the media publications and public reactions indicate. A few of such criticisms are furnished for putting forth the situation in the right perspective.

The Media Response

Frontline,¹³ India's national magazine from the publishers of The Hindu wrote "*The Central government exempts the CBI from the RTI Act's purview without seeking Parliament's approval...this provision could indeed mean amendment of the Act itself, which might undo the very objectives of the legislation*". Rajeev Kapoor a participant in the Shillong RTI convention, which under National Advisory Council member Aruna Roy as chairperson, unanimously adopted a resolution to delete altogether as Section 8 of the RTI Act provided adequate and vast coverage of exemptions from disclosures.

The Times of India¹⁴ carried headlines "*Activists criticise exemption to CBI from RTI Act*" and wrote that "*Activists have argued that the agency investigates cases of corruption and criminality rather than work in the arena of intelligence gathering.*" National Campaign for People's Right to Information (NCPRI)'s Shekhar Singh called the move a retrograde step as the decision was taken without any public debate and was in violation of the very purpose of the RTI Act. "*This is clearly a case of misuse of the powers delegated by Parliament to the government. The move is patently illegal and illegitimate and may set a dangerous precedent as many state governments will feel encouraged to insulate their entire police force and anti-corruption agencies in a similar manner,*" he said. Mazdoor Kishan Shakti Sangathan's Nikhil Dey said that there is need to define what an 'I&S agency' is and to evaluate all exempted organisations under this category under the RTI Act.

The CIC Vijay Sharma on being asked on demands to bring CBI under the ambit of RTI stated¹⁵ that "*What essentially you are saying may be there is a need to*

13 V. Venkatesan, Beyond Enquiry, FRONTLINE, Volume 28 - Issue 15, available at <http://www.frontline.in/static/html/fl2815/stories/20110729281504000.htm> (last accessed on May 30, 2016).

14 'CBI exempted from RTI Act, TIMES OF INDIA, available at <http://timesofindia.indiatimes.com/india/Activists-criticize-exemption-to-CBI-from-RTI-Act/articleshow/8945061.cms> (last accessed on May 20, 2016).

15 It is a good idea to debate exempted list under RTI Act, DECCAN HERALD, available at <http://www.deccanherald.com/content/491828/it-good-idea-debate-exempted.html> (last accessed on May 22, 2016).

revisit of what is on the exempted list. The RTI has induced a lot of openness and transparency. If there is a debate on whether there is scope for further rationalisation, it's a good idea to debate exempted list under RTI Act."

This issue also attracted the proceedings of Loksabha wherein an unstarred question no 3935 viz., "(a) whether the Government has kept the CBI out of the purview of the RTI Act; (b) if so, the details thereof; (c) whether the Government has received representations expressing concerns for keeping CBI out of the ambit of the RTI Act; and (d) if so, the details of the action taken by the Government to address these complaints?" was answered by the Ministry concerned as : "(a) & (b): The CBI has been included in the Second Schedule to the RTI Act, 2005 thereby exempting it from the purview of the Act except in respect of information pertaining to the allegations of corruption and human rights violations; (c) & (d): Yes, Some representations had been received objecting to the inclusion of CBI in the second schedule of the RTI Act, 2005. The Government decided to include the Bureau in the Second Schedule after satisfying itself that it qualifies to be included in the Schedule as a security and intelligence organisation and that it is necessary to do so in the interest of the security of the State." (answered on August 6, 2014).

The Divided Decisions

There are two important decisions of the CIC namely (i) decision no No.CIC/SM/C/2011/000117/SG/13230 dated July1, 2011 and (ii) decision No. CIC/SM/C/2011/000129/SG/13251 dated July 4, 2011 wherein 'what constitutes 'I&S organisation?' and 'whether CBI qualifies to be termed as one?', have been discussed in detail which I have selected for finding out the norms that could be laid down to determine what constitutes an "I&S organisation' in accordance with section 24 of RTI Act 2005.

The CIC in its decision No.CIC/SM/C/2011/000117/SG/13230 dated June 1, 2011 in the case¹⁶ 'Mr. Justice R N Mishra (Retd.) v. PIO, CBI, Anti Corruption Branch,' on submissions of the respondent that 'as per the notification dated June 9, 2011 of DOPT, CBI has been included in the Second Schedule in violations of section 24 of RTI Act as by its function CBI is not a I&S organisation' has been up held by the CIC. The CIC

16 Available at http://www.rti.india.gov.in/cic_decisions/CIC_SM_C_2011_000117_SG_13230_M_59799.pdf(last accessed on May 20, 2016).

examined the following facts in detail to ascertain as to whether CBI can be considered as an 'I&S organisation':

‘(I) Perusal of the CBI website and the relevant extract viz., *‘The Central Bureau of Investigation traces its origin to the Special Police Establishment (SPE) which investigate cases of bribery and corruption in transactions with the War & Supply Dept. Of India during World War II. ...The Delhi Special Police Establishment Act was therefore brought into force in 1946....’*

“(ii) The provisions of the Delhi Special Police Establishment Act, 1946, indicating the Constitution and powers of police establishment and terming that establishment as primarily an investigation organisation”.

“(iii) The Mission of CBI as per its Annual report of 2010 states that it is formed to uphold the Constitution of India and law of the land through in-depth investigation and successful prosecution of offences; to provide leadership and direction to police forces and to act as the nodal agency for enhancing inter-state and international cooperation in law enforcement. The vision statement does not indicate CBI to be an 'I&S organisation'”.

(iv) The FAQs on the CBI website which provide an insight on the functioning and mandate of the CBI does not indicate CBI as an 'I&Sorganisation', as they call themselves as an investigation agency.

After examination of the above facts the CIC held that the CBI was established primarily for the purposes of investigation of specific crimes including corruption, economic offences and special crimes; that it continues to discharge its functions as a multi- disciplinary investigating agency; that members of CBI have all the powers, duties, privileges and liabilities which police officers have in connection with the investigation of offences; that even the additional functions performed by CBI other than investigation of crimes do not include any function which would lend it the character of an 'I&S organisation'; that CBI may obtain certain information that can be classified as 'intelligence' or may have an impact on the security of the nation, the same may be sought to be exempted from disclosure under Section 8(1) of the RTI Act which is adequate and comprehensive to ensure that the disclosure of information does not inter alia compromise national security or impede the process of investigation or apprehension or prosecution or endanger the life or physical safety of any individual.

The CIC further stated that the right to information is a fundamental right of the citizens; that the fundamental right to information was being codified by way of the RTI Act, the Parliament felt that certain 'I&S organisation' may require greater protection from disclosure of information and therefore stipulated Section 24(1) of the RTI Act and therefore, even at the cost of abridging the fundamental right to information of citizens, identified certain bodies as 'I&S organisation' that required to be protected from disclosure of information to serve a greater purpose and were consequently included in the Second Schedule; that Parliament envisaged that during the course of time, there may be certain additions as well as omissions to the Second Schedule and therefore, under Section 24(2) of the RTI Act, the Central Government was given the power to inter alia amend the Second Schedule by notification in the Official Gazette by including therein any other 'I&S organisation'; that given the stature and mandate of CBI, it does not seem plausible that the Parliament could have inadvertently omitted to include CBI in the Second Schedule when the RTI Act was being enacted; that by enacting the Notification and bringing CBI within the Second Schedule, the Government appears to have increased the scope of Section 24(2) of the RTI Act, which was not envisaged by the Parliament; that the Government, however, appears to have stretched the interpretation of Section 24(2) of the RTI Act far beyond what Parliament had intended, by including an investigating agency such as CBI within the Second Schedule, which was envisaged exclusively for 'I&S organisation'; that by enacting the Notification and placing CBI in the Second Schedule, the Government appears to be claiming absolute secrecy for CBI without the sanction of law.

In another case vide decision No.CIC/SM/C/2011/000129/SG/13251 dated June 6, 2011 in *Mr. S.S. Ranawat v. Mr. Ashwani Kumar, CBI*¹⁷ on inclusion of CBI in the Second Schedule, the CIC reaffirmed the earlier decision. The CBI argued that as per the notification dated June 9, 2011 they are included in the Second Schedule in accordance with Section 24 of the RTI Act; that the provisions of the RTI Act would not apply to them, except allegations of corruption and human rights violation, and therefore, all pending appeals should be considered infructuous.

17 Available at http://rti.india.gov.in/cic_decisions/CIC_SM_C_2011_000129_SG_13251_M_59876.pdf(last accessed on May 10, 2016).

The CIC observed, “on a plain reading of the Notification, it does not appear to have a retrospective effect”. Placing reliance on the decision of the SC of India in *P. Mahendran v. State of Karnataka*¹⁸ wherein court held as follows:

It is well- settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. As the Notification was issued on June 9, 2011 and there is no express stipulation whatsoever that the Notification shall come into force with effect from any date prior to June 9, 2011, the information sought in any RTI application filed prior to June 9, 2011 with CBI must be provided in accordance with the provisions of the RTI Act.

In the same case the CIC went further to examine as to whether the notification itself is within the letter and spirit of the RTI Act. After examining (i) CBI website and details regarding circumstance that led to creation of the organisation (ii) The Mission and Vision of CBI in its Annual report of 2010 (iii) the FAQs on the CBI website etc., observed that:

..No reasons have been provided by the DOPT to justify the inclusion of CBI in the Second Schedule; that in the absence of reasons, inclusion of CBI in the Second Schedule along with National Intelligence Agency and National Intelligence Grid appears to be an arbitrary act; that *Springing such a Notification to shroud CBI with an armour of opacity without giving any reasons, is violative of the promise made by the Parliament in Section 4(1)(d) of the RTI Act. Since no reasons have been advanced, citizens are likely to deduce that the purpose of including CBI in the Second Schedule was to curb transparency and accountability from the investigations of several corruption cases against high-ranking Government officers.*

In the meanwhile with regards to the issue of notification¹⁹ to include the

18 AIR 1990 SC 405.

19 GSR No. 442E dated 09.06.2011.

CBI within the ambit of the second schedule was challenged through a PIL in High Court of Madras which has been decided in *Vijayalakshmi v. UOI*²⁰ on September 9, 2011. The observations contradicted the decisions of CIC stated above. According to the petitioner, *"in the light of the various scams, the country has become rudderless in the war on corruption and the Government instead of becoming more transparent has become reactionary by resorting to issue of notification under Section 24 of the RTI Act by granting blanket exemption to the CBI"*. It was further argued that Section 24 exempts only intelligence and security agencies and CBI is an investigating agency cannot be granted a blanket exemption; that investigative data require confidentiality has been adequately taken care in Section 8(1) (g) and (h) of the RTI Act; that Government was not justified in granting a blanket exemption to CBI under section 24 of the RTI Act when for over the past five years, the CBI enjoyed the exemptions provided for under section 8 of the Act. For this the HC held:

There is a vital distinction between the exemption from disclosure of information contemplated under section 8(1) of the Act to that of the exemption of the organisation themselves and the information furnished by them to the Government under section 24(1) of the Act. These two provisions are exclusive of each other and one cannot substitute for the other.

The HC did not agree with the submission of the petitioner and held that such contention is wholly misconceived:

If an RTI applicant comes with a query alleging corruption in any of the Agencies or Organisations listed out in the Second Schedule to the RTI Act, such information sought for is bound to be provided and the protection under section 24(1) cannot be availed of. Similar is the case relating to violation of human rights. Therefore, the safeguard is inbuilt in the Statute so as to ensure that even in respect of the Agencies or Organisations listed out in the Second Schedule are not totally excluded from the purview of the RTI Act.

The note filed by the CBI stated that the CBI is the premier agency of the Central Government for prevention and investigation of offences covering

20 W.P.No.14788 of 2011 & M.P.No.1 of 2011, Available at <http://indiankanoon.org/doc/173422957/> (last visited on September 26, 2015).

a wide spectrum of offences, including cases referred at the instance of courts. On perusal of list of cases that have been entrusted to CBI, the HC concluded:

Intelligence led approach has enabled CBI to make headway in the sensitive cases which have or had a direct bearing on the national and internal security and therefore, we are convinced that the CBI could very well be termed as a intelligence agency of the GOI. Cases handled by CBI have a direct bearing not only on the national security, but also the financial security of the country. As rightly contended the Security of the State can be affected in various ways and there can be no exact or exhaustive definition and security threats may be varied both internal and external and the Security of the State can be affected in various ways which would include the corruption of the Government officials, unauthorized disclosure of State secrets, Economic offences to destabilise the National Economy, and therefore, intelligence gathering is an inseparable part of the work of a Security Agency. Thus, it can be safely concluded that the security of the State is a very broad concept. Therefore, we are convinced that CBI would qualify to be defined as a Security Organisation as well.

In the case of *Mr. C J Karira v. CBI*²¹ on the issue whether an RTI application containing allegations of corruption should be entertained by the CBI under the proviso to Section 24 of the RTI Act or not, the CIC held that:

the wording of the proviso casts an obligation on the CPIO of the exempted organisation to entertain all requests for information pertaining to allegations of corruption or human rights violations. It does not make any distinction between the exempted organisations on the basis of the functions they perform nor between allegations of corruption on the basis of whether it is made against the employees of the exempt organisation or against others. It is true that the CBI is primarily responsible for investigating into all cases of corruption by public servants of the Central Government. Therefore, most of the information held by it would have a nexus with allegations of corruption. It is also true

21 Available at www.rti.india.gov.in/cic.../CIC_SM_C_2012_000374_M_94087.pdf (last accessed on May 15, 2016).

that the proviso to Section 24 of the RTI Act would make it necessary for the CPIO to entertain all such RTI applications, rendering the exclusion of the organisation from the operation of the RTI Act almost pointless.

The impact

The judicial pronouncements at present are divided on the issue of 'What constitutes an I&S organisation? Whether CBI is classifiable as such organisation?' No finality has been reached as the cases are pending in various stages of appeal. It is expected to take quite a long time for the decision of the Supreme Court to emerge. In the meanwhile RTI Act continues to be inflicted with this aberration. Further, whenever an organisation is covered under second schedule it changes its approach towards the rights of the citizen, which defeats the very purpose and object of RTI Act as the following case indicates. In this case of *Mr. C J Karira v. CBI*²² the complainant submitted that he had sent an RTI application addressed to the CPIO of the CBI by speed post and the envelope containing the RTI application was returned to him by the postal authorities with the remark that the addressee refused to accept it. On intervention by the CIC, the director CBI took up the matter and ensured that all RTI applications were duly received and acted upon within the provisions of the RTI Act by CBI. This clearly indicates that the organisation after the inclusion in the second schedule had resorted to non-acceptance of all the applications from the citizen under RTI Act which is not legal. There is need of immediate legislation as the decision of the judiciary will take much time.

The Remedy

From the above discussions the following observation could be made:-

1. The inclusion of CBI in the second schedule is not found proper by the citizens and the media who demand removal of provisions of Section 24 of RTI Act itself.
2. The divided decisions by the judiciary show no agreement for classifying CBI as an 'I&S organisation', which needs to be reviewed by the legislation at present.

22 File No.CIC/SM/C/2012/000374 dated October 31, 2012.

3. The objectives set out in article 19(1) of our Constitution as well as the objectives of the RTI Act have been affected or abridged by inclusion of CBI in second schedule.

For this the immediate remedy lies in the legislative action to be initiated on priority to restore the rights vested with the citizen. The legislative action could be taken based on the earlier decisions of the Apex court on similar issues and circumstances. Accordingly the ratios of decisions by the SC on such issues are discussed in further part of this paper.

The legislation norms followed in the present case ‘prima facie’ appears to be in accordance with the powers vested in central government to include ‘I&S organisation’ in the second schedule in terms of section 24(1) and (2) of RTI Act. The term ‘I&S organisation’ has not been defined in the Act and therefore the central government adopted its own norms to decide whether any organisation is ‘I&S organisation’ or not. As no norms or definition has been stipulated, the defective delegation has resulted in terming an investigating organisation as ‘I&S organisation’. The effects of such inclusion as discussed in the earlier part reveal that the fundamental rights vested in the citizens are aborted. As per the judicial decisions by the apex court, legislation may have a direct effect on fundamental rights although the subject-matter may be different. **The object of the law or executive action is irrelevant when it infringes a fundamental right** although its subject-matter may be different. In *Bennett Coleman v. UOI*²³ the union government contended that only the subject matter should be examined to test the violation and not the effect of the result of the legislation. The SC rejected this approach altogether and held that the true test is whether the effect of the impugned action is to take away or abridge fundamental rights. The court elaborated, *“The word ‘direct’ would go to the quality or character of the effect and not to the subject matter. The object of the law or executive action is irrelevant when it is established that the fundamental right is infringed.”* Therefore, the court concluded that the restrictions are to control the number of pages or circulation of dailies or newspapers and these restrictions fall outside the ambit of Article 19(2) of the Constitution, since the direct effect of the restriction is upon the growth of the paper, it would necessarily mean that the direct effect is on the freedom of speech and regulation.

23 1973 AIR 106.

The reasonable restrictions

The reasonable restrictions that could be imposed through an enactment, on the fundamental right, under Article 19(2) are limited to instances involving 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."* In respect of fundamental rights, no enactment / amendment could be fair or justifiable, if the subject matter or effect / impact of such law are beyond the scope and limitations / restrictions set out therein. In the present instance, as there is no proper explanation nor definition of what constitutes an 'I&S organisation' existing in the main legislation, the executive action to include or exclude an organization in such a list, should have been based on fair and reasonable examination as to (i) what are the objectives and purpose behind the formation of such an organization? (ii) by including such organization, whether the effect / impact on the fundamental rights are beyond the restrictions stipulated? The inclusion of the CBI in the second schedule as an 'I&S organisation', should be viewed in the light of the above parameters.

As discussed in the earlier part, it is abundantly clear that the objective and purpose of the formation of CBI is on the principles equivalent to any police organisation. The inclusion in the second schedule has an unreasonable impact on the fundamental rights. The purpose of RTI Act is to bring in transparency in administration and to reduce corruption in governance. The CBI has been formed primarily for the purpose of 'investigation of specific crimes including corruption, economic offences and special crimes'. By including the organization as an 'I&S organisation', the transparency that should be available as per the objectives are defeated.

Further, the restrictions stipulated under section 8 of the RTI Act are sufficient to safeguard the interests of any investigating or related agency, in the matters of which disclosure hampers the proper and fair investigation. The following excerpts from section 8 of the RTI Act strengthen my views:

Section 8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen, (a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the

State, relation with foreign State or lead to incitement of an offence; (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; ..(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; (f) information received in confidence from foreign Government; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes; (h) information which would impede the process of investigation or apprehension or prosecution of offenders;...

The discussions aforesaid clearly indicate that the present notification dated June 9, 2011 issued has aborted the rights vested in Art.19(1) as the restrictions imposed in this case fall outside the ambit of Art.19(2) of the Constitution and therefore not valid. The same needs to be suitably amended. The following precedents have guided the formulation of such a solution.

The precedents

The main objectives of the RTI Act are: (i) to promote transparency and accountability in the working of every public authority and (ii) to set up a practical regime for giving citizens access to information that is under the control of public authorities. Emphasising the need to protect right to information and highlighting on the emerging concept of an 'open Government', the Constitution Bench of SC in *The State of Uttar Pradesh v. Raj Narain*,²⁴ in 1975 held:

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. The right to know, which is derived from the

24 AIR 1975 SC 865.

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. ... To cover with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired.”²⁵

Another Constitution Bench in *S.P. Gupta v. President of India*²⁶ relying on the ratio in *Raj Narain* (supra) 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. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.²⁷

A note of caution has also been sounded by *SC in Dinesh Trivedi, M.P. v. UOI*²⁸ where it has been held:

Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead. It is important to realize that undue popular pressure brought to bear on decision makers in Government can have frightening side-effects. If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt.²⁹

25 Ibid., at Para 74, page 884

26 AIR 1982 SC 149.

27 Ibid., at Para 66, page 234.

28 (1997) 4 SCC 306.

29 Ibid., at Para 19, page 314.

In *M/s Esab India Limited v. Special Director Of Enforcement*³⁰ on 8 March, 2011, prior to notification including CBI as a I&S organisation, the HC of Delhi clarified the implications of section 24 as follows:

In the case at hand, as far as Section 24 is concerned, it is evincible that the said provision excludes the intelligence and security organisations specified in the Second Schedule. The petitioner is concerned with the Directorate of Enforcement which comes at serial No. 5 in the Second Schedule. ..., that information relating to corruption and information pertaining to human rights are not protected. In our considered opinion, the restriction on security and intelligence aspect cannot be scuttled as the same has paramountcy as far as the sovereignty and economic order is concerned. Article 19(2), which deals with reasonable restriction, mentions a reasonable restriction which pertains to security of the State, integrity of India and public order.³¹

Therefore, any legislation made should bar information pertaining to security and integrity of India and public order. The remaining information with the public authority could be communicated or shared with the citizen, subject to limitations and exemptions set out under RTI Act. The executive action in the present case has travelled beyond the restrictions clarified by the SC. This has happened due to defect in delegation of legislative powers without proper explanations.

Delegated Legislation

The delegated /subordinate legislation refers to the exercise of legislative powers by any agency which is subordinate to legislation and it is the law made normally by an executive authority under the powers given to them by the primary legislation, section 24 of RTI Act in the present issue, in order to implement and administer the requirements of that primary legislation. The advantage of such legislation among others is that it saves time for legislature and can be easily done in consultation with the parties affected. At the same time the disadvantage of such legislation is the executive will become more powerful and encroach upon the domain of legislation by making arbitrary regulations/amendments without proper reasoning which

30 F.No.CIC/AT/A/2008/01438, dated 11th May, 2009, available at <http://indiankanoon.org/doc/708385/> (last accessed on May 21, 2016).

31 Ibid., at para 19.

may go against the objectives intended in the main legislation. To avoid any such ill-conceived legislation, it is desirable that the primary legislation should indicate clearly the purpose and limitations of such subordinate legislation in the principal legislation itself, before delegating such powers. Failure to do so will result in creation of a subordinate legislation which defeats the very purpose set out in the main legislation. Similar situation has occurred in the present issue which needs to be rectified by amending the RTI act on priority. This could be effected by-

- i. including a definition for 'I&S organisation' in the main enactment.
- ii. detailing the process to be adopted for inclusion or omission of an organisation in the second schedule.

By doing so the objectives of the original enactment could remain intact and the ambiguity/arbitrariness in the decision making by the executive could be effectively managed or controlled. In the light of the above quasi-judicial and judicial pronouncements I proceed to find out the mandatory tasks assigned to certain organisation to find out their eligibility to obtain the tag 'I&S organisation' and to formulate a uniform principle in identifying an organisation for inclusion as an 'I&S organisation'.

RTI – the Charters of Organisations

The charters of four organisations included in the second schedule are examined with a purpose to find out the objectives behind the formation/creation of such an organisation so as to find out the nature of tasks primarily assigned to such organisation as per such mandate. For the study only relevant extracts of tasks assigned in respect of only four organisations are selected and reproduced herein and the details could be accessed at the URL cited. One organisation not listed in the said schedule is also discussed to bring out the fact that the norms adopted for classifying an organisation as 'I&S organisation' are not uniform and the same needs to be reviewed. In respect of primary tasks assigned to CBI, the discussions already made are to be considered.

1. 'Directorate of Revenue Intelligence' (DRI) (sl no 3 in the second schedule)-

The charter of organisation published³² *inter alia* states the tasks assigned as follows:

“(1) Collection of intelligence about smuggling of contraband goods, narcotics, under-invoicing etc. through sources of India and abroad, including secret sources; (2) Analysis and dissemination of such intelligence to the field formations for action and working on such intelligence, where necessary....; (3) To keep liaison with C.B.I. and; (4)..... for watching trends of smuggling and supply required material to the ministry of Finance and other Ministries; and (5) To study and suggest remedies for loopholes in law and procedures to combat smuggling.”

2. ‘Central Economic Intelligence Bureau’ (CEIB) (sln.4 in the second schedule)-

‘The Role of CEIB published³³ by the organisation highlights their tasks assigned as: *“It is ...for the purpose of effective information gathering, collation and dissemination, a close co-ordination between the Agencies enforcing different tax laws is essential. Hence, the CEIB was set up with the intention of creating a body which would coordinate and strengthen the intelligence gathering activities as well as investigative efforts of all the Agencies which enforce economic laws. Accordingly, the following functions have been entrusted..(1)To collect intelligence and information regarding aspects of the black economy which require close watch and investigation...(2)To keep a watch on different aspects of economic offences...(3)To act as the nodal agency for cooperation and coordination at the international level with other customs, drugs, law....(4) To act as a Secretariat of the Economic Intelligence Council which acts as the apex body to ensure full co-ordination among the various Agencies including CBI, RBI, IB etc.”*

From the above it can be inferred that the ‘DRI’ and ‘CEIB’ are created primarily to be an Intelligence organisation and to coordinate with other agencies for effective combating of black economy.

3. Central Industrial Security Force (CISF) (Sl.no.12 in the second schedule)-

As per the charter,³⁴ *“The CISF ...to provide integrated security cover to the Public Sector Undertakings (PSUs)with globalization and liberalization of the economy, CISF ...has become a premier multi-skilled security agency of the country, mandated to provide security to major critical infrastructure installations of the country in diverse*

32 Available at <http://dri.nic.in/home/charter> (last accessed on April 28, 2016).

33 Available at <http://www.ceib.nic.in/ceib.htm> (last accessed on April 28, 2016).

34 Available at <http://www.cisf.gov.in/dgmsg/> (last visited on September 26, 2015).

areas. CISF is currently providing security cover to nuclear installations, space establishments, airports, seaports, power plants, sensitive Government buildings and ever heritage monuments. ..Delhi Metro Rail Corporation, VIP Security, Disaster Management

From the above it is clear that CISF is primarily assigned tasks of protecting /providing security to sensitive installations/places.

4. National Security Guards (NSG) (S.No.12 in the second schedule)

The background for the formation and tasks assigned are published³⁵ as follows: *"The NSG was set up in 1984 as a Federal Contingency Deployment Force to tackle all facets of terrorism in the country. Thus the primary role of this Force is to combat terrorism in whatever form it may assume in areasThe NSG is a Force specially equipped and trained to deal with specific situations and is therefore, to be used only in exceptional situations. The Force is not designed to undertake the functions of the State Police Forces or other Para Military Forces of the Union of India. ... It is a task-oriented Force and has two complementary elements in the form of the Special Action Group (SAG) comprising Army personnel and the Special Ranger Groups (SRG).* From the above it is clear that NSG is primarily created for carrying out the tasks such as combating terrorism. NSG is not designed to undertake the functions of the State Police Force and is therefore mandatorily a security agency.

5. Directorate General of Central Excise Intelligence (DGCEI) (An organization which is not included in the second schedule)

There is no mention of DGCEI in the second schedule, but the role of this agency is primarily to gather intelligence as the publication³⁶ indicates: *"The growth of the Central Exciseneed for a specialised intelligence agency to target prevention of Central Excise duty evasion. The Directorate of Anti Evasion was created for this purpose with the following functions: a)Collection, collation and dissemination of intelligence relating to evasion of central excise duties on an all India basis; b)Studying the modus operandi of evasion peculiar to excisable commodities and to alert the Collectorates of their possible use; c) Studying the price structures....., e).. j) Maintaining liaison with other Central and State agencies in all matters pertaining to tax evasion".* From the above it can be inferred that DGCEI is primarily

35 Available at http://nsg.gov.in/organisation_history.php(last visited on September 26, 2015).

36 Available at <http://www.ceib.nic.in/dgae.htm>(last visited on September 26, 2015).

meant for gathering and disseminating of intelligence. As norms adopted to legislate second schedule is not uniform, the DGCEI do not find a place in the list of 'I&S organisations'.

In view of the above facts and circumstances, it is felt necessary and proper to recommend certain amendments to the existing RTI Act, to bring about an effective legislation, which does not take away the rights guaranteed to the citizens under art.19 (1) and the restrictions imposed are in accordance with art. 19 (2) so that the rights as assured by our Constitution are not denied on this pretext.

Recommendations

From the above discussion the following amendments are recommended for enabling a uniform approach for inclusion or omission of an organisation in the second schedule of the RTI Act.

- i) Amendment for inclusion of definition in section 2 of RTI Act:
“after sub-section (f) in Section 2, insert sub-section (ff) ‘intelligence and security organisation’ means any Public Authority established or constituted by central government with the primary mandate and objective to gather intelligence or to provide security or both, pertaining to the matter of security of state, integrity of India and public order.”
- ii) For amending the words in section 24(2) of RTI Act:
“in sub-section (2) of section 24 , replace the words ‘The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government’ by words “ ‘The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established and constituted primarily for gathering intelligence or for providing security or both, pertaining security, integrity and public order by that Government’”.

RTI - the realisation

Every citizen's development is possible only when the 'Fundamental Rights' as guaranteed in our constitution are not curtailed. They are of utmost importance as they assure the citizen of his physical, mental and moral needs. Without these rights, human life cannot be sustainable, happy and prosperous. These rights have been codified in the Constitution and any attempt to limit them with unreasonable restrictions is very much against the interests of democracy and welfare of citizens. The RTI Act is playing its role for the citizens to realise the goal of true democracy.

RTI Act undoubtedly is one of the world's best laws with an excellent implementation track record. It is one of the progressive and most empowering legislation passed in the post Independent India. The enlightened citizenry are using the law by making information requests in order to get their due entitlements or to expose the corrupt officials. As a result of the facility to access timely and accurate information through RTI way, the transparency in public administration has increased than ever before. The services of public servants are showing marked improvements in decision making and delivery of services as they are subjected to public scrutiny.

At present the RTI Act is passing through a decisive phase and its success depends upon the attitude of the public authority to respond positively to the information sought by the citizen in the larger interests of transparency in public governance. Change in approach and attitude of the public servants is the most essential requirement for providing a proper and fair environment to the citizens. At the same time, the citizens should also bear in mind that agitation against the ineffective implementation of the RTI law is not the solution, instead everyone should take forward this initiative carefully to enable the law to grow, mature and get established. It is the right time for every one of us to realise that right to information is the key component for redeeming the economic, social and political freedom and prosperity of an individual as well as of the society at large.

* * * * *

THE MISSING LINK OF RIGHT TO INFORMATION ACT IN INDIA

Dr. Subir Kumar Roy*

Abstract

Right to information is considered as a strong foundation of the good governance and democratic polity. Democracy ensures the participation of all into the helm of the affairs of the state but without having the proper information and knowledge the people cannot put forward their ideas, needs and aspirations properly and thus the possibilities remains there of transformation of 'participation of all' into 'tyranny of majority'. Freedom of information is also considered as touchstone of all the freedoms. The basic purpose of freedom of information is to create an informed citizenry which is sin qua non for a democratic system and good governance. 'Freedom of speech and expression' and 'right to get information' are complementary to each other. It is axiomatic that right to information is a facet of right to know and basically evolves from the freedom of speech and expression, liberty of thought belief faith etc. and essential for a democratic polity to save it from mobocracy. Most of the countries in the world framed legislation on freedom of information to ensure transparency, openness and accountability in governance. More than 90 countries across the world have inducted laws on freedom of information in their respective municipal legal system. Now a day a transition is being evident in legal framework whereby the 'freedom of information' is rapidly transforming into the 'right to information.' In India too, the law makers have preferred to enact Right to Information Act, 2005 which is considered as a potent and effective weapon to ensure the participation of each and every citizen of this country in decision making process and to fight against corruption. The RTI Act, 2005 endorses the statutory recognition to the concept of 'open society' and 'open government'. this article considers the RTI Act, 2005 as path breaking legislation but at the same time it comes into the conclusion that even after completion of a decade the said Legislation failed to achieve its purposes as still the citizen of this country is battling tough for getting transparent, viable, corruption free and responsive governance. This article reviewed the Annual Reports prepared by the Central Information Commission and finds the cold attitudes of the protectors of laws regarding the matter of dissemination of information. This article highlights the shortcomings of the Act and gives stress on the need for a strong central Information Commission as well as State Information Commission maintaining a hierarchical structure. This article also throws logic in favour of simplifying the judicial process so that aggrieved party may move to higher judiciary on the event of their dissatisfaction with the information provided by Information commission. We also need strong political will to find out the missing link of RTI Act, 2005.

* Assistant Professor, Law Department, School of Social Sciences, Bankura University, Bankura, West Bengal, India - Dr.roysubir@gmail.com, M-9733215777.

Right to Information: A Lifeline of Democracy

At the very outset it is worthwhile to quote James Madison who is known as “Father of the Constitution” of USA and was also the fourth president, who wrote a letter on 4th August, 1822 to William T. Barry, the then Lieutenant Governor of the State of Kentucky where he mentioned, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives” though the term like ‘Popular Government’ or ‘Popular Information’ invites wide space for debate but what is remarkable is that he understood the importance of freedom of information in the threshold of 19th century and tried to ensure the rights of the common people to access to government documents.

The right to information is considered as one of the important components of proper governance and closely associated with the values of democracy. Though the term ‘democracy, indicates towards a definite polity but at the same time it advocates in favour of an ideal society whereby the people can fulfill their aspirations, express themselves in a proper way and explore their potentialities to the fullest extent. Besides a specific political system, it is a name of a culture based on the progression of humanity and showing respect towards the dignity of each other. John Stuart Mill conceptualised democracy as a means to promote better and higher form of national character than any other polity. MacIver (1947) said, “Democracy is not a way of governing, whether by majority or otherwise but primarily a way of determining who shall govern and broadly to what ends.” For the success of democracy, participation of all in the affairs of the polity of country is prerequisite. But participation of all without having the information and knowledge will simply create a mess and the democratic environment may turn into tyranny of majority. Information helps the people to enrich their cognitive faculty so as to speak of their minds and to set ideas about their role in the participating polity, otherwise the democracy will turn into mobocracy. A democratic polity itself ensures the right of the citizen to know about the affairs of the government constituted by them by their free expression of will. Freedom of information is also considered as an important element of human right as it is considered by some jurists as

1 M.H Bari, For a Better Democracy, available at <http://www.dhakatribune.com/op-ed/2013/dec/15/better-democracy> (last accessed on May 2, 2016).

touchstone of all the freedoms. Universal Declaration of Human Rights vests Freedom of opinion and expression upon everyone and this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.² The basic purpose of freedom of information is to create an informed citizenry which is sine qua non for functioning of a democratic society, curb corruption and misuse of power and make the governors accountable towards the governed. An informed citizenry can only qualitatively evaluate the different policies of the government, suggests the ways for further improvement of those policies and through adoption of the process of check and balance import a culture of awareness which leads towards a progressive society.

Justice Brennan had given emphasis on the need of developing relationship in between the protection of process and the structural role of free expression. He stated in *Richmond Newspapers v. Virginia*,³ that, "The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication⁴." From the above it is evident that for effectuating healthy democratic system public participation is essential in formulation, administration and implementation of policies and that is only possible when the citizenry are well informed about the issues involved with the affairs of a state and also have the freedom to access the information. In *S.P. Gupta v. Union of India*⁵ which is popularly known as Judges Transfer Case, it had been observed by Bhagwati J that, "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 the Government must be the rule and secrecy an exception..."

A democratic polity always intends to ensure the values of freedom, rule of

2 Article 19 of the Universal Declaration of Human Rights, 1948.

3 448 U.S. 55, 587-588 (1980).

4 Phillip J. Cooper, The Supreme Court, the First Amendment, and Freedom of Information in PUBLIC ADMINISTRATION REVIEW, Vol. 46, No. 6 (Nov. - Dec., 1986), pp. 622-628, available at <http://www.jstor.org/stable/976228> (last accessed on May 2, 2016).

5 AIR 1982 SC 149, Para 66.

law, human rights and participation of the mass in the decision making process. Democracy is hostile to centralization of power as it believes that all power rests with the people and the above proposition enable them to take direct participation in decision making process. A democratic set up enables the citizens to express their views about the working of Government and generate public opinion either in favour of the ruling group or against them. This participatory approach of the democracy will not succeed unless and until the people are well informed about the polity by which they are governed. David Held claims that individual autonomy is possible only in the public sphere, where wide, participatory action is the best mechanism for the reconciliation of diverse, and potentially conflicting, values.⁶ A well informed and conscious citizen can only monitor the activities of the government and has the potentiality to create strong public opinion against any undemocratic act of the government. Conscious and educated citizens not only air their own opinion about the socio-economic and political environment of a society, rather they also invite others to share their feelings and in this process help in importation of democratic environment and create a mechanism to connect with the decision making process.

So in democracy, 'Freedom of speech and expression' and 'right to get information' gets equal importance like 'equality' clause or guarantee of life and liberty. These rights have been considered by the jurists as a natural and inborn right. 'Freedom of speech and expression' and 'right to get information' are complementary to each other and contains within its gamut freedom of propagation, exchange of ideas and dissemination of information which help in shaping of the ideas and viewpoints and also help to involve in healthy debates on public concern. In *State of U.P. v. Raj Narain*⁷ it was observed by Mathew, J. that, "The right to know 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". It had been further observed that ". 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

6 Quoted by Norman Barry, *An Introduction To Modern Political Theory*, p 305 (St. Martin's Press, New York: 2000).

7 (1975) 4 SCC 428, para 64.

public functionaries."Bhagwati J. opined in *S.P. Gupta v. Union of India*⁸ that a democratic government cannot survive without having accountability and the basic postulate of accountability comes when people have information about the running of the affairs of the Government and this process only can solely make the participatory democracy an effective one. In *Dinesh Trivedi v. Union of India*,⁹ Ahmadi, C.J. observed, "In modern Constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seeks to formulate sound policies of governance aimed at their welfare. However, like all other rights, even this right has recognized limitations; it is, by no means, absolute." It is worthwhile to mention about the observation of Jeevan Reddy J. made in the case of *Secretary, Ministry of I & B v. Cricket Association of Bengal*,¹⁰ who said that the right to free speech and expression also carries within its domain the right to receive and impart information. To ensure right to free speech and expression, citizens must have the benefit of plurality of views and a range of opinions on all public issues. He further said that diversity of opinions, views, ideas and ideologies are sine qua non for citizens to arrive at informed judgments on all issues affecting them.

In *Union of India v. Association for Democratic Reforms*¹¹ case, the right to know about the antecedents of the candidates contesting election has been guaranteed as a fundamental right under Art.19 (1)(a) of the Constitution. Certainly this aspect of right to know highlights about a special category of right which is distinct from the knowledge acquired or gathered through the access of public documents. Here right to information to know about the antecedents of the candidates contesting election has been guaranteed against an individual who after becoming elected will become the representative of the people. The idea behind such conclusion is perhaps that the citizen in our country connects with the affairs of the realm through their elected representative and not only that from these elected representatives the 'Government' is constituted, so people should know the introduction of the candidates in detail before exercising their franchise to make the democracy more viable and also to participate actively in the decision making process. This aspect of right to information is initiated to

8 Supra note 5.

9 (1997) 4 SCC 306, para 16.

10 (1995) 2 SCC Page 161.

11 (2002) 5 SCC 294.

improve and refine the political system and to strengthen the concept of democracy i.e., 'for the people, of the people and by the people' as propounded by Abraham Lincoln.

Our former Chief Justice Sabyasachi Mukharji depicted more vividly the relationship which exists in between the freedom of information and democracy in *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. & Others*¹² by saying, "...We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of 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. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform."

Hence, it is axiomatic that right to information is a facet of right to know and basically evolves from the freedom of speech and expression, liberty of thought, belief, faith etc. and essential for maintaining democratic norms. With the passage of time, the urge has been felt to use 'Right to Information' as a potent weapon to serve public interest in a more efficient way and to attach the concept directly with the governance to make it more pro bono publico.

Freedom of Information: Statutory recognition

Lord Acton said, "Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can be discussed and publicity"¹³ the edifice of active liberty lies on the concept of free speech which suggests about sharing of a state's sovereign authority among its people. The idea of sharing of sovereign authority means proximity in between the way of functioning of the government and the knowledge of common people about such functioning. Freedom of information has been accepted in one form or other in many parts of the globe especially where the polity is governed through "Rule of Law". For quite some period it is evident that most of the countries in the world are inclining towards

12 (1989) AIR 190, Para 34.

13 Adam D. Moore, *Privacy Rights: Moral and Legal Foundations* (Penn State Press, 2010) at p 201, quoting Lord Acton and his Circle, Letter 74 Ed. Abbott Gasquet (London, G. Allen: 1906).

incorporation of legislation which may ensure transparency, openness and accountability in governance.

UN General Assembly through its Resolution 59 adopted in the year 1946 considered the Freedom of Information as an integral part of fundamental rights. Already it has been mentioned here that Article 19 of the UDHR ensures the freedom of information and expression. Freedom of Information has also been recognised as an inalienable right by Art.19 of Covenant of Civil Political Rights, 1966 and American Convention on Human Rights. UNESCO also mandates through its legal framework to “promote the free flow of ideas by word and image”. Freedom of Information has also got priority in the Dakar declaration on Media and Good Governance, 2005, Brisbane Declaration on Freedom of Information: The Right to Know, 2010, The Maputo Declaration on Fostering Freedom of Expression, Access to Information and Empowerment of People etc. As per the study of UNESCO more than 90 countries across the world have inducted laws on freedom of information in their legal framework.¹⁴ Perhaps Sweden is the first country which has incorporated laws on right to information in the year 1766 and thereafter the Colombia is following this tenet since 1888. USA framed Freedom of Information Act (FOIA) in 1967. Now-a-days, a transition is being perceived in legal framework of obtaining access to information from public domain, i.e. freedom of information is changing into right to information. The glaring example of it is India where Right to Information Act, 2005 has been enacted to ensure the right of the citizens to seek information and to curb arbitrariness, red-tapism, corruption etc; of the public authorities. Again in 2007, Jordan enacted the law related to right to information. This trend of the global polity clarifies that freedom to access information, freedom to know and ultimately freedom of speech, expression, ideas, etc; have been recognised as a fundamental human rights which is really a very significant development and will pave the way for right to information regime the world over.

Right to information and Indian Legal Mechanism

The preamble of the Constitution promises to secure “liberty of thought, expression, belief, faith and worship” and the nature of the polity as

14 *Freedom of Information*, available at <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/> (last accessed on May 3, 2016).

Sovereign, Socialist, Secular, Democratic and Republic. Free flow of information undoubtedly help the people to shape their ideas and to update their knowledge which only can enable them to think independently and to express their mind properly as per their belief, faith; etc. The international human right NGO, Article19, Global Campaign for Free Expression, has described information as, “the oxygen of democracy¹⁵”. So the ideal society what has been vowed by our constitutional makers in the preamble cannot be achieved without allowing the people to involve in the decision making process actively. Under right to information regime the accountability of the public authorities to disseminate information to public creates check and balances on their activities, prevents them from involving in corrupt practices and very importantly the whole episode reminds the people that Government is not formed to dominate the will of the people, but to rather serve the people. A properly informed and knowledgeable person can cast his vote either during formation of the government or at the time of giving their opinion on various developmental projects related with education, health, banking, other matters related to economy in a prudent and judicious manner. It is axiomatic that the rulers and ruled can only come in a similar footing where there exist liberal and democratic environments. So from the preamble of our Constitution it is clear that it is in favour of creating a man of knowledge by disseminating wisdom, understanding, knowledge, information, and data. Art.19 (1) (a) of the Constitution gives the guarantee of freedom of speech and expression and this speech and expression may relate to any ideas which the people acquire in their life either by their self experience or through the experiences of other and these ideas may relate to spiritual, religion, study of science, literature; etc. and also ensures one another important aspect of right i.e. right to know about the affairs of the government and thus through incorporation of the said Article the founders of our Constitution have tried to gift a transparent, corruption free, effective and democratic governance to the people of this country. Freedom of press is also embodied under Art.19 (1) (a) of our Constitution. Freedom of press is sine qua non for political liberty. Press is considered as fourth estate because it keeps a close watch upon the activities of the government and has the potentiality to create

15 The Public's Right to Know: Principles on Freedom of Information Legislation (London: June 1999), Preface. quoted by Toby Mendel in Freedom of Information: A Comparative Legal Survey, available at http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf, (last accessed on May 3, 2016).

strong public opinion against any undemocratic act of the government. It not only circulates its own opinion about the socio-economic and political environment of a society, rather it also invites the people to share their feelings and thus helps the people to connect with the decision making process. From the above it is clear that like an ordinary person, press not only expresses its opinion rather it helps in shaping the public opinion. The Judicial Activism in India has also played a very salutary role to expand the gamut of 'freedom of speech and expression' whereby it construed 'Right to Know', 'Right to remain Silent', 'Right to Know the Antecedents of Candidates contesting Election' as a fundamental right and given priority on free circulation of news papers and ban on imposition of pre-censorship on print media; etc. No right can be absolute one because absolute right itself is the cause of negation of other rights. So freedom of speech and expression should also not be absolute. Reasonable restriction can be imposed on freedom of press. Art.19 (2) deals with the restrictions on the grounds of security of the state, friendly relation with the foreign states, public order, decency of morality, contempt of court, defamation, incitement of an offence, sovereignty and integrity of India,

Right to Information Act: A Positive Step to Strengthen Democracy

Though the right to information is very much embodied in our Constitution but through enactment of Right to Information Act, 2005 (RTI Act), the parliament of our country intended to arm the people with a comprehensive and specific legislation regarding all aspects of securing and getting access of information from public domain and considered securing of information as a matter of right. The Act was enacted with a sole intention to create a conscious and informed citizenry, to promote transparent, accountable and corruption free governance and to ensure full and effective participation of people in democratic process so as to achieve the core constitutional values of a democratic republic. The Act gives emphasis on harmony among conflicting interests of Government to preserve the confidentiality of sensitive information with the right of citizens to know the functioning of the government in tune with the democratic ideal. So the very remarkable feature of the Act is that it endorses the statutory recognition to the concept of 'open society' and 'open government'.

The Act has given widest connotation to information which includes records, documents, memos, e-mails, opinions, advices, press releases,

circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and also incorporates information from the domain of private body which can be accessed by the public authority under any law for the time being in force. In a similar manner the term 'Public authority' has broadened under sec. 2 (h) to include even an authority, body or institution of self-government established through a notification issued by the appropriate Government and includes anybody owned or controlled or financed by the Government and most importantly the nongovernmental organization substantially financed by the appropriate Government, directly or indirectly.

Beside bestowing responsibilities upon the Central and State Information Commissions and the respective Public Information Officers to supply the information as and when asked by the citizen, the most striking feature of this Act is induction of Sec.4 which deals with the disclosure laws i.e., to provide some information *suomotu* to the public by using various modes of communications including internet at regular intervals. As per the guide issued by the Department of Personnel & Training, issued on 28th November, 2013, Sec.4 (1) (b) contains sixteen categories of information needed to be disclosed by the public authority *suo-motu*. The information like particulars of its organisation, functions and duties, power of the officers and employees, norm, rules, regulation etc, by which they are governed, their pay structure, directory of the employees, the names, designations and other particulars of the Public Information Officers; etc.

As per Section 5 of the RTI Act, 2005, every authority/department is required to designate the Public Information Officers and to appoint the Central Information Commission and State Information Commissions in accordance with its provisions of Sections 12 and 15 respectively. All public authorities with more than one PIO should create a RTI Cell within the organisation to receive all the RTI applications and first appeals and to route them to the concerned PIOs/FAAs. As per the norms, the Public Information Officer at the Centre and the State Levels are expected to attend the application or request for providing the information. Appeal against decision of such Public Information Officer would lie to an official of his senior in rank in terms of Section 19(1) within a period of 30 days. Such First Appellate Authority may admit the appeal after the expiry of this statutory period subject to satisfactory reasons for the delay being established. A second appeal lies to the Central or the State Information

Commission, as the case may be, in terms of Section 19(3) within a period of 90 days. The decision of the Commission shall be final and binding as per Section 19(7). Though, it appears from the above assertion that as if Section 19 is a complete code but nothing in the Act of 2005 can oust the High Court and Supreme Court from its jurisdiction vested under Article 226 and under Article 32 of the Constitution respectively.

Section 18 of the Act deals with the power and functions of the information Commissions so that they can fulfill the object of the Act. As we know no right can be absolute one and absolute right itself becomes the cause of negation of other rights. RTI Act also imposes some restriction on supply of information in exceptional situations. Section 8, 9, 11 and 24 deal with the exemption from disclosures of information in certain situations like the information which may affect security of nation, privacy, commercial confidence, foreign relation, copyright, third party interest or matters related to certain agencies of government; etc. Here it is pertinent to mention that if any provision of any Act or statute will become inconsistent with any of the provisions of RTI Act, 2005 then this Act will prevail over, meaning it will have the overriding effect over other legislations.

Under Section 20 of RTI Act, the Central or the State Information Commission has the power to impose penalties on public information officers if it is of opinion that they fail to act within the stipulated time period or fail to supply information or supplied distorted information or concocted information. It provides penalty of two hundred and fifty rupees each day till the application is received or information is furnished, but such penalty shall not exceed twenty-five thousand rupees. As per section 25, the Central and the State Information Commissions, after the end of each year should prepare a report and forward a copy to appropriate authority and for this each ministry or department sends the report regarding registration of requests for information, numbers furnishing information, number of rejections, number of appeals made; etc, to Central and the State Information Commissions and to lay down a copy before each House of Parliament. Hence, it is clear that RTI Act, 2005 is a remarkable legislation that has endorsed the right of the citizen to share with sovereign authority and thus transform the relation in between citizen and state. It confers a potent weapon at the hands of the people to keep vigil on the

activities of the instrumentalities of governance which is sine qua non for the healthy democracy.

An appraisal of RTI Act, 2005: Is it orchestrating with rhythm?

RTI Act, 2005 can be said to be an effective and path breaking legislation with little doubt which has to some extent been able to influence the work culture of Indian society. At the same time it is axiomatic that it has not been able to achieve the objects which have been enshrined in its preamble. Still we are struggling hard for obtaining transparent, viable, corruption free and responsive governance. When even after completion of a decade we fail to get the expected result from the said legislation, then of course it is needed to scan the reasons for its failure to reach a desired result.

In *Namit Sharma v. Union of India*,¹⁵ the question has arisen about the constitutionality of sub-Sections (5) and (6) of Section 12 and sub-Sections (5) and (6) of Section 15 of the Act of 2005 on the ground that as the Chief/State Information Commissioner and/or the Information Commissioners appointed to discharge judicial or quasi-judicial functions or powers under the Act of 2005, ought to have a judicial approach, experience, knowledge and expertise or at least have some legal acumen. It has been held by the Supreme Court that the information commission is a 'judicial tribunal' as it renders services 'judicial' or 'quasi judicial' in nature and that is why the information commission shall be comprised of two members and the judicial member should be a person possessing a degree in law, having a judicially trained mind and experience in performing judicial functions or a law officer or a lawyer may also be eligible provided he is a person who has practiced law at least for a period of twenty years as on the date of the advertisement and should have experience in social work. It has also been held that the appointment of the judicial members to any of these posts shall be made 'in consultation' with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be. The appointment of the Information Commissioners at both levels should be from panel prepared by the Department of Personnel & Training in the case of Centre and the concerned Ministry in the case of a State and the panel has to be prepared after giving wide advertisement and on a rational basis.

15 Writ Petition (Civil) No . 210 of 2012, decided on September 13, 2012, available at www.judice.nic.in.sc (last accessed on May 5, 2016).

Now if we make analysis of this judgment we will find beyond any proposition of doubt that our Supreme Court has taken an active role to supplement the lacuna of the legislation regarding qualification as to appointment of information commissions but still the appointment procedures of information officers are not free from impediments which is directly affecting the spirit of the Act. The Public Information officers are appointed from the same concern, institutes or departments and that is why always a departmental bias works while they work to disseminate information. Often the public Information Officers are appointed from the junior grade and even if not, always a competition remains over there to appease the departmental boss and either to conceal or distort or cook the information. One cannot rule out the reality that the Statute prescribes the stringent punishment against this sort of activities but service is more valuable to the above punishments. For the above reason, often the citizens are deprived from getting the true information or denied from getting the information by using trickery and due to the same reason of departmental bias, the first appellate authority may also not supply the true information in connivance with the public information officer. It is a settled rule that 'justice should not only be done but it is seen to be done' as propounded by our higher judiciary in its several decisions.

Let us have a look towards the Annual Report prepared by the Central Information Commission which also showing the cold attitudes of the protectors of laws regarding the matter of dissemination of information.

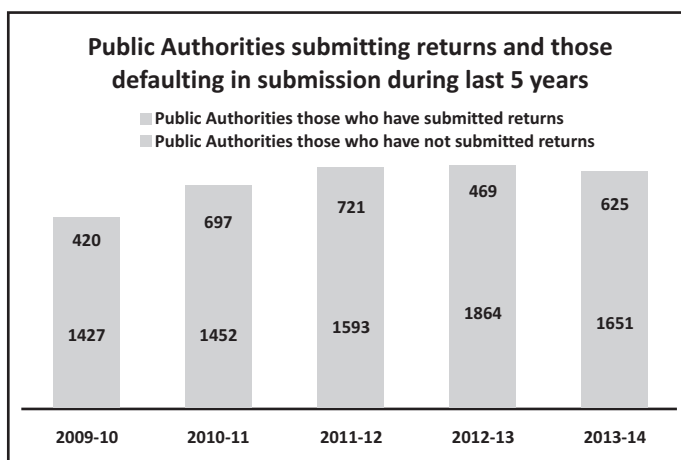


Figure 2.1 : Public authorities compliance and default status in submitting returns over last five years

* * * * *

RTI & POLITICAL PARTIES

Sameer Avasarala* & Shashank Kanoongo**

Abstract

The Right to Speech and Expression is a water drop in the desert devoid of the Supreme Court's interpretation to include Right to Know as knowledge. The Right to Know was implemented by the Parliament of India in the form of Right to Information Act, 2005. The Right to Information is a powerful tool in the hands of the citizen to obtain information from public authorities in our democracy today. Two activists filed an RTI Application with various Political Parties requesting their financial information. The same was not entertained by the parties as they ascertained that they were not 'public authorities'. This question first arose before the full bench of Chief Information Commission, including the then CIC Satyananda Mishra, which ruled that Political Parties are 'public authorities' and hence, fall within the ambit of the RTI Act and directed the officials to designate Public Information Officers and Appellate Authorities and respond to the RTI applications within four weeks. Further, the bench also directed the parties to comply with proactive disclosures under the RTI Act. The parties however chose not to comply with the orders of the Chief Information Commission and after 22 months, the court reaffirmed its order, however acceding to the constriction of the power of the Commission to deal with contempt under the RTI Act. The activists approached the Supreme Court and the matter is currently sub-judice. The Government's arguments were that bringing the political parties within the ambit of RTI would hamper their internal working and political functioning contending further that the CIC made a liberal interpretation of the RTI Act leading to an erroneous conclusion. This paper seeks to analyze the importance of political parties in the functioning of a democracy and alienation of Right to Information in its absence of including political parties within its ambit by also analyzing the systems prevalent in similar democracies. The words 'public authority' bear very high importance. It would be important to study the interpretation of the term 'public authority' under the RTI Act to look into its scope and extent. The independence of political parties is very well-founded and such independence is an important feature of a democracy. The role of the independence of the political parties and its nexus with inclusion into RTI shall be reviewed and analyzed. The Government of India's Right to Information (Amendment) Bill, 2013 to remove political parties from the meaning and scope of 'public authorities' under the RTI Act is a blatant method to adopt undemocratic methods to circumvent orders of judicial or quasi-judicial or other authorities. The Bill by way of specific exclusion has not only removed political parties but also gave itself a presiding effect over any judgment, order or decree of any court or commission. This paper looks into the merits of the said amendment and analyzes the intention of the legislature in making such a law. It is RTI's companionship with every democratic institution that makes possible better accountability in this democracy.

*Student, B.B.A LL.B (Hons) LL.B (Hons), Symbiosis Law School, Pune.

**Student, B.B.A LL.B (Hons) LL.B (Hons), Symbiosis Law School, Pune.

Introduction

India, the seventh largest (area) and second most populous country in the world, is regarded as the largest democracy in the world. The Constitution of India was constituted in 1950 after the independence in 1947 which included five major democratic principles namely Sovereignty, Socialism, Secularism, Democracy and being a Republic. Sovereign refers to an independent nation, Socialist implies social and economic equality for all citizens, Secular implies freedom to choose and profess religion of choice, Democratic means that the government is democratically elected and Prime Minister of India is elected by the people and lastly Republic means head of the state i.e. the President of India who is not a hereditary King but is indirectly elected by the people. Free and fair periodical elections, a free Press, an independent judiciary and a non-political civil service are the essential ingredients of a democracy.

The Election Commission of India is an autonomous, established federal authority responsible for administering all the electoral processes in the Republic of India. Under the supervision of the election commission, free and fair elections have been held in India at regular intervals as per the principles enshrined in the Constitution. The Representation of the People Act, 1951 deals in detail with all aspects of conduct of elections and post-election disputes.

The Indian Constitution, while not mentioning the word "press", provides for "the right to freedom of speech and expression" (Article 19 (1) (a)). However, this right is subject to restrictions under sub clause (2), whereby this freedom can be restricted for reasons of "sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, preserving decency, preserving morality, in relation to contempt of court, defamation, or incitement to an offense".

Independence of Judiciary is a very important tool of democracy. It ensures justice to the citizens of the country. Indian Constitution has given high importance to independence of judiciary. Independence of judiciary requires that judiciary as an organ of the government should be free from the other two organs of the government namely legislature and executive. It not only ensures public good but paves a protection to individual freedom. The Constitution of India adopts diverse devices to ensure the

independence of the judiciary in keeping with both the doctrines of Constitutional and Parliamentary sovereignty. The hierarchy of judicial system in India also plays an important role in maintaining the independence of judiciary. Hence, these are the various factors which lead to the emergence of India as the world's largest democracy.

Historical Perspective of Right to Information

The foundation of RTI Act 2005 was laid down by the National Campaign for People's Right to Information (NCPRI) which was founded in 1996. One of the primary objective of NCPRI was facilitating the fundamental right to information. NCPRI and Press Council of India formulated the draft of RTI law. Subsequently, Freedom of Information Bill was introduced in Parliament in 2002. NCPRI forwarded to the National Advisory Council a set of suggestions for amendment of Freedom of Information Act 2002. The endorsement of these suggestions by the Advisory Council formed the basis for the subsequent Right to Information Bill introduced in the Parliament on 22nd December, 2004. Due to various weaknesses hundreds of amendments were made including the jurisdiction to extend to whole of India. Pursuant to the 77th Report of Parliament Standing Committee headed by Shri Pranab Mukherjee, finally, the RTI Act came into effect all over India from 12th October 2005.

Right to Information Act 2005 provides for setting out a regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matter connected therewith or incidental thereto.¹ The Act defines 'right to information' as the right to access information accessible under the Act which is held or under the control of a public authority. Since the provisions of the Act are applicable only to public authorities as defined under Section 2(h) of the Act, the Act imposes certain obligations as mentioned in Section 4 of the Act, on public authorities pertaining to aspects of indexing, cataloguing and computerization of records within reasonable time. RTI Act, 2005 mandates public authorities to periodically publish information regarding its organization, employees, rules & regulations, remuneration paid to employees, proposed expenditures,

1 Preamble to the Right to Information Act, 2005.

budgetary allocations; etc. The Act provide immense powers to the citizens for suomotu provision of information through various media.

Judicial Perspective : The Right to Know

Right to know or to be informed is the foundation of democracy. Right to know is implicit in freedom of speech and expression enshrined under Article 19 (1) (a) of the Constitution of India. In the case of *State of Uttar Pradesh v. Raj Narain*,² the court observed that freedom of speech and expression includes right of the citizens to know every public act, everything that is done in a public way, by their public functionaries. The freedom to speech and expression is inclusive of right to impart and receive information. The restrictions to Article 19 (1) (a) is provided in 19 (2). Hence, right to know is derived from the plenary provisions of Article 19 (1) (a) of the Constitution of India. The Supreme Court in another case of *Peoples Union for Civil Liberties v. Union of India*³ held that true democracy cannot exist unless the citizens have a right to participate in the affairs of the policy of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of issues in respect of which they are called upon to express their views. It is obvious from the Constitution, that India has adopted a democratic form of government. It is an elementary right that the citizen's know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if the people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. A popular government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy or perhaps both. The citizen's right to know the facts, the true facts about the administration of the country is thus one of the pillars of a democratic state. That is why the demand for openness in the government is increasingly growing in different parts of the world. The important role people can fulfil in a democracy is only if it is an open government where

2 1975 4 SCC 428.

3 AIR 2003 SC 2363.

there is full access to information in regard to functioning of government. Enlightened and informed citizens would undoubtedly enhance democratic values. In the absence of law on right to information, the Supreme Court observed in case of *Union of India v. Association for Democratic Reforms*,⁴ wherein, it gave the directives and that were included to operate only till the law was made by the Legislature and in that sense³ pro tempore in nature. Once legislation is made, the court has to make an independent assessment in order to evaluate whether the items of information statutorily ordained are reasonably adequate to secure the right to information available to the citizens. The court has to take a holistic view and adopt a balanced approach in examining the legislation providing for right to information and laying down the parameters of that right. In a government of responsibility, 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. The Supreme Court earlier in 1950 also has observed that the freedom lay at the foundation of all democratic organisations, for without free political discussion on public education, the proper functioning of the processes of popular government is not attainable. A freedom of such amplitude might involve risks of abuse. But it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. The fundamental rights involved are the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration⁵. The member of the democratic society should be sufficiently informed so that they may influence intelligently the decisions, which may affect them. Further the right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy.⁶ The public interest in freedom of discussion stems from the requirement that members of a democratic society should be sufficiently informed.⁷ Between these periods a plethora of sensitive judgments followed the Supreme Court's concern on the right to know. In

4 AIR 2002 SC 2112.

5 Attorney General v. Time News Papers Ltd. 1973 3 ALL ER 54.

6 Union of India v. Association for Democratic Reform AIR 2002 SC 2112.

7 Indian Express News Papers (Bombay) v. Union of India AIR 1986 SC 515.

2002 the Law Commission of India's 179th Report was public interest disclosure and protection of informer followed the Freedom of Information Act 2002 and finally Indian Parliament passed the law on Right to Information in May 2005.

An Analysis on the Judgment of the CIC dated 3rd June 2013

The Chief Information Commission on an appeal presented before it by Subhash Agarwal and Anil Bairwal gave a decision that Political Parties feature within the ambit of RTI Act, 2005. The complainants sought information from six national political parties including INC, BJP, NCP, CPI(M), CPI and BSP with regard to election manifestos, satisfaction of promises in election manifestos, outline of receipts and payments, contribution to party funds by Center or State level party and details with regard to that, corrupt practices, proposals with regard to electoral reforms. With regard to the information sought, most of the information was available on the respective websites of the Political Parties and their databases. Upon denial of being 'Public Authorities' under RTI Act, the complainant approached the said authority by way of appeals. The court went ahead to the extent to obiter that it would not be an exaggeration to say that devoid of political parties in India, there is no democracy. The CIC took into consideration the following aspects of political parties that suggest to be a public character.

Legal or General Aspects

Political parties are building blocks of a constitutional democracy. They are the utmost institutions that are crucial in the functioning of the government and its institutions. The Tenth Schedule of the Indian Constitution vests immense powers in the political parties and is the striking part which enables a political party to issue whips and those who do not follow orders of such whips, may be suspended by the speaker upon recommendation by the parties. This gives a lot of power to the political parties. Political Parties are registered under Section 29A of Representation of People Act, 1951 and hence, are statutory bodies. They are so powerful that in the words of Prof. Harold Laski, in his textbook 'Grammar of Politics' has termed them 'natural' though not 'perfect'.⁸

8 Harold J. Laski, *A Grammar of Politics* (Harper Collins Publishers Limited, 5th Edition, 1967).

Further, the court observed that under section 29C of the Representation of Peoples Act, 1951, a Political Party is required to submit a report for each Financial Year to the Election Commission of India in respect of contributions received by it in excess of 20,000/- rupees from any person, as also contributions in excess of 20,000/- rupees received from non-Government companies and that when Section 29A be read with Article 324 and Rules 5 and 10 of Conduct of Election Rules, 1961, the Election Commission has issued Election Symbols (Reservation & Allotment) Order, 1968, under which election symbols are allotted to various National/State Political Parties. Further, the Election Commission can suspend or withdraw recognition of a recognized political party in the event of violation of provisions of Election Symbol (Reservation & Allotment) Order, 1968. The order of the CIC dated 29.04.2008 directing Political Parties to disclose their income tax returns holds the field and is complied with.

Financial Aspects

The following financial aspects were noted by the court:

- The Land & Development Office of the Ministry of Urban Development has allotted large tracts of land in Delhi to various political parties either free of cost or at concessional rates;
- The Directorate of Estates, Ministry of Urban Development, has allotted accommodation in Delhi to various political parties on rental basis at concessional rates;
- Political Parties have been claiming and granted a total tax exemption under section 13A of the Income Tax Act for all their income;
- The State has been indirectly financing political parties by way of free air time on All India Radio and Doordarshan of India during the elections; and
- Recognized political parties are issued copies of electoral rolls by the Election Commission, free of cost, at the time of elections

The Public Authority Debate

The scope of Right to Information Act is limited to the public authorities. Therefore under RTI Act, citizens have right to information which can be exercised only against public authorities. The definition of public authorities

is defined under Section 2(h) of the RTI Act 2005. The scope of public authorities under RTI has been discussed in various cases to understand the ambit of ‘public authorities’ under the RTI Act. Section 2 (h) of the Right to Information Act 2005⁹ reads as follows –

- “(b) “public authority” means any authority or body or institution of self-government established or constituted—
- (a) by or under the Constitution;
 - (b) by any other law made by Parliament;
 - (c) by any other law made by State Legislature;
 - (d) by notification issued or order made by the appropriate Government, and includes any—
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;”

In the case of *The Hindu Urban Cooperative Bank Limited and Ors. v. the State Information Commission and Ors.*¹⁰ the Punjab & Haryana Court laid down certain conditions as to what can be brought under the purview of the definition of public authorities. Deciding on 24 civil writ petitions, the court laid down that those institutions which come under the definition of public authorities would be legally required to impart the required information in concurrence with the procedure laid down in the RTI Act. The conditions laid down in the aforementioned case are as follows –

- (i) the institution has to be registered and regulated by the provisions of a legislation; or
- (ii) the State Government has some degree of control over it through the medium of *Acts/Rules*; or
- (iii) it is substantially financed by means of funds provided directly, or indirectly, by the appropriate Government; or
- (iv) the mandate and command of the provisions of the RTI Act along with its Preamble, aims, objects and regime extends to their public dealing; or
- (v) the larger public interest and totality of the other facts and circumstances emanating from the records suggest that such information may be disclosed.

9 Available at <http://rti.gov.in/rti-act.pdf> (last accessed on May 16, 2016).

10 (2011)ILR 2Punjab and Haryana64.

The court further laid down that the arguments on the contrary would lead to dilution of public interest and would be against the objectives and reasons for emergence of Right to Information Act, 2005.

The Central Information Commission (CIC) had alluded to the judgement given by Madras High Court in the case of *Tamil Nadu Newsprint & Papers Ltd. v. State Information Commission*.¹¹ The court observed that the mere requirement of the RTI Act for an institution to be deemed a public authority under Section 2 (h) of the Act is that the government must substantially finance it. The court further laid down that whether or not government exercises such control is immaterial. In another case of *Diamond Jubilee Higher Secondary School v. Union of India*,¹² the Madras High Court held that even a private aided school can fall within the ambit of public authority under the RTI Act because it was both substantially funded by the appropriate government and was under its control.

The Madras High Court in another case of *New Tirupur Area Development v. State of Tamil Nadu*¹³ held that Section 2 (h) (d) (i) qualifies a 'body owned' or 'body controlled' but nowhere it states that the body must be wholly owned or controlled and even the term 'substantially financed' has not been defined in the Act. Section 2(h)(d)(ii) further ropes in non-governmental organisations (NGOs) that are substantially financed.

Some of the institutions are exempted from being under the definition of public authorities under the Act. In the case of *AC Bhanunni Valluvanattukara v. The Commissioner, Malabar Devaswom Board*,¹⁴ the Kerala High Court exempted the offices and officers of public religious institutions. In various other judgements it has been held that cooperative housing societies, banks, etc; are not creation of law made by the legislature or are not bodies owned or controlled or substantially financed by the government, and hence, exempt from the ambit of a "public authority" under the RTI Act. The judgement was criticized on the grounds that the Kerala High Court overlooked the basic objectives of larger public interest enshrined in the Act.

11 CDJ 2008 MHC 1871.

12 (2007) 3 MLJ 77.

13 AIR2010Mad176.

14 WP(C).No. 7237 of 2009(Y).

The issue is whether these political parties would qualify as public authorities. The points raised are as follows:

1. Indirect Substantial Funding by Central Government;
2. Performance of public duty by the Political Parties; and
3. Constitutional/legal provisions vesting Political Parties with rights and liabilities.

Instances considered as examples of Indirect Substantial Funding

- The land has been allocated at a hugely concessional rate and lease value and premium do not reflect true value of these properties. Hence, this is indirect funding. Tax Exemption from PPs makes it Substantial Indirect Funding.
- Allotment of houses on rental basis on concessional rates in which the rental value of the property does not even closely match with the rent paid by the Pps.
- Total exemption from payment of income tax in accordance with Section 13A of the Income Tax Act.
- 30% of the income received by Political Parties was given up by the Government. No one can deny that this is substantial funding by the Central Government.
- To the argument that even NGOs are given tax subsidies, the court held there is a great difference between the tax exemption given to charitable and non-profit nongovernmental organisations and that given to the political parties. The exemption given to the former is strictly conditional: full or partial exemption is given to these organisations only if they pursue the objectives outlined in their respective charters, be it the memorandum of association and bye-laws in case they are societies or the trust deeds, in case they are private trusts. There are other strict conditions laid down in the Income Tax Act which the assessee must comply with. In other words, if any of these non-governmental organisations are found not to be pursuing their objectives or spending the tax exempt amount on activities other than what is enshrined in their respective charters or not comply with the conditions, their entire income becomes

subject to taxation, sometimes with penalty. On the other hand, the tax exemption given to the political parties is complete, the only condition being that they must report to the Election Commission of India, every year, the details of all the contributors who contribute Rs. 20,000 or more to the political party concerned. Thus, the political parties enjoy an almost unfettered exemption from payment of income tax, a benefit not enjoyed by any other charitable or non-profit non-governmental organisations.

- Beneficiaries of free time on AIR.

Hence, the court held that the Central Government substantially finances the Political Parties. The question remains to be whether the same is substantial financing. In *Indian Olympic Association v. Veeresh Malik and Ors*,¹⁵ the Delhi High Court observed that Public Authority has to be interpreted liberally and not restrictively. *A majority of funding* test supports a narrow interpretation of such word and that is not the test to be applied. Similar view has been taken by the Karnataka High Court in *Bengaluru International Airport Limited v. Karnataka Information Commission*.¹⁶ Thus, majority funding is not the criterion. Funding by the appropriate government is achieving a “felt need of a section of the public or to secure larger societal goals. Therefore the political parties have been substantially funded by the Government and they are public authorities.

Performance of Public Duty

The political parties are life-blood of our polity. Political parties (Ruling & Alliance) draw its development plans on the basis of political agenda. It affects the citizens directly in every conceivable way in which the public interacts with the Government. Hence, their accountability is always a question that remains intact. It would be odd to argue that transparency is good for all state organs but not so good for Political Parties, which, in reality, control all the vital organs of the state.

In *Bengaluru International Airport Limited v. Karnataka Information Commission*,¹⁷ the Karnataka High Court defined public authority as:

15 (WP)(C) No. 876/2007.

16 WP 12076/2008.

17 ILR 2010 KAR 3214.

A public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit. Not every such person or body is expressly defined as a public authority or body, and the meaning of a public authority or body may vary according to the statutory context; one of the distinguishing features of an authority not being a public authority, is profit making. It is not incumbent that a body in order to be a public body must always be constituted by a statute; for an authority to be a 'public authority' it must be an authority exercised or capable of being exercised for the benefit of the public.

In *Union of India v. ADR*,¹⁸ SC has laid emphasis on purity of elections. National Commission to Review Working of Constitution in its 2002 report recommended that PPs as well as individual candidates be made subject to a proper statutory audit of the amounts they spend. In *Common Cause v. Union of India*,¹⁹ the SC dealt with income and expenditure of PPs. People of India need to know the cause and source of expenditure of PPs and the candidates in election.

The CIC has observed thus:²⁰

[The RTI Act] also aims to create an 'informed citizenry' and to contain corruption and to hold government and their instrumentalities accountable to the governed. Needless to say, Political Parties are important political institutions and can play a critical role in heralding transparency in public life. Political Parties continuously perform public functions which define parameters of governance and socio-economic development in the country.

Comment

Firstly, to analyze, the judgment, it is important to look into the Statement of Objects and Reasons of the RTI Act, 2005:

“Whereas the Constitution of India has established democratic Republic;

And whereas democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption

18 AIR 2002 SC 2112.

19 AIR 1996 SC 3081.

20 File No. CIC/SM/C/2011/001386 & File No. CIC/SM/C/2011/000838, decided on 3rd June 2013 (Central Information Commission).

and to hold Governments and their instrumentalities accountable to the governed;

And whereas revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

And whereas it is necessary to harmonise these conflicting interests while preserving the paramountcy of the democratic ideal;

Now, therefore, it is expedient to provide for furnishing certain information to citizens who desire to have it.”

It is important to look that the RTI Act has been enacted with a purpose to keep the citizenry of the democracy informed. From a bare reading of the Statement of Objects and Reasons, it can be reasonably derived that the democratic bodies and their instrumentalities are to be held accountable to the people through the Right to Information. Further, containing corruption is a reason for enactment of the RTI. It is now important to look into the long title of the RTI Act.

“An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.”

It is important to look into the usage of the word ‘Government and its Instrumentalities’ as enshrined in the Statement of Objects and Reasons. The word ‘instrumentality’ has been defined by Oxford Dictionary as “the fact or quality of serving as an instrument or means to an end”. Further, the word ‘instrument’ has been defined as ‘tool to implement’. Hence, interpretively, instrumentality may be understood to be the quality of serving as a tool to implement or means to an end.

Political Parties form an important way of implementing the policies of the ruling government. Manifestos of Political Parties depict a public character as every policy directly affects the people. The Government, through the

Ruling Political Party's ideology implements various policies and thus, it is important to consider the same.

Political Parties under the RP Act

The Representation of People Act, 1951 provides for under Section 29A {Part IVA} that

“29A. Registration with the Election Commission of associations and bodies as political parties.— (1) Any association or body of individual citizens of India calling itself a political party and intending to avail itself of the provisions of this Part shall make an application to the Election Commission for its registration as a political party for the purposes of this Act.

(2) Every such application shall be made,— (a) if the association or body is in existence at the commencement of the Representation of the People (Amendment) Act, 1988 (1 of 1989), within sixty days next following such commencement;...”

Hence, it makes provision for registration of Political Party under the Act for availing itself of provisions under this Part. This provides for statutory recognition of Political Parties under the provisions of the Representation of People Act, 1951. The public character of a Political Party may be observed by the spirit of Section 29A(5).

“(5)The application under sub-section (1) shall be accompanied by a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.”

The procedural provision that mandates a political party to have a provision in Memorandum of Association that the body shall bear true faith and allegiance to the Constitution and to the principles of Socialism, Secularism and Democracy. Without having a public character, a private body would not be under an obligation under law to conform to the principles of Secularism, Socialism and the true ideals of the Constitution of India.

Difference between legal framework of societies and political parties

Section 2 of Societies Registration Act, 1860 may be looked into for the same purpose

“The memorandum of association shall contain the following things, that is to say,-

- a) the name of the society;
- b) the object of the society;
- c) the names, addresses, and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.
- d) A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association”

While, Section 29A(5) of Representation of People Act, 1951 mandates that the Memorandum of Association must conform to the ideals of democracy and the Constitution. The aforesaid provision provides that a political party should provide a copy of the memorandum or rules and regulations of the association or body, by whatever name called, and such memorandum or rules and regulations shall contain a specific provision that the association or body shall bear true faith and allegiance to the Constitution of India as by law established, and to the principles of socialism, secularism and democracy, and would uphold the sovereignty, unity and integrity of India.

Conclusion

India, the seventh largest (by area) and second most populous country in the world, is regarded as the largest democracy in the world. Democracy means that the government is democratically elected and Prime Minister of India is elected by the people and lastly Republic means head of the state i.e. the President of India who is not a hereditary King but is indirectly elected by the people. Political Parties are a central feature of any democracy. They are the hands of the people which bring public interests and aspirations together for betterment of the society. They play an intermediary role to control and influence public policy linking the institutions of government to economic, ethnic, cultural, and religious and other societal groups. Right to know or to be informed is the foundation of

democracy. Right to know is implicit in freedom of speech and expression enshrined under Article 19 (1) (a) of the Constitution of India. The freedom to speech and expression is inclusive of right to impart and receive information. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. The Supreme Court in case of *Peoples Union for Civil Liberties v. Union of India* held that true democracy cannot exist unless the citizens have a right to participate in the affairs of the policy of the country. Further the right to get information in democracy is recognised all throughout and it is natural right flowing from the concept of democracy, as held in *Union of India v. Association for Democratic Reform*. Between these periods a plethora of sensitive judgments followed the Supreme Court's concern on the right to know. In 2002, the Law Commission of India's 179th Report was public interest disclosure and protection of informer followed the Freedom of Information Act, 2002 and finally Indian Parliament passed the law on Right to Information in May 2005. The scope of Right to Information Act is limited to the public authorities. Therefore under RTI, citizens have right to information which can be exercised only against public authorities. The definition of public authorities is defined under Section 2(h) of the RTI Act 2005. The Court laid down in various judgements that the arguments on the contrary as mentioned in Section 2 (h) of the RTI Act would lead to dilution of public interest and would be against the objectives and reasons for emergence of Right to Information Act, 2005. The Right to Information is a light in this democracy. Political Parties should be within the ambit of the Right to Information in the better interests of the democracy. The closer the political parties are to accountability, the higher the chances that democracy is fulfilled.

* * * * *

EFFECTIVENESS OF RTI ACT IN ERADICATING CORRUPTION

Robit Kumar & Vishnu Prabhakar Pathak***

Abstract

The Right to Information constitutes a concept of fundamental importance in any civilised society. It is an essential prerequisite for the existence of any modern democratic republic. In Indian perspective the existence of 'Right to know' holds a paramount importance simply because the neoteric expedition of corruption to its zenith has almost dismantled the social, political and economic structure of the nation. It has made the people feel betrayed and has gravely undermined the peoples' faith in the democratic institutions which certainly can't be regarded as a good omen for the future of democracy in India. The Corruption hampers the equality of opportunities and prevents the citizens to enjoy their basic fundamental and constitutional rights. However, the enactment of RTI in 2005 by the Indian Parliament has proved to be a trenchant tool in the crusade against corruption and has been successful in resurrecting the hope for a better democratic and corruption free society.

The potential of RTI in eradicating corruption can be well understood by the fact that its very genesis was against the arrogance of bureaucracy and the culture of secrecy deeply pervasive in the government institutions and the mind-set of the officialdom. The author(s) in the present piece of writing have endeavoured to throw light over the significant contribution of RTI in eradicating corruption and the success it has achieved in its journey of a decade. They have tried to portray with the help of practical illustrations that how much this pioneering legislation has played a crucial role in checking the culture of bribe in the government offices which is the most visible form of corruption in our society. The efforts have also been made to elucidate its contribution in unmasking several grand political corruption which in the absence of RTI would have never come in the public domain. The advent of RTI has started the culture of questioning which in turn is incessantly invading the evil correlation between power and corruption.

Introduction

If an analogy could be drawn between the Indian Constitution and the Ocean, it shall not be an exaggeration to remark that the Right to Information has been one of the most precious gems that people of this nation have been able to elicit out of it. The very existence of a democratic society like ours symbolises an urgent need for relation of mutual trust between state and its citizenry. This trust stands as a cornerstone and a

*BA.LLB (4th year) School of Law, KIIT University, Bhubaneswar.

**BA.LLB (4th year), School of Law, KIIT University, Bhubaneswar.

monolithic pillar upon which the Indian democratic republic rests. This trust cannot be maintained unless the state institutions are completely transparent, participatory and accountable to its own people. An iota of suspicion in this trust-based relation between the state and its citizenry shakes the very foundation of democracy and the principles upon which it is based. No state can claim itself to be democratic till it decides to remain opaque, unaccountable and non-participatory for its people. The Right to Information constitutes a concept of fundamental importance in any civilised society. It is pertinent to mention what one of the framers of the American Constitution, James Madison explicated about the importance of information and the means for the people to procure it in any democratic society. He said, "Knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power which knowledge gives. A popular government without popular information or the means of obtaining it, is but a prologue to a farce or tragedy, or perhaps both".¹ The greater inevitability for RTI Act in India is enhanced by the fact that the deep rooted corruption and its pervasiveness in almost all spheres of the government's Institutions has entirely emasculated the governance of our country. Corruption impedes an individual to enjoy his basic Fundamental Rights and perils the very existence of democratic institutions. Though there are several legal frameworks to tackle corruption, nonetheless, RTI Act 2005 is peerless in its own sphere. It has proved to be an impregnable and a mighty weapon in the crusade against corruption. The Right to Information Act was enacted by the Parliament in 2005 which provided a major tool to combat corruption and unlatched the door for participatory democracy. This paragon legislation has enabled the power givers to become power sharers. People can now participate in governance, ask questions to those holding direct power, demand details of each particular action they take and the money they spend in their name. Killings of at least 45 RTI activists and the assault and harassment of almost 250 activists² evinces its robustness and bespeaks how much this pioneering legislation has a cataclysmic effect in power corridors.

1 Dr. R.K Verma, *Right to Information Law & Practice* (Taxmann Publications, 2nd Ed. 2009) at p 1.7.

2 Human Rights Watch, *India: New Killing of Right to Information Activist*, available at www.hrw.org/news/2015/09/10/india-new-killing-right-information-activist (last accessed on May 14, 2016).

Propinquity between Corruption and the Genesis of RTI

Although, corruption originates from different sources, nonetheless, non-transparency and unaccountability are considered to be the fountainhead of corruption. The effectiveness of RTI Act in eradicating corruption can be well recognised by the fact that its very genesis was against a pervasive culture of secrecy and arrogance of bureaucracy towards common man on issues fundamental to their livelihood and survival.

Role of MKSS

The Mazdoor Kishan Shakti Sangathan (MKSS) is a people's organisation. As the name indicates, the MKSS works with the rural poor: workers and peasants from the central districts of the north western Indian state of Rajasthan³.

The MKSS's interest in the right to information arose from its work in the early 1990s on livelihood issues, such as the failure of the state government to enforce minimum-wage regulations on drought-relief works, to ensure availability of subsidised food and other essential commodities through the Public Distribution System.⁴ The MKSS's central focus on wages and prices kindled the belief that without accessing the official documents, the struggle for seeking accountability may prove to be a futile attempt. Consequently a huge campaign started with demand for a law which allows a common man access to official records. Thus, a popular local struggle finally led to the enactment of Right to Information law in the country.

The RTI and Anti-corruption Movement in Maharashtra

If in Rajasthan an awareness of peoples' right to information sprang out of a movement for minimum wages by a marginalised rural work force, in Maharashtra it is an offshoot of a movement against corruption.⁵

3 Story of the MKSS: A Process of Peoples' Political Mobilisation for Democratic Rights, available at <http://www.mkssindia.org/about-us/story-of-mkss/> (last accessed on May 14, 2016).

4 Rob Jenkins & Anne Marie Goetz, *Accounts and Accountability*, THIRD WORLD QUARTERLY, Vol. 20, no.3 (1999), pp. 603-622.

5 The RTI and Corruption Movement in Maharashtra, available at <http://www.mkssindia.org/writings/mkssandrti/the-rti-and-corruption-movement-in-maharashtra> (last accessed on May 15, 2016).

Corruption: An Evil Phenomenon Weakening Democracy

There is no global consensus over the specific elements that constitute corruption, leading most scholars to argue that attempting to define 'corruption' in general is a futile exercise.⁶ Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts market, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.⁷ Though, the monstrosity of corruption haunts every nook and corner of global civilisation irrespective of their geographical expansions and economic stabilities, it is the developing countries in the world which have to bear its deleterious consequences the most. As a behavioural virus causing decay in the moral fibre of political and public life, corruption appears to be an eternal and universal phenomenon. Corruption as a socio-politico-administrative phenomenon has been understood differently by different sets of viewers, watchers and sufferers. As a deviant behaviour it has legal, moral, social and religious dimensions and overtones. The complexities of corruptions as a phenomenon have their ramifications in the social process as a whole.⁸

The Contours of Corruption

The corruption in India has a multileveled anatomy. Despite multifarious provenance of corruption, some of its prominent accepted forms are distinctions between grand corruption and petty corruption.

Petty corruption is either the collusive or coercive action of a public official vis-à-vis a member of the public to subvert the system over relatively small transactions. It therefore mostly involves down the line public official. Grand corruption is the subversion of the system by senior governmental official and formations of the political executive, usually in collusion with private sector players.⁹

6 C.Raj Kumar, *Corruption and Human Rights in India* (Oxford University Press, 1st Ed., 2011) at p 3.

7 Kofi Anan, *United Nations Convention Against Corruption*, UNTS A/38/422, available at www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (last accessed on May 14, 2016).

8 K.N. Gupta, *Corruption in India* (Anmol Publication Pvt. Ltd, Reprint 2014) at p 1.

9 Navita Srikant, *Final Draft National Anti-corruption Strategy*, Central Vigilance Commission, 2010, at p 5.

The Detrimental Effect of Corruption

The ill-effects of corruption are multi-dimensional. It costs the nations economically, socially politically and environmentally. It is out of the ordinary to find any dissension amongst most of the academicians and policy makers throughout the globe, such that the crippling effects of corruption mushroom in all aspects of public life. Several studies have shown that corruption not only stifles growth, it also perpetuates inequalities, deepens poverty, causes human suffering, dilutes the fight against terrorism and organised crime, and tarnishes India's image globally.¹⁰ On the political front, the misuse of power and office for private benefits destroy the democratic and institutional legitimacy. Economically, corruption acts as a major obstacle to the advancement of fair market structures and distorts competition which ultimately engenders disinvestment. On social front, it imbalances the social structure due to its multidimensional corrosive effects where it finally ends in undermining the peoples' credence in democratic institutions.

The Potential of RTI to Eradicate Corruption

The question whether eradication of corruption in India is a dream or reality has always been a matter of debate. The former Prime Minister of India, Mrs Indira Gandhi said that corruption was a global phenomenon, and consequently it is not possible to eradicate it.¹¹ But what George Bernard Shaw said stands as a strong counter to those who hold pessimistic views with respect to eradication of corruption. He opined that a reasonable man looks at the world as it is, observes the limitations, adjusts himself accordingly and leads a peaceful life but an unreasonable man wants the world to change to his way of thinking and in the process achieves success.¹² Who could have imagined few centuries back that the human beings would be able to fly like a bird which we have been successfully doing today. In our view the Right to Information Act, identically possesses the potential to break the gravity of corruption. Corruption flourishes in

10 Ibid.

11 Supra note 8.

12 Ibid.

13 Using the Right to Information as an Anti-Corruption Tool, Transparency International, Berlin(2006) at p 5.

darkness and so any progress towards opening governments and inter-governmental organisations to public scrutiny is likely to advance anti-corruption efforts.¹³

RTI: A Strong Kick to Kickbacks

Bribery is the most visible form of corruption in India. One can easily witness its unbridled character in government offices though it is not confined to public sector alone. Bribes sometimes also known as speed money refers to situations where a citizen sometime pays to public officials to get undue favours but more often compelled to do so to get his work done or to receive the services for which he is legally entitled. It includes instances from obtaining a birth certificate upto getting a death certificate, in making a passport, obtaining a driving license, getting admissions in educational institutions, receiving health care treatments; etc. The advent of RTI has drastically watered down the victimisation of public by public officials for getting their legally entitled work done and has proved efficacious in dissipating culture of bribery in the country. This could well be illustrated with the help of a real practical incident. For the people living in Jhilmil area of Delhi, the RTI Act became an effective weapon to get their work done without giving bribe. These people needed income certificates to get their children admitted in public schools against the 'poor class quota' but due to corrupt officials in SDMs (Sub-Divisional Magistrate) office it was being delayed. Similar was the position as regards residence certificate and officials were always asking to come in the morning and then subsequently to come in the evening. In these circumstances when RTI Act came, people of the area invoked it by asking as to why their applications have not been attended to so far and they also asked for the names of personnel who had to prepare income certificates. This alerted the officials in the SDM's office and all the required certificates were issued within two or three days¹⁴. In a similar case, one old and weak person named Kaniram, residing in the village Untonki Bari in Rajasthan, had an Annapoorna ration card from the government which entitled him to receive 10 kilos of free wheat every month but he never got it for the last 11 months. On 13th October Kaniram, under RTI Act, asked the government whether in last 11 months his ration was released to the ration shop or not. Two days later the ration shop keeper visited his house and gave him 100

14 Niraj Kumar, *Treatise on Right to Information Act* (Bharat Law House, 1st Ed. 2007) at p186.

kilos of wheat. Now Kaniram is getting his free wheat every month¹⁵. Thus, it clearly indicates how RTI is not just a trenchant weapon to onslaught corruption rather it is very fundamental to protect the livelihood and survival of silent sufferers of this nation who were hitherto mute subalterns.

RTI: A Potent Tool to Fight Political Corruption

The political corruption in India seems to be as old as the establishment of the political institutions itself. But now corruption having reached its crescendo in politics, have become inseparable to each other. "Political or grand corruption takes place at the high level of the political system. Political corruption occurs when political decision makers use the political power they are armed with, to sustain their power, status and wealth".¹⁶ The neoteric cloudburst of major political corruption scandals in India have sold citizens down the river and splintered peoples' trust in politicians and political establishments. The prerequisite for eradicating political corruption is to unearth the corrupt political deeds because once a corrupt political scandal is smoked out it becomes very difficult for perpetrators of corruption to escape action of law. This is where the paramountcy of RTI legislation comes into picture. It helps exposing scams and corrupt political deeds of politicians and political establishments because the law makes it mandatory for public authorities to disclose the sought information within a stipulated time period of 30 days in ordinary cases if not exempted by the Act itself.¹⁷ Thus, once a political corruption is unmasked and brought to public domain using RTI, many other things facilitate the eradication of corruption such as public pressure, pressure of civil society, existence of legal frameworks, fear of judiciary; etc. This supreme legislation has produced very fruitful results in battling political corruption. For instance it helped unveiling Adarsh society scam. The applications filed by RTI activists like Yogacharya Anandji and Simpreet Singh in 2008 were instrumental in bringing to light links between politicians and military

15 Ibid., at p.193.

16 Igne Amunsen, Political Corruption: An Introduction to the Issues at p 8, available at <http://www.cmi.no/publications/file/1040-political-corruption.pdf> (last accessed on May 14, 2016).

17 Section 7(i), Right to Information Act, 2005.

officials, among others. The 31-storey building, which had permission for six floors only, was originally meant to house war widows and veterans. Instead, the flats went to several politicians, bureaucrats and their relatives. The scandal led to the resignation of Ashok Chavan, the former chief minister of Maharashtra. Other state officials are also under the scanner¹⁸. Similarly the RTI has played a significant contribution in unfolding other scams which rocked the country such as CWG scam, 2G scam, etc¹⁹.

Conclusion

The dynamism or efficiency of RTI in eradicating corruption can be well understood in terms of the evil correlation between power and corruption. Lord Atkin's famous quote that "Power corrupts; absolute power corrupts absolutely" , gives us a good opportunity to fathom this ignominious correlation between these two. The illegitimate consolidation of power creates a harmonious ambience for corruption to flourish. It provides the corrupt all possible opportunities to camouflage their corrupt activities, illegal deeds, immoral actions etc by misutilizing their power, position and office. So any effort to eradicate corruption will have to constitute the process of ravaging this evil engagement of power with corruption. This is possible only when people are equipped with the power to question every illegitimate action of power holders. The RTI has not only successfully started this process; rather it has accelerated it as well. This magnificent legislation has started the process of decimating the culture of secrecy which in turn increases transparency and accountability. It has thus championed in striking at the root of corruption. The journey of RTI for a decade itself bears testimony of its immeasurable contribution in being a serious beginner of corruption free society. Those government officials and their political bosses who once used to consider themselves unquestionable and unassailable now need to rethink once about the existence of RTI and

18 Vibhuti Agarwal, *A look at some RTI success stories*, available at <http://blogs.wsj.com/indiarealtime/2011/10/14/a-look-at-some-rti-success-stories/> (last accessed on May 14, 2016).

19 See Betwa Sharma, *5 Scams The RTI Act Helped Bust In Its First 10 Years*, Huffington Post, available at http://www.huffingtonpost.in/2015/10/12/5-most-critical-scams-exp_n_8263302.html (last accessed on May 15, 2016).

20 Crane Brinton, *Lord Acton's Philosophy of History*, HARVARD THEOLOGICAL REVIEW, Vol. 12, No. 1 (Jan. 1919) at p 95.

the possibility of being questioned through it at the later stage, before they proceed to take any arbitrary or illegitimate move. My personal journey with RTI for half a decade has instilled in me the zeal and hope for a corruption free society and RTI appears to me to be a silver lining amidst the cloud of corruption. However, it is saddening that no political establishment has ever been its admirer which is reflected in their efforts to dampen the quintessential soul of this splendid enactment time and again. If we dream to have a society free from corruption we must continuously invigorate and protect the power it consigns.

* * * * *

RTI - A FAILING INSTITUTIONAL MECHANISM

Utkarsh Kumar Sonkar*

Abstract

Information is the “live wire” which illuminates democracy and good governance. Participatory democracy is strengthened through the right to information as it aids people in taking informed decision. Uninformed citizenry makes democracy a farce and renders the right to participate in the affairs of the state meaningless. The Right to information Act ushers an era of transparency. Since, transparency is one of the essential facets of good governance, the quality of the right conferred plays a critical role in checking the health of the largest democracy in the world. In this context the institutional mechanism created to ensure the dissemination of information becomes pivotal.

The Right to Information Act in our country is a glaring distinction from similar legislations over the globe provided the adjudicatory forum constituted thereunder is neither branded as a Court nor a tribunal. It is argued that the Commission constituted under the Act be treated as a quasi-judicial authority rather than being administrative simpliciter. The apex court in Namit Sharma v. Union of India adopted an activist approach and read into the qualifications the requirement of legal acumen, expertise and experience for persons manning the Chief Information Commission and State Information Commission. The researcher subscribes to the approach of the apex court in Namit Sharma vis-à-vis the qualification requirements of persons holding such key positions. It is argued that the review of Namit Sharma by apex court by doing away with the qualification requirements prescribed in its earlier decision fails to address the challenges posed in implementation of the RTI. Further, it does not address the arguments put forth in favour of judicial presence and skims over it stating that the IC does not adjudicate a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority and thereby terming the functions discharged by Information Commissioners as administrative simpliciter. It is respectfully submitted that this reasoning is neither sound nor appealing because the Information Commissioners have to continuously adjudicate the tussle of protecting privacy vide Article 21 and disclosing information vide Article 19(1)(a). Thus, it pierces through arenas of legal and constitutional nuances. Further, the structure of the commission, the nature of powers vested and diversity of functions attributed indicate that the Information Commissioners are exercising judicial/ quasi-judicial functions. Hence, the nature of adjudication provided in the Act rather than being inclined towards administrative adjudication is specifically oriented towards a judicial determinative process and it should be branded as a tribunal manned by members having legal qualifications. The failure of non-judicial Information Commissioners as well as the government in making the needful changes justifies the court coming

*III year B.A., LL.B (Hons.), National Law School of India University, Bengaluru.

to the rescue of information regime. This move by judiciary had come in an environment where controversial amendments are sought to be made and the financial autonomy of the Information Commissioners usurped, thereby subverting the objective of the Act. It is further argued that the harmonious construction of the Official Secrets Act, 1923 with the RTI Act remains a myth and the contrary is rarely found. An information disseminating regime demands that a liberal approach for interpreting the provisions of the Act be employed and primacy be given to suo moto disclosure.

Introduction

Information is the “live wire” which illuminates democracy and good governance.¹ I.P.Massey has drawn an analogy of information with Article 39 of the Constitution of India i.e., equitable distribution of material resources to check concentration of wealth and means of production. Since, information is wealth in present day context, the need for its equal distribution cannot be over emphasised.² Participatory democracy is strengthened through the right to information as it aids people in taking informed decision. Uninformed citizenry makes democracy a farce and renders the right to participate in the affairs of the state meaningless.³

A statutory right to information was conferred on the citizens by virtue of Right to Information Act, 2005 [hereinafter referred to as “the Act” for the sake of brevity]. However, this right was formally recognised by the judicial community more than two decades before the matter was even debated. In the seminal judgement of *State of Uttar Pradesh v. Raj Narain*,⁴ it was held that right to information is implicit in Article 19(1)(a) of the Constitution of India which confers right to freedom of speech and expression. The glimpses of obligations similar to those under the Act can be found under other laws such as, Section 74 to 78 of the Indian Evidence Act, 1872 which confer a right on a person to gain knowledge about the contents of a public document. Similarly, Section 25(6) of the Water (Prevention and Control of Pollution) Act, 1974 obligates every State to maintain a register of information regarding water pollution which shall be open to inspection by interested persons.

1 Dr. I.P.Massey, *Administrative Law*, 571 (6th edn., 2007, Eastern Book Company, Lucknow) at p 571.

2 Ibid., at 575.

3 Secretary, Ministry of Information and Broadcasting, Government of India and Ors. v. Cricket Association of Bengal and Anr, (1995) 2 SCC 161.

4 State of Uttar Pradesh v. Raj Narain AIR 1975 SC 865.

The significance of the information regime marks the relevance of the research paper. Right to information ushers an era of transparency. Since, transparency is one of the essential facets of good governance,⁵ the quality of the right conferred plays a pivotal role in checking the health of the largest democracy in the world.⁶ Despite a statutory right to information being conferred on the citizens, the framework through which this right is facilitated aids in watering down the efficacy of the right. In light of this context, the research paper aims to analyse the current status of information regime in the country. This study involves determination of the nature of adjudicative forum and challenges faced in the implementation of the Act. The paper puts forth potential suggestion to rectify the problems highlighted. The author has initiated the research with the hypothesis that - the powers, functions and nature of performance of functions - attributed to the Information Commissioners under the Right to Information Act are of quasi-judicial nature which merits adjudication by a person acquiring judicial acumen, expertise and experience. Unwarranted classifications act as a rider to dissemination of information. It is to be noted that the scope of this paper is restricted to the study of legal nuances concerning information regime and does not delve into infrastructure related lacunae.

With respect to the above, the research paper endeavours to answer the following research questions:

1. Is the nature of Information Commissioners as an authority under the Right to Information Act, 2005 administrative simpliciter or judicial/ quasi-judicial?
2. Is the apex court ruling in *Namit Sharma v. Union of India* an apparent error of law?
3. How do Right to Information Act, 2005 and Official Secrets Act, 1923 go hand in hand?
4. What should be the approach for information dissemination?

5 Planning Commission, Volume I – Dimensions and Strategies: Chapter 6 – Governance and Implementation, Tenth Five Year Plan, 177 (2007), available at www.npc.gov.np/images/download/10th_eng.pdf (last accessed on May 4, 2016).

6 Krista Mahr, *The World's Largest Democracy Is Heading to the Polling Booth*, TIME (April 07, 2014) available at <http://time.com/51519/the-worlds-largest-democracy-is-heading-to-the-polling-booth/> (last accessed on May 4, 2016).

Adjudication under RTI : Administrative Simpliciter or Quasi-Judicial?

The case of *Namit Sharma v. Union of India*⁷ is a precedential law which governs the field of nature of adjudicative forum under the Act. In this case, the apex court adjudicated upon the constitutionality of Section 12(5) and 15(5) of the Act which concerns with qualification requirements for the Chief Information Commissioner [“CIC”] and State Information Commissioner [“SIC”] respectively. It was contended that the mere experience in various fields devoid of any specific qualification and without there being nexus of such fields to the objective of the Act is violative of fundamental constitutional values. Further, the subjects of legal accuracy cannot be adjudicated by persons of ordinary experience. Such vagueness and uncertainty *vis-à-vis* the composition of the commission which is vested with wide adjudicatory and penal powers was tantamount to affect the administration of justice prejudicially. Hence, the issue before the court was whether the Information Commissioner [“IC”] under the Act is performing functions which are administrative simpliciter or quasi-judicial in nature.

The court while upholding the validity of the impugned sections on the touchstone of Constitution “*read into*” some aspects to effect a meaningful and purposive interpretation. It was held that words “*knowledge and experience*” manifest the intention of appointment of persons having legal acumen, expertise and experience. This decision was subsequently adjudicated upon by the Supreme Court by virtue of its review jurisdiction under Article 137 owing to dissatisfaction with the judgement.⁸ It was held that the direction of the court in its earlier judgement was an apparent error because it was for the Parliament to consider whether appointment of a judicial member will improve the condition of the commission. Ruling out the argument of IC discharging quasi-judicial functions, it was stated that the IC does not adjudicate a dispute between two or more parties concerning their legal rights “*other than their right to get information in possession of a public authority*” and thereby termed the functions discharged by IC as administrative simpliciter. In the prevailing scenario, it becomes incumbent to decipher the true nature of functioning of IC.

7 *Namit Sharma v. Union of India* (2013) 1 SCC 745.

8 J. Venkatesan, *SC recalls judgment on RTI*, THE HINDU (September 04, 2013) available at <http://www.thehindu.com/news/national/sc-recalls-judgment-on-rti/article5088573.ece> (last accessed on May 4, 2016); *Union of India v. Namit Sharma* (2013) 10 SCC 359.

The Functions of Information Commissioners – A Quasi - judicial venture

At the outset, in light of the nature of multifarious functions performed by the IC, it is submitted that the IC is not merely an administrative body because, *first*, it is required to decide a information is sought and furnish contest such that the adjudication pierces through legal and constitutional nuances. *Second*, it performs adjudicatory functions via a hierarchal structure and complying with norms of natural justice. *Thirdly*, it exercises penal powers along with investigative and supervisory functions. *Fourth*, the commission exercises powers of a civil court in a restricted manner.

With regard to the first proposition, admittedly, the adjudication of a *lis* cannot render in discharge of quasi-judicial function *per se*,⁹ however, in the instant case the nature of adjudication makes the discharged function quasi-judicial. Right to privacy has been held to be an integral aspect of right to life in plethora of Supreme Court judgments.¹⁰ Undue inroad into right to privacy is not permissible.¹¹ Privacy has been protected under Section 8(1)(j) of the Act as well. The IC encapsulates the essential trappings of the court since it adjudicates upon the extent to which right to information can be affected where information sought is exempted or encroaches upon right to privacy.¹² The information sought can be in form of a simple query but entailing far reaching consequences. This proposition is highlighted by the apex court while denying the information sought regarding medical expenses of judges.¹³ This becomes a huge challenge provided 75% of queries under the Act are of personal nature.¹⁴ The above

9 B. Johnson and Co. (Builders) Ltd. v. Minister of Health, (1947) 2 All England Law Reports 395.

10 Kharak Singh v. State of U.P., AIR 1963 SC 1295; R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632; People's Union for Civil Liberties (PUCL) v. Union of India, (1997) 1 SCC 301; State of Maharashtra v. Bharat Shanti Lal Shah, (2008) 13 SCC 5; Ram Jethmalani v. Union of India, (2011) 8 SCC 1.

11 Gobind v. State of Madhya Pradesh, (1975) 2 SCC 148.

12 Sharma, *supra* note 8.

13 Shreeja Sen, *Supreme Court says judges' medical bills not amenable to RTI*, LIVE MINT (July 02, 2015) available at <http://www.livemint.com/Politics/xjk1UemhZyqt6St8msWBnN/Supreme-Court-says-judges-medical-bills-not-amenable-to-RTI.html> (Last accessed on May 5, 2016).

proposition has been endorsed in *Thalappalam Service Cooperative Bank Ltd. v. State of Kerala*,¹⁵ where it was stated that if the information sought is personal in nature and is devoid of any relationship with public activity or interest or it will not sub-serve larger public interest, in this eventuality the public authority or the officer concerned is not legally obliged to provide that information. Similarly, in *Girish Ramchandra Deshpande v. Central Information Commissioner*¹⁶ it was held that the disclosure of information would cause an unwarranted invasion in the privacy of the individual if there is no bona fide public interest in seeking information. Besides the claims of privacy, some provisions like Section 8(1) sub-clause (e) concerning fiduciary relationships, (f) concerning information received in confidence of foreign government, (g) concerning endangerment to life and security of any person who has given information for law enforcement or security purposes, (h) concerning impeding investigation apprehension or prosecution of offenders and (i) concerning cabinet papers; requires concrete satisfaction of the authority as to whether public interest calls for disclosure of information.¹⁷ It is submitted that such matters delve into areas of legal essence.

With reference to second assertion, section 5 of the Act mandates every public authority at the Centre and the State to nominate Public Information Officers [“PIOs”] for the effective furnishing of information. Provision for appeal on refusal of information by the PIO is provided under Section 19(1) to a nominated senior officer. Hence, the Act provides for appeals on two levels.¹⁸ Appeal against the order of first appellate authority lies to the State Information Commission or Central Information Commission depending upon whether the first appellate authority was Central or State information officer. The factum of two levels appeal being statutorily provided depicts the seriousness of the adjudicatory function. Such orders

14 Shantanu Nandan Sharma, *RTI: Challenges so far and the changes needed*, THE ECONOMIC TIMES (February 03, 2013) available at http://articles.economictimes.indiatimes.com/2013-02-03/news/36704533_1_rti-applicants-rti-act-rti-queries (last accessed on May 5, 2016).

15 *Thalappalam Service Cooperative Bank Ltd. v. State of Kerala*, 2013 (12) SCALE 527.

16 *Girish Ramchandra Deshpande v. Central Information Commissioner*, (2013) 1 SCC 212.

17 Sharma, *supra* note 8.

18 Section 19(3), The Right to Information Act, 2005.

are statutorily not subject to judicial review.¹⁹ It is submitted that such provision is redundant provided the inherent jurisdiction of the High Court and Supreme Court cannot be ousted in light of a catena of judgments, nevertheless, it implies that the adjudicatory function of the commission is serious.²⁰

According to the third proposition, the commission is also vested with supervisory as well as investigative authority and is empowered to hear complaints regarding inaction, delayed action etc.²¹ Section 20 of the Act empowers the IC to sanction penalty as well as recommend disciplinary action against PIOs who without any reasonable cause have failed to comply with the Act.

With regard to the fourth submission, it is submitted that the IC is vested with powers of a civil court in a restricted manner.²² This is analogous to powers conferred upon the Telecom Disputes Settlement Appellate Tribunal.²³ Therefore, even if the commission cannot be considered a court *strictosensu*, it is a tribunal by virtue of discharging *quasi-judicial* functions that entails vesting of the power of a civil court in a restricted fashion.²⁴ This strengthens the hypothesis made at the outset of the research paper that the nature of the functions discharged by the ICs is judicial/*quasi-judicial* in nature.

The nature of adjudication provided in the Act rather than being inclined towards administrative adjudication is specifically oriented towards a judicial determinative process. The adjudication delves into the issues of niceties of law. In light of the arguments advanced, it is submitted that the functioning of the IC is not administrative *simpliciter* but is judicial/*quasi-judicial* in nature. Hence, the CIC and SIC should be persons acquiring legal acumen, expertise and experience. The word *quasi-judicial* being generic seeks further elucidation.

19 Section 23, The Right to Information Act, 2005; Sharma, *supra* note 8, at p 78.

20 L. Chandra Kumar v. Union of India, AIR 1997 SC 1125; I.R.Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

21 Section 18(1), The Right to Information Act, 2005.

22 Section 18(3), The Right to Information Act, 2005.

23 Section 16, The Telecom Regulatory Authority of India Act, 1997.

24 Durga Shankar Mehta v. Raghuraj Singh, 1955 (1) SCR 267.

Quasi-judicial Functions and Tribunals – CIC/SIC as Tribunals

In *State of Himachal Pradesh v. Raja Mahendra Pal*,²⁵ the apex court has categorically stated that the term “quasi-judicial” implies midway between administrative and judicial functions. An authority is termed to be quasi-judicial if it is conferred with the statutory authority to act judicially in arriving at the decision. In *S.P. Sampath Kumar v. Union of India*,²⁶ it was held that in administrative tribunals the presence of a judicial member is requisite as it has to inspire confidence in public with regards to its competence and expertise. The court observed that civil servants in our country possess tremendous capacity to resolve and overcome complex administrative problems but this does not fill the vacuum created of absence of judicial training and experience. This view of the court has been endorsed in *Madras Bar Association v. Union of India*.²⁷ The Commission formed under the Act, that though it cannot be termed a court, performs functions akin to a tribunal. Currently, most of the positions of ICs are held by retired civil servants.²⁸ The report of RaaG suggests that the post of ICs is becoming a post-retirement incentive for civil servants, hence, efforts shall be made to counter this.²⁹

Further, in *Madras Bar Association v. Union of India*,³⁰ it was held that there might be some highly specialized fact finding tribunals which may compose only of technical members but such tribunals “are rare and are exceptions”. In the instant case, the commission performs adjudicatory functions which pierce through legal and constitutional provisions. Hence, the exception carved out for tribunals composed of non-judicial members does not apply to the commission under the Act. This supplements the need for appointment of person possessing legal acumen, expertise and experience.

The knot between Experience and Qualifications - a Requirement for Appointment of Information Commissioners

The review of *Namit Sharma* provides an optimistic note of the apex court

25 *State of Himachal Pradesh v. Raja Mahendra Pal*, 1995 Supp (2) SCC 731.

26 *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

27 *Madras Bar Association v. Union of India*, (2010) 11 SCC 1.

28 RTI Assessment and Advocacy Group (RaaG) et al, Peoples’ Monitoring of the RTI Regime in India 2011-13, 103 (October, 2014) available at <http://www.rti-assessment.com/raag---ces--rti-study-2011-13.html> (last accessed on May 5, 2016).

29 Ibid.

30 *Madras*, supra note 28 at p 14.

that the matters concerning intricate questions of law will be heard by an IC who has the knowledge and experience in law. The object of the Act is to harmonise various conflicting interests while preserving the democratic ideal and furnishing certain information to citizens who seek it.³¹ Article 19(1)(a) provides right to information³² whereas Article 21 protects right to privacy.³³ Hence, the commission vested with the authority of harmonising these conflicting interests call for an effective adjudicatory process. Therefore, “*knowledge and experience*” provided in Section 12(5) and 15(5) of the Act should be read in correct perspective.³⁴ It is respectfully submitted that the Court in its review of *Namit Sharma* has failed to understand the term “*experience in law*” in correct perspective. It is asserted that the phrase “*experience in law*” holds wide connotation and presupposes requisite qualification in law as well as experience in the field of law. It is highlighted that experience in law cannot be equated to qualification in law and vice-versa. This is endorsed by the Supreme Court in *State of Madhya Pradesh v. Dharam Bir*³⁵ where it was held that experience acquired by working in a post or practice in that field for a prolonged period does not tantamount to qualification in that field. In this case, promotion to the post of Principal of Industrial Training required a Degree or Diploma in Engineering as a pre-requisite. The respondent held the post on an ad hoc basis for 10 years and on removal challenged the same. The court negatived the contention propounding that the educational qualification has direct nexus with the post and highlighted requisite qualification as a facet of experience.³⁶ Though in the instant case, the broad fields mentioned in Sections 12(5) and 15(5) do not prescribe any specific qualification, the term experience in itself incorporates basic qualification in that field. Such a qualification becomes pivotal when the IC has to strike a balance between freedom

31 Thalappalam, *supra* note 16.

32 *Union of India v. Motion Picture Association*, 1999 (6) SCC 150; *Dinesh Trivedi v. Union Of India*, 1997 (4) SCC 306; *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*, 1995 (5) SCC 139; *Secretary, Ministry of Information & Broadcasting v. Cricket Association Of Bengal*, 1995 (2) SCC 161; *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, 1992 (3) SCC 637; *Reliance Petrochemicals Ltd. v. Proprietors Of Indian Express Newspapers*, 1988 (4) SCC 592; *Sheela Barse v. State of Maharashtra*, 1987 (4) SCC 373; *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

33 *Gobind v. State of Madhya Pradesh and Anr.* (1975) 2 SCC 148.

34 *Sharma*, *supra* note 8.

35 *State of Madhya Pradesh v. Dharam Bir*, (1998) 6 SCC 165.

36 *Ibid.*, at p 34.

granted vide Article 19(1)(a) and right protected vide Article 21.³⁷ Hence, the optimistic note of the court in reviewing *Namit Sharma* that matters concerning intricate questions of law will be heard by an IC who has the knowledge and experience becomes a myth unless IC with legal qualifications are appointed.³⁸

Failure of Non-Judicial Information Commissioners

The apex court in *Namit Sharma* has acknowledged the fact that experience over the years regarding functioning of the information commissioners indicate that they have at times gone beyond the ambit of the Act and have failed to harmonise the conflicting interests deciphered from the Preamble and other provisions of the Act. Elaborating on the reasons for this dysfunctional attitude of the information commissioners, the court observed two eventualities viz., *first*, appointment of persons who do not satisfy the criteria prescribed in Sections 12(5) and 15(5), *second*, persons appointed not having the required mind to balance the conflicting interests and restraining themselves to ambit of the Act.³⁹ It was held that the direction of the court in its earlier judgement was an apparent error because despite the dysfunctional attitude of the information commissioners, it was for the Parliament to consider whether appointment of judicial member will improve the condition.

It is true that such consideration falls in the exclusive domain of the legislature, however, good governance mandates that the judiciary can intervene in situations where a failure of representative institution is apparent.⁴⁰ The failure of representational institution is evident from *first*, the controversial amendment bill in 2013 to further the era of secrecy and *second*, the usurpation of financial autonomy of IC.

The controversial Right to Information (Amendment Bill), 2013 came in the backdrop of the order of Chief Information Commissioner in *Subhash*

37 Sharma, *supra* note 8, at p 98.

38 Union of India v. *Namit Sharma*, (2013) 10 SCC 359.

39 *Namit*, *supra* note 39, at pp 22-34.

40 Nick Robinson, *Expanding Judiciaries : India And The Rise Of The Good Governance Court*, available at <http://www.cprindia.org/sites/default/files/articles/Expanding%20Judiciaries%20India%20and%20the%20Rise%20of%20the%20Good%20Governance.pdf> (last accessed on May 5, 2016).

Chandra Aggarwal v. Indian National Congress,⁴¹ which brought in the six major political parties within the ambit of public authorities as is defined in Section 2(h) of Right to Information Act. The amendment bill was sought to effect retrospectively from June 3rd, 2013 thereby nullifying the order of CIC. The rationale put forth was availability of adequate provisions in the Representation of People Act, 1951 and the Income Tax Act, 1961.⁴² It is submitted that this rationale is contrary to the very formulation of RTI Act. The RTI Act was formulated to provide a single consolidated legislation envisioning transparency in various transactions rather than having various provisions in every legislation.⁴³ The amendment bill also put forth that labelling political parties as public authorities will hamper its internal functioning as political rivals can misuse the provisions of RTI to adversely affect the functioning of political parties. This argument however is redundant in light of Section 8(1)(d) of Right to Information, Act which provides for non-disclosure of *“information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party”*. It is regrettable to note that very limited dissent was raised on the controversial amendment, the major one being of Ms. Anu Aga, Member of Legislative Council who raised the concern of informed decision being made by the citizens as political parties are an integral element of democracy. She also raised the argument of pre-existing provisions to safeguard the interests of political parties. She opined grave concerns regarding transparency and accountability as 80% of the income of political parties was debited from “unknown” sources.⁴⁴ Though the bill

41 Subhash Chandra Aggarwal v. Indian National Congress, [2013] 121 SCL 43 (CIC).

42 The Statement of Objects and Reasons, The Right to Information (Amendment Bill), 2013, available at [http://www.prindia.org/uploads/media/RTI%20\(A\)/RTI%20\(A\)%20Bill,%202013.pdf](http://www.prindia.org/uploads/media/RTI%20(A)/RTI%20(A)%20Bill,%202013.pdf) (last accessed on May 5, 2016).

43 1st Report of the Second Administrative Reforms Commission, Right to Information – Master Key to Good Governance, at p2.2.7(June, 2006) available at <http://arc.gov.in/rtifinalreport.pdf> (last accessed on May 6, 2016).

44 66th Report of the Parliamentary Standing Committee, at p 21 (December 17, 2013) available at <http://www.prindia.org/uploads/media/RTI%20%28A%29/SC%20Report%20-RTI%20%28A%29%20Bill.pdf> (last accessed on May 05, 2016); Anuja, Political parties got 75% income from unknown donors: report, LIVE MINT, (September 14, 2013) available at http://www.livemint.com/Politics/vKaQPbE0TN7SOg3G29mCSP/Political-parties-got-75-income-from-unknown-donors-report.html?utm_source=copy (last accessed on May 5, 2016).

has lapsed, it caused huge public outcry,⁴⁵ further the current party in power doesn't seem to be holding the stand of bringing political parties within the purview of Right to Information Act, something that it campaigned at the time of elections.⁴⁶ This shows the approach of government in the matters concerning transparency and accountability vis-à-vis their vested political interests.

With reference to the financial autonomy of the institution, despite the statutory command of Section 12(4), the finance ministry had taken away the financial powers of the CIC.⁴⁷ The ICs at both the Central and State level should have financial autonomy to effectively discharge their duties provided they are institutions which aid in information dissemination which results in empowering people to question authorities in the matters of concern. ICs have cited financial reliance as the biggest constraint.⁴⁸ This becomes crucial as the absence of financial autonomy deters them from acting adverse to the interests of the authority which is sustaining them. In such circumstances, the initiative by judiciary to further the objective of the Act cannot be considered unwarranted.

This indicates that despite an endeavour to usher an era of transparency, an attempt is made by the representational institute and the government to subvert the essence of the basic fabric which the Act envisages. The report by RaaG on the RTI regime in India advocates the need for training of IC in law and case law, further, recommends their training in institutes like

45 Vidya Subrahmaniam, *First-ever amendment to historic RTI Act tabled in Lok Sabha*, THE HINDU, (August 13, 2013) available at http://www.thehindu.com/news/national/first-ever-amendment-to-historic-rti-act-tabled-in-lok-sabha/article_5015695.ece (last accessed on May 5, 2016).

46 Anuja and Liz Matthew, *BJP reverses stand on bringing parties under RTI*, LIVE MINT, (August 1 2014), available at : http://www.livemint.com/Politics/PQxOBEl2XaS1UoAFqzP0mO/BJP-reverses-stand-on-bringingparties-under-RTI.html?utm_source=copy (last accessed on May 5, 2016).

47 Nidhi Sharma, *Centre restores financial powers of chief information commissioner*, THE ECONOMIC TIMES (July 31, 2015) available at <http://economictimes.india.com/news/economy/policy/centre-restores-financial-powers-of-chief-information-commissioner/articleshow/48298949.cms> (last accessed on May 6, 2016).

48 Rajvir S. Dhaka, *RIGHT TO INFORMATION AND GOOD GOVERNANCE*, 208-209 (2010); RaaG, supra note 29, at 114.

National Judicial Academy, Bhopal.⁴⁹ A number of ICs have underscored the requirement of recruiting professional experts to assist the commission for the purposes of implementing the Act.⁵⁰ In light of the above factors, coupled with the nature of functions discharged by the ICs, there is a need for quasi-judicial appeals for appointment of person possessing legal acumen, expertise and experience.

Information Regime in an Environment of Multiplicity of Laws

Section 22 provides for primacy of the provisions of the Act via a non-obstante provision over anything inconsistent contained in the Official Secrets Act, 1923; any other law for the time being in force and any other instrument.⁵¹ The question of repugnancy would not arise if the provisions of the Act can be applied harmoniously.⁵² This proposition has been endorsed by the Chief Information Commissioner in the case of *Saurabh Yadav v. Dinesh Chand*,⁵³ where the National Board for Examination had set out a procedure for furnishing information. In light of two separate procedures co-existing for furnishing information, it was held that the citizen is at the liberty to forum at their discretion. The CIC further held that in governmental functioning certain documents, records, procedures etc. are explicitly termed as confidential. Such branding of documents, records, procedures etc. are no bar to disclosure of information in the Act which are subject to exemptions only under Section 8 and 9. However, the picture is not clear in all cases.

Despite the primacy of the Act, the multiplicity of laws governing the same subject matter i.e., vis-à-vis the disclosure of information renders in ineffective implementation of the mandate of the legislature.⁵⁴ Such duplication and ambiguity result in unnecessary litigation. The lack of openness in the functioning of the government renders in fertile growth of inefficiency and corruption.⁵⁵ This is explained through an analysis of the Act vis-à-vis The Official Secrets Act.

49 RaaG, supra note 29, at 114.

50 RaaG, supra note 29, at 114.

51 Section 22, The Right to Information Act, 2005.

52 Sharma, supra note 9, at p 79.

53 Saurabh Yadav v. Dinesh Chand, CIC/SG/A/2011/002724/16593, at p 16.

54 ARC, supra note 44, at p 2.2.11.

55 Sharma, supra note 8, at p 40.

The Official Secrets Act, 1923 vis-à-vis RTI

The Official Secrets Act, 1923 [“OSA”] was enacted in the colonial era to imbibe secrecy and confidentiality in matters of governance. In light of the colonial climate of mistrust and public official being accorded the primacy to deal with the citizens, the OSA spurred a culture of secrecy which resulted in confidentiality being the norm, and disclosure an exception.⁵⁶ Section 5 of the OSA strives to deal with potential breach of national security, however, the wide ambit of the provision has rendered it in being the catch all provision to encapsulate every issue of governance into a confidential matter.⁵⁷ It is highlighted that the OSA does not define the term “secret” or the phrase “official secrets”. Accordingly, the public servants enjoy the discretion to classify anything as a secret.⁵⁸ In the case of *Sama Alana Abdulla v. State of Gujarat*⁵⁹ the apex court categorically stated that the word “secret” in Section 3(1)(c)⁶⁰ of the OSA is qualified by official code or password and thereby does not extend to other eventualities mentioned in the section. However, sanction for other eventualities is provided by the provision when the accused is found in the conscious possession of the material and is unable to offer a plausible explanation for the same. Consequently, a presumption is drawn that such matters were collected or obtained by the accused for the purposes prejudicial to the State’s interest. The necessary implication of this is that a document, article, note, plan,

56 ARC, supra note 44, at p 2.1.2.

57 Section 5, The Official Secrets Act, 1923; ARC, supra note 44, at p 2.2.4. As per this Section, any person having information about a prohibited place, or such information which may help an enemy state, or which has been entrusted to him in confidence, or which he has obtained owing to his official position, commits an offence if (s)he communicates it to an unauthorised person, uses it in a manner prejudicial to the interests of the State, retains it when (s)he has no right to do so, or fails to take reasonable care of such information.

58 ARC, supra note 44, at p 2.2.4.

59 *Sama Alana Abdulla v. State of Gujarat*, (1996) 1 SCC 427.

60 Section 3(1)(c), The Official Secrets Act, 1923.

“Penalties for spying - (1) If any person for any purpose prejudicial to the safety or interests of the State -...

(c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or another document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States.”

model or sketch need not be a secret per se in order to come within the ambit of the OSA. The only requirement is it being classified as an “official secret”, the determination of which has been left at the discretion of the public officials.⁶¹

The 43rd Report of the Law Commission of India has acknowledged the difficulty that the all-encompassing nature of Section 5 OSA offers⁶² and has consequently recommended defining the phrase “official secret”.⁶³ A comprehensive definition of “official secret” is provided by the Working Group constituted under the Chairmanship of Shri H. D. Shourie on “*Right to Information and Transparency, 1997*” which restricts it to violations concerning national security which has been endorsed by the Second ARC Report.⁶⁴ Despite such specialist recommendations, the same have not been adopted to date. Since, the OSA has not been repealed till date,⁶⁵ an analysis of working of Act in practice along with OSA is requisite.

Classification of Information – A Deterrence to Information Regime

Prof. S.P. Sathe observed that a literal interpretation of the non-obstante clause of Section 22 renders in implied repeal of the OSA with a note of caution that implied repeal is against the principles of statutory interpretation. Since, the OSA is not repealed by the advent of the Act, the same calls for harmonious construction. Prof. Sathe stated that a harmonious reading of RTI and OSA will provide for substantially restricted information regime.⁶⁶ The practical difficulties with harmonious construction of the Act and OSA are explained herein.

In the present day scenario, the official documents are graded in light of the level of sensitivity of the information and the implications of its disclosure on the national security.⁶⁷ The classification is made at four levels viz., Top

61 ARC, supra note 44, at p 2.2.5.

62 43rd Report of the Law Commission of India, Offences against the National Security, 7.6.1 (1971), available at <http://lawcommissionofindia.nic.in/1-50/report43.pdf>. (last accessed on May 6, 2016)

63 Ibid., at 7.6.3.

64 ARC, supra note 44, at p 2.2.12.

65 ARC, supra note 44, at p 2.2.12.

66 S.P. Sathe, ADMINISTRATIVE LAW, 517 (6th edn., 1999).

67 Section 1(60), Central Secretariat Manual of Office Procedure, MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSION (13th edn., September 2010).

Secret, Secret, Confidential and Restricted with the corresponding implications as exceptionally grave damage, serious damage, and damage respectively. The fourth classification does not implicate the national security per se but the information therein contained is meant only for official use such that the same cannot be communicated or published to any person except for official purposes.⁶⁸ It is submitted that these security classifications need to be harmonized with the provisions of Act. The Act by virtue of Section 8 provides for exemptions to disclosure of information and compliments the need to keep certain information outside the public domain. The inherent flaw vis-à-vis classification in the existing legal framework is *first*, absence of guiding framework concerning classification and *secondly*, absence of prescription of time limit regarding such classification.

With regard to first proposition, the Central Secretariat Manual of Office Procedure prescribes the logistics *vis-à-vis* the flow of classified documents. This classification is done in accordance with the Departmental Security Instructions issued by the Ministry of Home Affairs, however, the criteria for classification has not been disclosed by the MHA despite RTI requests.⁶⁹ The Second ARC recommended classification of only such information as is exempted against disclosure under the provisions of the Act and provided for suggestive classification vis-à-vis concerned exempted provisions viz., Section 8 and 9 of the Act. This recommendation was not accepted by the government citing inability to classify information accounting for exempted provisions as a reference point.⁷⁰

With reference to second proposition, the current trend is unlike the trend in other countries where the classified information is put forth into the public domain post the expiry of a specific period, for instance, usually 30 years for war secrets.⁷¹ This calls for declassification of exempted information in the public domain which does not merit exemption post expiry of a specific period. The same has been provided in the Public Records Act, 1993 and the Public Records Rules, 1997 but the current

68 IE, Explained: It's a secret, INDIAN EXPRESS (April 21, 2015) available at <http://indianexpress.com/article/explained/explained-its-a-secret/> (last accessed on May 5, 2016).

69 Ibid.

70 Ibid.

71 ARC, *supra* note 44, at p 4.1.4.

framework for declassification is inadequate and ineffective meriting overhaul of the Public Records Act. The Union Government has recently put forth an inclination towards reviewing the Public Records Act.⁷²

These flaws in classification have spurred in the tendency of unwarranted classification of information⁷³ and according higher classification than requisite.⁷⁴ These factors play a pivotal role in the growth of the culture of secrecy. I.P. Massey argues that excessive classification is an impediment to information sharing. People generally exercise right to information for settling personal scores and not for enforcing governmental transparency and accountability.⁷⁵ Such classification creates deterrence especially amongst the PIOs in disclosing the information who often lack adequate training regarding the primacy of the Act.⁷⁶ Hence, classifications should be driven by suitable illustrative lists for the guidance of the officers empowered to classify the documents and the same shall ordinarily be made only in respect of the exempted provisions of the Act.⁷⁷

Need for an Information Disseminating Approach

Right to information in India is a direct consequence of people's movement for reaching socio-economic justice to deprived sections of the society whose entitlements under rural development schemes were being deprived due to lack of information on developmental projects.⁷⁸ In order to affect the objective of the Act, a liberal approach should be adopted and emphasis should be on *suo moto* disclosure.

An Inclination towards a Liberal Approach

It is argued that the historical context in which the Act was enacted has resulted in right to information only with respect to public authorities. The

72 PTI, National Archive slowly goes digital: Govt. spends Rs. 25 lakh to digitise 11 lakh documents, FIRSTPOST (March 02, 2015) available at <http://www.firstpost.com/india/national-archive-slowly-goes-digital-govt-spends-rs-25-lakh-to-digitise-11-lakh-documents-2131191.html> (last accessed on May5, 2016); IE, *supra*, note 65.

73 ARC, *supra* note 44, at p 4.1.1.

74 Ibid.

75 Massey, *supra* note 2, at p 581.

76 RaaG, *supra* note 29, at p 93.

77 ARC, *supra* note 44, at p 4.1.2.

78 Massey, *supra* note 2, at 575.

drive for RTI was made in late 90s when the awareness *vis-à-vis* the effect of liberalisation was low. This resulted in creation of information dissemination as a mandate only for public authorities and not private authorities. This approach is enduring a transition and private authorities which have large impact on the public are sought to be incorporated within the ambit of public authorities. This argument is supplemented by the fact that a liberal approach has been adopted in the construction of public authorities. This is evident from the case of *Kishan Lal v. Rohit Prasad*⁷⁹ where the CIC held that inherent nature of public-private partnerships envisage certain monetary and non-monetary contributions as well as certain degree of governmental control in their function to further the objectives of the PPP. Consequently, PPPs in certain cases were held to be public authorities within the ambit of Section 2(h) of the Act. It was acknowledged that the word “*financed*” is qualified by “*substantial*”, but was observed that the same depends on the peculiar circumstances of the case and substantial financing has to be interpreted as “*material*” or “*important*” or “*of considerable value*”. A generic observation was made holding receipt of over one crore of grant resulting in the PPP being a public authority. Similarly, in *Thalappalam Service Cooperative Bank Ltd. v. State of Kerala*⁸⁰ it was held that even private organizations (NGOs) which are substantially funded by the government come within the ambit of Section 2(h)(ii) of RTI Act. It was also held that all the bodies having deep and pervasive control of the government are public authorities.

In *Ashok Kumar Dixit v. Delhi Technological University*⁸¹ it was held that records cannot be destroyed during the pendency on an RTI application irrespective of the fact that the document has outlived the time-frame prescribed under the weeding out policy. Such destruction would invite penalty under Section 20 of the Act. This approach clearly indicates lowering of stringent standards and avoiding hyper-technicalities of law to provide better transparency and promote good governance.

79 *Kishan Lal v. Rohit Prasad*, CIC/SG/C/2011/001273/17356.

80 *Thalappalam*, *supra*, note 16.

81 *Ashok Kumar Dixit v. Delhi Technological University* *Ashok Kumar Dixit v. Delhi Technological University* CIC/SA/C/2013/000013.

This liberal attitude in promoting right to information is in stark contrast to the lenient attitude adopted by the ICs towards the PIOs.⁸² The cases where penalty for non-compliance with mandates of the Act are exceptional.⁸³ Admittedly, even judiciary is at the receiving end of the flaws at certain events. For instance in *The Public Information Officer v. The Central Information Commission* the Madras High Court asked for reasons in order to seek information under RTI⁸⁴ which goes against the very spirit of the legislation. However, it is argued that an interpretation which furthers the organic nature of the legislation must be given. In *S.P. Gupta v. Union of India*⁸⁵ the organic nature of law was highlighted. It was held that statutory interpretation be fashioned to suit the changing concepts and ideas.

Suo moto disclosure – a Goal to be looked forward

The scheme of RTI is that it should provide for an information regime in which information is disseminated to the people even without being asked for.⁸⁶ A total of 67% of the information being asked for was such that it should either have already been made public pro-actively.⁸⁷ Proviso Section 8(1)(i) of the Act is a crucial provision which underlines the theme of *suo moto* disclosure. It is regrettable that this crucial provision has been shrouded and goes unnoticed. It provides for the *suo moto* obligation of government to provide information premised on which policy decisions is taken post taking such decision. An apt example for the same is disclosure of the grounds for postponing the achievement of targets of fiscal consolidation as mandated by the Fiscal Responsibility and Budget Management Act, 2003. Rule 3(2) of the Fiscal Responsibility and Budget Management Rules, 2004 mandates that the Central Government is obligated to reduce the fiscal deficit of the country to 3% of GDP by the end of financial year 2007 i.e., 31st March 2008. The fiscal deficit is

82 Price Water House Coopers, Understanding the “Key Issues and Constraints” in implementing the RTI Act, available at http://rti.gov.in/rticorner/studybypwc/key_issues.pdf (last accessed on May 5, 2016); RaaG, supra, note 29, at 111.

83 Vinod Bharti v. Pawan Kumar Bhatia, CIC/SG/A/2009/002597/5818/Adjunct-I.

84 *The Public Information Officer v. The Central Information Commission*, (2014) 7 MLJ 1.

85 *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

86 Sathe, supra note 67, at 516.

87 RaaG, supra note 29, at 44.

however liable to exceed the specified target in the event of the contingencies envisaged in Section 4(2)(b) of the FRBM Act. Section 4(2)(b) provides three contingencies and in the event of satisfaction of any one or more of it only can the target be postponed to a later date. The contingencies provided are as follows, first, national security, secondly, national calamity and lastly, any other exceptional grounds that the Central Government may specify. It is submitted that the target to reduce the fiscal deficit to 3% of GDP has been post-poned from 31st March 2008 to 31st March 2009 to 31st March 2015 and subsequently to 31st March 2018 vide Section 152, The Finance Act, 2015. This policy decision has been taken four times without mentioning the grounds post such decision being taken. Prof. S.P. Sathe had appreciated the underlining theme behind the provision by seeking to distinguish between decisions which have been made public and decisions which are yet to be made public while disseminating information.⁸⁸

Conclusion

The Right to Information Act in our country is a glaring distinction from similar legislations over the globe provided the adjudicatory forum constituted thereunder is neither branded as a Court nor a tribunal. The court in *Namit Sharma v. Union of India* adopted an activist approach and read into the qualifications the requirement of legal acumen, expertise and experience. The researcher subscribes to the approach of the apex court in *Namit Sharma*. The review judgement does not address the arguments put forth in favour judicial presence and skims over it stating that the IC does not adjudicate a dispute between two or more parties concerning their legal rights *other than their right to get information in possession of a public authority* and thereby terming the functions discharged by IC as administrative *simpliciter*. It is respectfully submitted that this reasoning is neither sound nor appealing because the ICs have to continuously adjudicate amongst the tussle of protecting privacy and disclosing information. Further, the structure of the commission, the nature of powers vested and diversity of functions attributed indicate that the ICs are exercising judicial/ quasi-judicial functions. The defence of tribunals exclusively manned by the non-

88 Sathe, *supra* note 66, at 514.

judicial members cannot be taken because IC is not a highly specialized fact finding tribunal. Hence, the nature of adjudication provided in the Act rather than being inclined towards administrative adjudication is specifically oriented towards a judicial determinative process and it should be branded as a tribunal manned by judicial members. It is requisite that experience in law cannot be equated to qualification in law and vice-versa. The failure of non-judicial ICs as well as the government in making the needful changes justifies the court coming to the rescue of information regime. This move by judiciary had come in an environment where controversial amendments are sought to be made and the financial autonomy of the ICs usurped thereby subverting the objective of the Act.

The colonial heritage acts as a rider to right to information. Even after 65 years of independence, the bureaucrats feel that they are acting on behalf of the President or Governor and not the public. Hence, they have a tendency to remain anonymous, prolonging the era of secrecy for the convenience of the government in power. Thus, the harmonious construction of OSA with the Act remains a myth and the contrary is rarely found. It is to be noted that the OSA was enacted in a climate of foreign rule and the provisions furthering secrecy are fashioned in a way to suit such rule which goes against the tenants of participative democracy. An information disseminating regime demands that a liberal approach for interpreting the provisions of the Act be employed and primacy be given to suo moto disclosure.

The researcher submits the following suggestions. First, the OSA be expressly repealed and provisions for penalty for disclosing information that prejudices national security should be put forth by a separate law. This law shall depart from the colonial legacy of secrecy and be devoid of OSA's draconian character. Secondly, classification of documents be made only within the exempted categories provided in the Act and the same shall be guided by comprehensive and transparent rules inclusive of provisions for declassification. Third, the ICs be constituted of persons acquiring judicial acumen, expertise and experience. Fourth, sanctions under the Act must extend to public authorities and not merely to PIOs appointed by them as some public authorities like political parties have not appointed PIO and

hence, an implicit ignorance of the orders of ICs will set a bad precedent.⁸⁹ The last suggestion becomes pivotal in light of *Subhash Chandra Aggarwal v. Indian National Congress* which has brought political parties within the ambit of public authorities. It is essential for participative democracy that the narrow pedantry which surrounds the privilege to withhold information must now be replaced by the right to know mobilisation. It is worthwhile to conclude in the words of Malcolm Gladwell that "*the key to good decision making is not knowledge. It is understanding. We are swimming in the former. We are lacking in the latter.*"

* * * * *

89 PTI, *No need to amend RTI Act: Chief Information Commissioner Vijai Sharma*, ECONOMIC TIMES (June 15, 2015) available at http://economictimes.indiatimes.com/article/show/47677018.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last accessed on May 6, 2016).

RIGHT TO INFORMATION AND GOOD GOVERNANCE : THE INDIAN AND KENYAN PICTURE

Nyatundo George Oruongo*

Abstract

“When the Righteous are in authority, the people rejoice; but when a wicked man rules, the people groan”¹

The legal development of the Right of Access to public Information has been remarkable. Many international conventions, laws and national regulations have been passed on this matter. In this regard, access to information has been consolidated within the framework of international human rights law that is part of the right to freedom of speech; as the individual right of any person to search for information and as a positive obligation of the state to ensure the individual's right to receive the requested information. This development is in recognition that everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity. Disclosure is not merely an action; it is a way of life which carries both sense and sensibility: you are what you know, and no state has the right to make you less than you are. Many modern states forget that they were founded on the principles of the Enlightenment, that knowledge is a guarantor of liberty, and that no state has the right to dispense justice as if it were merely a favour of power. Justice, in fact, rightly upheld, is a check on power, and we can only look after the people by making sure that politics never controls information absolutely. Openness or sunlight in governance aims to combat and disinfect corruption, deceit, abuse and malpractice in public and private organisational affairs of state by seeking to equalise power between governments and the governed by providing citizens with the information that they need to hold their rulers and the bosses that be, to account which supports the idea of good governance. In this paper, I examine some of the most important issues bearing on freedom of information and its centrality to the idea of good governance in India and Kenya.

Introduction

The right to information (RTI) has long been recognised as a ‘Fundamental Right’ of a free citizenry. It is from this right that other basic human rights can be achieved successfully. No society can claim to be truly free unless it has both the instruments and the practice of providing its people with access to information. No government that claims to be democratic can

*Research Scholar, P.G. Dept. of Studies in Law, Karnatak University Dharwad, Karnataka State, India.

1 Holy Bible, Proverbs 29:2.

deny its people the ability to participate in governance or itself refuse to be transparent to its people. Whether called the ‘freedom of information’ as it is in most countries or the ‘right to information’ as more recent access laws are referred to, it is the duty of governments to guarantee this right by implementing access to information laws.² Although, the exercise of the freedom of information has now matured in several societies, it is relatively nascent in most developing countries. These countries moreover are in many cases those which are only now emerging from the incubus of a colonial hierarchy.

Unfortunately, despite long years of independence many countries have continued to hold information away from people and even penalise the slightest breach through such insidious laws like ‘Official Secrets Acts’ of colonial vintage. These laws were predicated on the view that the public was the enemy and a subject and had no right to seek information or explanation from the overlord government. This thinking has no place or legitimacy into day’s democratic egalitarian world and since the 1990s over 40 countries have joined in the trend towards greater openness and replaced secrecy, with transparency as the fundamental norm defining governance.³

The fundamental importance of access to information as an empowerment tool has been recognised from its pivotal role in democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency, the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation based on the principle of maximum disclosure, establishing a presumption that all information is an accessible subject only to a narrow system of exceptions.⁴

2 Maja Daruwala and VenkateshNayak, eds, Commonwealth Human Rights Initiative ‘Our Rights Our Information Empowering people to demand rights through knowledge’ available at http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf (last accessed on April 25, 2016).

3 Ibid. It is worth mentioning that India’s Right to Information Act, 2005 and The Right to Information as provided in the Kenya’s Constitution (2010) Under Article 35 give their respective citizens the right to access information held by the state and other institutions of governance.

4 Toby Mendel, 2004 Joint Declaration by the Three Special Mandates for Protecting Freedom of Expression, Accessable at <http://merlin.obs.coe.int/iris/2005/2/article1>. (last accessed on April 25, 2016).

Right to Information (RTI), is an initiative that represents the latest attempt by governments and their leaders, the world over to place their countries onto a path of sustainable development which encompasses good governance and prosperity with a consolidation of peace, security, and stability by agreeing among other things, to subject their policies, decisions and programmes to public scrutiny and assessment to see that they comply with, at least, the general and minimum codes, and standards pertaining to governance and sustainable development. It is thus used to assess the performance and processes of governance for their compliance with a number of agreed codes, standards, and commitments that underpin the good governance and sustainable development framework.⁵

The Right to Information

The right to information is a unique human right. Not only has its status as a fundamental right been recognised throughout international and regional human rights law, for example in Article 19 of the Universal Declaration of Human Rights⁶ and the International Covenant on Civil and Political Rights,⁷ but also countless stories from around the globe testify to the

5 Ron Hope, 'Towards Good Governance and Sustainable Development: The African Peer Review Mechanism', available at http://www.researchgate.net/profile/Ron_Hope/publication/227658214_Toward_Good_Governance_and_Sustainable_Development_The_African_Peer_Review_Mechanism/links/02e7e51e9876d2e79b000000.pdf (last accessed on April 25, 2016).

6 The right to information is enshrined under Article 19 of the Universal Declaration of Human Rights. United Nations General Assembly (1948) Universal Declaration of Human Rights, Resolution n 271 A (III) 10 December recognizes that everyone is "endowed with reason and conscience", a principle developed further in human rights law to include, among other things, the protection of opinion, expression, belief, and thought, available at <http://www.un.org/Overview/rights.html> (last accessed on April 25, 2016).

7 As protected under Article 19 of the International Covenant on Civil and Political Rights. United Nations (1966) International Covenant on Civil and Political Rights which provides that "everyone shall have the right to hold opinions without interference." This is important since opinion and expression are closely related to one another, as restrictions on the right to receive information and ideas may interfere with the ability to hold opinions, and interference with the holding of opinions necessarily restricts the expression of them. However, human rights law has drawn a conceptual distinction between the two. During the negotiations on the drafting of the Covenant, "the freedom to form an opinion and to develop this by way of reasoning was held to be absolute and, in contrast to freedom of expression, not allowed to be restricted by law or other power" available at <http://www.ohchr.org/english/law/ccpr.htm> (last accessed on April 25, 2016).

power of the right to information as a tool in the hands of everyday people. Information is power that provides people with the knowledge to demand political, economic and social rights from their governments from the right to food to the right to be free from torture.⁸ It has been seen as the key to strengthening participatory democracy and ushering in people centred governance by empowering the poor and the weaker sections of society to demand and get information about public policies and actions, thereby leading to their welfare.⁹

This is important because, even though we live in the age of information, where knowledge can be accessed and shared at the click of a button, and spans the globe in an instant, a lack of information continues to frustrate people's ability to make choices, participate in governance and hold governments accountable for their actions. This unfortunate fact is especially true for the poor and marginalised who need information the most. In particular, the lack of easily accessible information continues to prevent people from being aware of their human rights and demand that governments turn them into practical realities. Without good governance, which entails among other things, transparency, accountability, predictability and participation no amount of developmental schemes can bring improvements in the quality of life of the citizens.¹⁰

Every country's government needs information to function. Governments need information on a wide variety of issues - from statistics on health and employment, social security entitlements of individuals, occurrences of crimes, to tenders and contracts that they are awarding, to the levels of production and consumption and the extent of savings and investment in the economy and changes in the prices of basic commodities. The list goes on and on. This information is a public good that we own collectively. It does not just belong to the government - it belongs to everybody. In democracies, the government exists only to represent and act on behalf of the people. The information it gathers is done for the public's benefit, with the public's funds, for public purposes. The collection, use, storage and retrieval of information are all carried out for the sake of the wider public

8 Supra note 2.

9 First Report Second Administrative Reforms Commission Right to Information – Master Key to Good Governance, June 2006 available at <http://arc.gov.in/rtifinalreport.pdf> (last accessed on April 25, 2016).

10 Supra note 2.

good. People have a right to have access to that information; to seek it and also to receive it.

The right to information is referred to in various ways across the world - some talk of “freedom of information” others talk of “access to information”, or “the right to know”, but all these terms have the same meaning, that is, people have a human right to seek and receive government-held information. This right places an obligation on governments to store and organise information in a way that makes it easily accessible to the public, to provide information proactively and to respond positively to requests for information. They should withhold information only when it is in the best public interest, to do so meaning that limitations must be narrowly drawn, established by law and applied strictly and only in warranted exceptional circumstances.¹¹

In order to work effectively, the right to information should ideally be realised through the enactment of a domestic law. Sweden was the first country to legally guarantee its people their right to access information when it enacted a law in 1766 recognising the right of the press to seek, obtain and publish information held by the government.¹² Since then, over 70 countries from all regions of the world have either enacted right to information laws or put in place systems to provide people with access to government held information. Putting in place systems that provide the public with access to information is one of the most positive steps a government can take to achieve a variety of economic, social and political goals such as equitable economic development, poverty alleviation and the reduction of corruption.

It may seem incredible that one mechanism can result in so many different and far reaching benefits. However, the many benefits of the right to information stem from the fact that a guaranteed legal assurance of access to information (except for a narrowband of information which it may be in the best interests of the public not to disclose) is at the centre of democratic reform as it transfers some of the government’s knowledge and

11 Y. Ghai, *Our rights our information- Empowering people to demand rights through knowledge*, available at http://webcache.googleusercontent.com/search?q=cache:zyK1Y1hvc9MJ:www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf+&cd=1&hl=en&ct=clnk&gl=in (last accessed on April 25, 2016).

12 Ibid.

power back to the people, enabling them to participate in their own governance in unprecedented ways. An effective access regime can fundamentally change the way that a government interacts with its citizens.

States may ratify international human rights instruments or create constitutions that promise their people an array of rights and remedies easily; however, the practical realisation of human rights requires effective policies, laws and practical mechanisms that ensure access to information. Only access to timely and accurate information can empower the citizens of a country with the knowledge they need to scrutinise the policies that affect their human rights and the leverage to challenge the status quo. Armed within formation, civil society is empowered to demand that legal obligations are translated into practical realities for themselves and their communities.

Over the past few years, human rights discourse of the importance of right to information has gained increasing prominence in the democratic discussion. As more and more countries have embraced democratic norms and adopted commitments to more open, responsive government, so too has there been an increase in the passage of laws,¹³ which have entrenched a legal right to access information from governments, and even from private bodies in certain specified circumstances.¹⁴ At the heart of the Right to Information are two key concepts:¹⁵

- a) The right of the public to request access to information and the corresponding duty on the government to meet the request, unless specific, defined exemptions apply; and
- b) The duty of the government to proactively provide certain key information, even in the absence of a request.

In practice, these require that governments develop legislation, setting out the specific content of the rights, like who are the people who can access information, from where, how, when and at what cost and the duties on relevant bodies to provide information, including when they can legitimately

13 Chairmaine Rodrigues, *The Right to Information: The Key to deepening democracy and development*, available at http://webcache.googleusercontent.com/search?q=cache:NP78QqemifsJ:www.humanrightsinitiative.org/programs/ai/rti/articles/rti_key_deepening_democracy_development.pdf+&cd=2&hl=en&ct=clnk&gl=in (last accessed on April 25, 2016).

14 Ibid.

15 Ibid.

refuse to provide information. Experience has shown that legislation is only the first step in operationalising the right. Effective implementation requires a genuine commitment to opening up scrutiny from all levels of government, adequate resourcing, improved record systems and infrastructure and education for the public and bureaucracy on their rights and obligations under such law. In many right to information regimes throughout the world, Ombudsmen have often played a key role in ensuring effective implementation of access laws.¹⁶

Why is the Right to Information Important?

Access to public information is a requisite for the very functioning of democracy, greater transparency, and good governance and that, in a representative and participatory democratic system, the citizenry exercises its constitutional rights, inter alia, the rights to political participation, to vote, education, and association, by means of broad freedom of expression and free access to information.¹⁷

With assured information, marginalised groups will be given their rightful voice and a powerful tool to scrutinise and engage with the development activities being directed at them. They can access information about their development rights, as well as the projects and programmes from which they are supposed to be benefiting. In fact, experience shows that personal information is the most common type accessed under right to information laws. People use the law to ensure they receive proper entitlements and find out what the government is doing for them or for their locality. Noting the democratic importance of Access to Information, Kofi Annan, former, UN Secretary General Said:

The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task is to make that change real for those in need wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed.¹⁸

16 Ibid.

17 Ibid.

18 Chairmaine Rodrigues, Commonwealth human Rights Initiative *The Right to Information in the Ugandan Context*, available at http://webcache.googleusercontent.com/search?q=cache:SPqqCK2We5kJ:www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uganda/rti_paper_uganda.pdf+&cd=6&hl=en&ct=clnk&gl=in, (last accessed on April 25, 2016).

Good Governance

Governance is the buzzword in development and human rights discourse. It has various definitions in the economic, social, environmental and political disciplines.¹⁹ As per the Webster dictionary, “Governance means conducting the policy and affairs of a state, organisation or people in accordance with certain rules, standards or principles in the process of production, distribution and consumption of various goods and services.”²⁰ The World Bank identifies transparency, legal framework, accountability and information as the key components of governance.²¹ In this sense, governance can be defined as the traditions and institutions by which authority in a country is exercised including the process by which the government is selected, monitored and replaced, the capacity of the government to effectively formulate and implement sound policies and the respect of citizens and state for the institutions that govern economic and social interactions among them.²² While these components undoubtedly had benefits for the public at large in developing countries, they were relevant more especially to the interests of transnational companies seeking to do business in these developing countries, where the prevailing rules of the game were unfavourable to them.

The concept of good governance has been clarified by the work of the Commission on Human Rights which identifies the key attributes of governance as: transparency, responsibility, accountability, participation and

19 Vishwanath M., *Is Good Governance Answer for Better Environment Management? A Critical Analysis*, THE BENGALURU LAW JOURNAL, Vol.3, 2010.

20 Webster's 3rd International Dictionary (Massachusetts, USA: G & C, Merriam Company, 1968), pp.982-983. Ibid.

21 Binu S. Thomas, Governance: Background and Perspective, available at <http://infochangeindia.org/governance/background/governance-background-a-perspective.html> (last accessed on April 25, 2016).

22 Available at <http://info.worldbank.org/governance/wgi/index.aspx#home> (last accessed on April 25, 2016). The meaning of this has evolved over time. In a recent report on governance from the Bank, six dimensions of governance were cited: voice and external accountability, political stability and lack of violence, crime and terrorism, government effectiveness, lack of regulatory burden, and rule of law and corruption; Howard Stein, *The World Bank and the making of the governance agenda*, Page 7, available at http://www.institutionsafrica.org/trackingdevelopment_archived/resources/docs/PaperASSR-Amsterdam-October-09--Stein-Final2.pdf (last accessed on April 25, 2016).

responsiveness to the needs of the people.²³ It directly and expressly links good governance to an enabling environment conducive to the enjoyment of human rights and promoting growth and sustainable human development comprising of the mechanisms, processes and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.²⁴

Specific reference is made to democratic governance as “a process of creating and sustaining an environment for inclusive and responsive political processes and settlements.”²⁵ In spirit, good governance requires that, decisions are made and implemented using a clear and legitimate process, to achieve consistent and effective policies. It can be applied at International, National, Local and Organisational levels and to manage many types of resources. Although terminology may differ, the principles of good governance as recognised worldwide are similar.²⁶

Good governance is an essential complement to sound economic policies. Efficient and accountable management by the public sector and a predictable and transparent policy framework are critical to the efficiency of markets and governments, and hence to economic development and promotion of equitable and sustainable development. Governments play a key role in the provision of public goods. They establish the rules that make markets work efficiently and, more problematically, they correct for market failure. In order to play this role, they need revenues, and agents to collect revenues and produce the public goods. This in turn requires systems of accountability, adequate and reliable information, and efficiency in resource management and the delivery of public services. Yet there is no certainty that institutional frameworks conducive to growth and poverty alleviation will evolve on their own. The emergence of such frameworks needs incentives, and adequate institutional capacity to create and sustain them.

The following has been given as the parameters of good governance:²⁷ Legitimacy of the political system. This implies limited and democratic

25 UN System Task Team on the Post-2015 UN Development Agenda, available at www.un.org/millenniumgoals/pdf/Think%20Pieces/7_governance.pdf (last accessed on April 25, 2016).

26 Supra note 19.

27 N. Parida, Civil Servant's Accountability for Good Governance- Odisha, available at odisha.gov.in/e-magazine/orissareview/2013/dec/engpdf/43-51.pdf (last accessed on April 25, 2016).

government; Freedom of association and participation by various social, economic, religious, cultural and professional groups in the process of governance; An established legal framework based on the rule of law and independence of judiciary to protect human rights, secure social justice and guard against exploitation and abuse of power; Bureaucratic accountability including transparency in administration; Freedom of information and expression required for formulation of public policies, decision making, monitoring and evaluation of government performance; A sound administrative system leading to efficiency and effectiveness and Co-operation between government and civil society organisations.

Practically, governance is undoubtedly strengthened by the existence of a right to information as meaningful, substantive democracy is founded on the notion of an informed public that is able to participate thoughtfully in its own governance. In this context, governments committed to participatory and representative democracy have embraced the right to information as a practical mechanism for facilitating the meaningful engagement of their constituents in the activities of government.

At a more basic level, without information, representative democracy is undermined because the public have insufficient information on which to base the exercise of their vote. Voters may fall back on tribal, clan, religious or class affiliations or otherwise as the basis for their choice, instead of choosing their parliamentary representatives on the basis of the strength and legitimacy of their policies or their past experience and demonstrated capacity.²⁸

Apart from elections, access to information is vital to ensuring that the public can engage with their representatives and the bureaucracy on an ongoing basis, and can therefore more effectively participate in the development and implementation of policies and activities purportedly designed for their benefit. Too often, members of the public have difficulty finding out what the bureaucracy is doing and whether it is doing it effectively. In fact, Ombudsmen are often on the frontline intermediating such problems between the public and the bureaucracy. Access to information laws can also be used to systematically address this problem.

28 Commonwealth Human Rights Initiative, *The Right to Information: Strengthening Democracy and Development*, available at <http://www.humanrightsinitiative.org/programs/ai/rti/articles/RTI%20Paper%20-%202005%20Ombuds%20Conf.pdf>. (last accessed on April 25, 2016).

Most commonly, in addition to allowing access to information upon request, most access laws also specifically require proactive disclosure of information regarding public consultations, regular open meetings of committees and councils and any other opportunities for the public to participate in policy-making. Good access laws can also provide a useful oversight and participation mechanism for non-Cabinet parliamentarians and government watchdogs like Ombudsman, who themselves are also sometimes left out of key policy and budget processes.²⁹

Democracy and national stability are also enhanced by policies of openness which engender greater public trust in elected representatives. This is crucial because, without the support and trust of the people, government will be more likely to face resistance to proposed policies and programmes and implementation will be more difficult. Conflict also becomes more likely, particularly if government secrecy exacerbates perceptions of favouritism and exclusion. Systems that encourage communication and give people the ability to personally scrutinise government decision-making processes reduce citizens' feelings of powerlessness, and weaken perceptions of exclusion from opportunity or unfair advantage of one group over another. It effectively reduces the distance between government and people and combats feelings of alienation.³⁰

Kenya's Take-Away from the Indian Experience with the RTI Act

Right to information has been seen as the key to strengthening participatory democracy and ushering in people centred governance. Access to information can empower the poor and the weaker sections of society to demand and get information about public policies and actions, thereby leading to their welfare. Without good governance, no amount of developmental schemes can bring improvements in the quality of life of the citizens. Good governance has four elements - transparency, accountability, predictability and participation. Transparency refers to availability of information to the general public and clarity about functioning of governmental institutions.

Right to information opens up government's records to public scrutiny, thereby arming citizens with a vital tool to inform them about what the government does and how effectively, thus making the government more

29 Ibid.

30 Ibid.

accountable. Transparency in government organisations makes them function more objectively thereby enhancing predictability. Information about functioning of government also enables citizens to participate in the governance process effectively. In a fundamental sense, right to information is a basic necessity of good governance.³¹

In recognition of the need for transparency in public affairs, the Indian Parliament enacted the Right to Information Act in 2005. It is a path breaking legislation empowering people and promoting transparency. While right to information is implicitly guaranteed by the Constitution, the Act sets out the practical regime for citizens to secure access to information on all matters of governance. This enactment of the Right to Information Act, 2005, is indeed one of outstanding legislative accomplishment in the democratic evolution of the Indian Republic.³²

Though, the transition is not going to be either smooth or simple since the entrenched mindset of denial of information on the part of the bureaucracy coupled with justifiable apprehension of the consequences of such disclosure might tend to distort procedures and delay full implementation of the provisions of the Act.³³ The capacity of the common man to access the information is today very limited because of socio-economic and historical reasons, which in a way explains why this slow and sluggish pace in the quality of governance even after a decade in the operation of the Act.

Nevertheless, the mandate of the law and the commitment on the part of a section of the intelligentsia to make common cause with the people who for long have been at the receiving end of mal-administration and corruption might increasingly create a climate for transparency and influence a change in the desired direction.³⁴ In the words of the Prime Minister:

Efficient and effective institutions are the key to rapid economic and social development, institutions which can translate promises into policies and actionable programmes with the least possible cost and

31 First Report, Second Administrative Reforms Commission, Right to Information: Master Key to Good Governance, available at <http://arc.gov.in/rtifinalreport.pdf> (last accessed on April 25, 2016).

32 Ibid.

33 Ibid.

34 Ibid.

with the maximum possible efficiency; institutions which can deliver on the promises made and convert....., outlays into outcomes. For institutions to be effective they must function in a transparent, responsible and accountable manner.....The Right to Information Bill, will bring into force another right which will empower the citizen in this regard and ensure that our institutions and the functionaries discharge their duties in the desired manner. It will bring into effect a critical right for enforcing other rights and fill a vital gap in a citizen's framework of rights.³⁵

This law is very comprehensive and covers almost all matters of governance and has the widest possible reach, being applicable to government at all levels - Union, State and Local as well as recipients of government grants. Access to information under this Act is extensive with minimum exemptions. Even these exemptions are subject to strict safeguards which more often than not are either abused or by-passed as may be expected in a new legislation of this kind, permanently impacting all agencies of government, there are bound to be implementation issues and problem areas, which need to be addressed and reviewed as we gain experience.

Whereas the pendulum has swung towards a free and democratic world, governance issues in Kenya on the other hand, are concerned with concepts of democratic deterioration and the rule of law, impunity, including rights based claims to equality before the law, judicial independence, participation in the conduct of public affairs, electoral integrity, political plurality, freedom of expression and media independence.³⁶ These claims include demands for gender equality and the inclusion of youth and marginalised groups. Integral to effective implementation is an informed and empowered citizenry engaged in transparent and accountable governance processes. Free and pluralistic media are considered essential to such ends as is the

35 *PM's intervention in the Lok Sabha on the Right to Information Bill debate*, May, 11 2005, available at <http://archivepmo.nic.in/drmanmohansingh/pmsinparliament.php?nodeid=9> (last accessed on April 25, 2016).

36 General Assembly Resolution 59/201 entitled, "Enhancing the role of regional, sub-regional and other organizations and arrangements in promoting and consolidating democracy", available at <http://www.worldlii.org/int/other/UNGARsn/2004/201.pdf> (last accessed on April 25, 2016).

right to freely access information held by public bodies.³⁷

To some, democracy implies certain institutional arrangements, which raises political sensitivities, a “universal value” base on the freely expressed will of the people to determine their own political, economic, social and cultural systems and full participation in all aspects of their lives.³⁸ The blending of transparent, accountable and capable institutions of governance with concepts of democracy and rule of law is common in governance debates as they are closely connected and mutually reinforcing and therefore, progress in these areas are essential for the realisation of social and people centred sustainable development and hence are indispensable foundations of a more peaceful, prosperous and just world,³⁹ which is still scant and elusive generally for many African countries and Kenya in particular.

Government secrecy is often portrayed as antithetical to transparency as well as an affront to the general right to know, citizen participation, administrative oversight and democracy itself. Furthermore, government secrecy is connected to “much broader questions regarding the structure and performance of democratic systems” and in instances, is “more dangerous than the practices they conceal.”⁴⁰ A condition that has been described as a secrecy state which has extended the secrecy far beyond its legitimate bounds, in doing so the target is far less to prevent disclosure of information to enemy governments, than to prevent the disclosure of information to parliament, press and the people, for the governments have discovered that secrecy is a source of power and an efficient way of covering up the embarrassments, blunders, follies and crimes of the ruling regime.⁴¹

Secrecy in this setting precludes the public from providing any oversight

37 UNESCO General Conference Resolution 55 adopted at its 33rd session, available at <http://unesdoc.unesco.org/images/0014/001428/142825E.pdf> (last accessed on April 25, 2016).

38 Supra note 25.

39 General Assembly Resolutions 66/102 and 66/159, available at <http://www.ipu.org/splz-e/unbrief12/ga2012.pdf> (last accessed on April 25, 2016)

40 Susan Maret, Jan Goldman, *Government Secrecy*, available at https://books.google.co.in/books?id=DcZqim45MGEC&pg=PA347&dq=the+right+to+information+in+africa+pdf&hl=en&sa=X&ei=v_qPVbzFL4biuQTx-oL4Dw&ved=0CBwQ6AEwAA#v=onepage&q=the%20right%20to%20information%20in%20africa%20pdf&f=false (last accessed on April 25, 2016).

41 Ibid.

through informed pressure on their elected officials. It also ensures that researchers in general and scholars examining repression in particular will not have access to data on these activities until long after research would be most useful. Perhaps the most profound consequence of government secrecy is its encroachment on public trust of information, which in turn potentially undermines confidence in government. Secrecy, accompanied by selective and varying degrees of governmental transparency and openness, may contribute to the rise of conspiracy theory which in turn undermines rule of law.⁴²

History suggests that the government of Kenya has not always been keen to release information that is in its custody,⁴³ and classifies information “per their culture.”⁴⁴ Threats to internal security are often cited to justify withholding information.⁴⁵ The lack of criteria to guide the information that could be released or withheld has aggravated the situation as officials are unsure of how they should deal with this aspect leading to “proprietaryship” of information by the state with the general attitude being that information should not be shared by civil servants as they fear that it would be used against them. The safe position is not to give information. There is no obligation to release as the risk of giving information is greater than not giving information. So Government officials decide to err on the side of caution. Therefore, they end up not giving information.⁴⁶

Interestingly, this unofficial ban applies not only to information sharing between the Government and the public. On the contrary it is also applicable between Government agencies. In other words, various Government departments hardly communicate.⁴⁷ Clearly, this is

42 Ibid.

43 African Network of Constitutional Lawyers, Towards Promoting Access to Information in Kenya, April 2011 available at <http://www.right2info.org/resources/publications/publications/towards-promoting-access-to-information-in-kenya-2011> See also, David Makali, *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers: Nairobi, 2003); International Commission of Jurists, *Freedom of Information Survey: An Audit of Laws Hindering Access to Information in Kenya* (International Commission of Jurists: Nairobi, 2006).

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

unfortunate, and raises several questions. In particular how is the Government, which was designed originally to function as a single unit, expected to work? Indeed, it is curious how any institution would be able to conduct its affairs effectively or efficiently under such circumstances. Apparently, the success or failure of any organization depends on the extent to which the various departments speak with each other. Eventually the current state of affairs is likely to affect not only operations of the Kenyan Government, but service delivery to the general public as well, a crucial responsibility of any serious State.⁴⁸

While descriptions of government secrecy abound in scholarly and popular literature, no universally accepted definition of government secrecy exist, although the concept of secrecy is generally understood as the intentional concealment of information by individuals and groups. It is related to larger concept of information control whereby secrets, private information and the like are shared with few but not to others. It is mandatory or voluntary, but calculated, concealment of information, activities, or relationships. From the community's perspective, the secrets may involve activities, plans or relationships that are legal, illegal or ethically neutral.⁴⁹

Manifestation of this type of plans, relationships whether legal, illegal or otherwise tend to involve and thrive on secrecy as a *modus operandi* which in turn runs against the basic premise of governance, that is, "exercise of authority, control, management, and power of government in which power is exercised in the management of a country's economic and social resources for development."⁵⁰ Therefore, the country's concern with sound development management must thus, extend beyond building the capacity of public sector management to encouraging the formation of the rules and institutions which provide a predictable and transparent framework for the conduct of public and private business and to promoting accountability for economic and financial performance. The main focus here should be on the overall management of resources for development with as pecial emphasis on accountability, the legal framework for development, and information and transparency.⁵¹

49 Supra note 40.

50 Governance and Development, World Bank, 1992, available at http://www.gsid.nagoya-u.ac.jp/sotsubo/Governance_and_Development_1992.pdf (last accessed on April 25, 2016).

51 Ibid.

This is necessary since effectiveness of both adjustment and investment operations is impeded by factors which contribute to poor development management which include weak institutions, lack of an adequate legal framework, weak financial accounting and auditing systems, damaging discretionary interventions, uncertain and variable policy frameworks, and closed decision making, which increase risks of corruption and waste.⁵² This is damaging in a country like Kenya where corruption has adversely affected development, pervasive patronage in government has led to public investment choices being used to finance whiteelephants, usually by contracting excessive foreign debt. Monopolies are being sanctioned and allocated to friends of those in power, at great economic cost to the nation.⁵³

Even in societies that are highly market-oriented, only governments can provide two sorts of public goods:⁵⁴ rules to make markets work efficiently and corrective interventions where there are market failures. With respect to rules, without the institutions and supportive framework of the state to create and enforce the rules, to establish law and order, and to ensure property rights, production and investment will be deterred and development hindered because high “transaction costs” (that is, the cost of arranging, monitoring, and enforcing contracts) will inhibit such activities. Compensation for market failure is more problematic.

The government of Kenya must now start to recognize the need for more restraint and for taking “market-friendly” steps to deal with market failure issues. In addition, the state must play a key role in providing services such as education, health, and essential infrastructure, particularly when such services are directed at the poor and are not forthcoming from the private sector. A well-educated labour force and adequate infrastructure are fundamental to the quality of private investment.⁵⁵

To finance such expenditures, however, the state needs revenues. The state also needs “agents” who will collect taxes from the public and produce and deliver essential services such as education and health, and a legal framework. This, in turn, requires systems of accountability both within the government and from the government to those it serves. For the system to

52 Ibid.

53 Ibid.

54 Ibid.

55 Ibid.

work, an adequate and reliable flow of information is essential. Without it, the rules are not known, accountability is low, and uncertainties are excessive. Thus, accountability, publicly known rules, information, and transparency are all elements of sound development management. Moreover, the institutional framework needed to provide these public goods must be managed efficiently.⁵⁶

Conclusion

Although Kenya's Constitution provides an unqualified right of access to all and any information in the hands of the state and to any information that is in private hands, there are several hurdles to be surmounted for the promises that are contained in the books to be translated into real practice. All stake holders must take a proactive role in the passage and implementation of the operational law. Laws that protect whistle blowers will go a long way towards reinforcing this right. Lessons from elsewhere must also be embraced if national legislation is to bear fruit particularly in its application.

Equally important is that the Kenyan parliament must not only make their intentions clear about the executive being under the new law, but also should expressly include the legislature and the judiciary under the new law when it passes muster, though carefully without compromising the independence and the dignity of the courts like under the Indian law. There is also need to bring uniformity in the information recording systems, introduce standard forms and a better system of classification of cases. The law may be used as an instrument to build capacity to evolve efficient systems of information dissemination with holistic culture of disclosure, as a process in *continuum* that is not necessarily unidirectional, but that which will improve over time like a plant that needs constant tending.

Accountability is found where rulers readily delegate authority, where subordinates confidently exercise their discretion, where the abuse of power is given its proper name, and is properly punished under a rule of law which stands above political faction. It is a process based on an understanding of the importance of and a commitment to further promote resilient, legitimate and inclusive national and local institutions, as well as inclusive participation in public processes. It must address institutional and

⁵⁶ Ibid.

governance bottlenecks to ensure transformative and sustainable development. It must encourage the identification and support of options and initiatives that enhance the collaborative capacities of the empowered societies to find peaceful, effective and long term solutions to global, national and local development challenges.

* * * * *

CASE COMMENTS

IMPLEMENTING THE RTI ACT : INFORMATION COMMISSION'S JUDGMENTS ON RTI

Dr. Sairam Bhat*

Abstract

RTI Act is a short and brief piece of legislation, with lucid Sections and few explanations, to enable laymen to apply the Act efficiently. As a result, the provisions have given rise to a certain level of ambiguity over their exact scope and ambit, thus requiring a more detailed and nuanced interpretation by the Information Commissions and the judiciary. The author aims to trace this interpretation through decided cases to infer guidelines for an overall effective implementation of the provisions of the Act. The concepts under the RTI Act, whose judicial interpretation has been discussed by the author by analyzing relevant case laws are as follows- scope of definition of "citizen", difference between "proper" and "improper" information, meaning of certified copies, receipt of fees and the time at which application can be rejected, self-disclosure of information by public authorities, response time for application, third party information, meaning of information concerning life and liberty and understanding of the concept of public interest under the Act, partial disclosure of information and destruction of information. The author concludes the article by analysing the major grouse of the complainants and RTI activists with respect to the Act.

Introduction

The Constitutional principles are the cornerstone of our democracy and legal system. Constitutional principles must be relied on whenever statutory law has vacuum or interpretative issues. Hence, it is the Constitution that provides answers when Statute shows lack of clarity. RTI Act is a short and brief piece of legislation. The same is deliberate attempt to keep it short and simple, so that common man can apply and use the provisions of the law. This, however, also means that the RTI Act has lot of words and sentences which do not carry explanations and continue to pose interpretation issues. Ordinarily when a statutory law is framed, it need not and does not rely on the freefall of Constitutional interpretation. But when the statutory law is not clear, does not communicate the right intention of the legislature, the Judiciary is forced to invoke the principles of the Indian Constitution to arrive at a conclusion. Whether or not this is a right approach is debatable. Whether this is making RTI a complex set of right is another issue. The current chapter will help in sorting out some of the

* Associate Professor of Law, National Law School of India University, Bengaluru.

issues raised to be practical implementation of the Act. Hence, through decided cases one can draw some conclusions and guidelines for the implementation and enforcement of the Act.

Who can apply for information (Section 3)

Section 3 of the Right to Information Act gives the right to all Indian citizens to access information from the public authorities. A citizen under the Act means only natural and not juristic persons like firms, companies or other corporate bodies. In addition, a citizen need not give reasons for asking particular information from any public authority and the public information officer (PIO), or the public authority cannot question the applicant under the RTI Act as to why he/she needs the particular information. Even if more than one person seeks the same kind of information it should be made available to all the requesters. The citizen has also been given the right to ask for information, which has been already, disclosed as per the self-disclosure requirements of the Act (Section 4). It has to be provided to a citizen who applies for such information from a public authority.

Definition of ‘Citizen’: Only persons in individual capacity can apply for information under RTI Act

In the case of *Inder Grover v. Ministry of Railways*,¹ the applicant had applied for some information to the PIO of the Railways Ministry in the capacity as the Managing Director of a company. The CIC interpreted Section 3² of the RTI Act to hold that persons applying for information under the Act should apply as natural and individual persons (citizens). Corporate bodies and juristic persons cannot apply for information under the Act. It was accordingly ruled that if a person applies for information to a public authority as a representative of a corporate body, then he/she is not entitled to information under the Act.

In the case of *D.C. Dhareva & Co. v. Institute of Chartered Accountants of India*³ (a corporate body/company), had applied for information from a public authority and sought certain documents relating to a another firm which

1 CIC/OK/A/2006/00121/27/06/2006.

2 Section 3 - Subject to the provisions of this Act, all citizens shall have the right to information.

3 Decision No.560/IC/2007, dated 22/2/2007.

had submitted this information to the public authority as per the legal requirements of furnishing such information. It was held by the Commission in this case that since the appellant organization is a corporate body and not an individual it is not eligible to seek information under Section 3 of the RTI Act.

In *Manoj Chaudhry v. DDA*⁴ it was held that a PIO can decline information under Section 3, if the applicant applies as a Managing Director of a company and not as a citizen of India. The appellant argued that since Wildrift Adventures is a company registered in India it qualifies as a citizen. The Act specifically confers the right of information on all "citizens" and not on all "persons". A plain reading of the provisions of the Act read with the provisions of Part II of the Constitution and the Citizenship Act, 1955 makes it clear that the right of information cannot be claimed by a company or by an association or by a body of individuals .

In *M M Lal v. Customs Department*⁵ the CIC made the distinction between a legal person and a citizen. Further in *J.C. Talukdar C.E. (E), CPWD, Kolkata*,⁶ it was held that, while a Corporate body in India is a legal person, it may not be qualified to be called as a citizen to exercise rights under the Constitution. Section 2(f) of the Citizenship Act defines a person as under: "Person" does not include a company, an association or a Body of individuals whether incorporated or not." A "Citizen" under the Constitution Part II (which deals with citizenship) can only be a natural born person and it does not even by implication include a legal or a juristic person.

Memo random No. 1/69/2007-IR dated 27 February, 2008 of the Ministry of Personnel, Public Grievances & Pensions reads as under:

The Act gives the right to information only to the citizens of India. It does not make provision for giving information to Corporations, Associations, Companies etc. which are legal entities/persons, but not citizens. However, if an application is made by an employee or office-bearer of any Corporation, Association, Company, NGO etc.

4 CIC/WB/A/2006/00194.

5 CIC/AT/A/2008/01489.

6 Complaint Nos.CIC/WB/C/2007/00104 & 105.

indicating his name and such employee/office bearer is a citizen of India, information may be supplied to him/her. In such cases, it would be presumed that a citizen has sought information at the address of the Corporation etc.

Unresolved Questions

1. What cannot be done directly, can it be sought to be done indirectly?

While the above conclusion arrived by the CIC cannot be disputed, this has raised serious challenges of the RTI Act with that of the Constitution. Right to Information is part of Art. 19(1)(a) of the Indian Constitution. As early as in 1963, Supreme Court in *State Trading Corporation of India v. Commercial Tax Officer*⁷ held that company or corporation is not a citizen of India and cannot therefore claim such of the fundamental rights as have been conferred upon citizens. In *Tata Engineering and Locomotive Co. v. State of Bihar*,⁸ in a petition by the Company, some shareholders also joined. They argued that though the company was not a citizen but its shareholders were citizens and if it was shown that all its shareholders were citizens the veil of corporate personality might be lifted to protect their fundamental rights. The Court rejected this argument and held that 'if this plea is upheld, it would really mean that what corporation and companies cannot achieve directly can be achieved by them indirectly'. This is an argument also made under the RTI Act. If Companies or Corporations cannot seek information because there are not citizens as per the Citizenship Act, they are indirectly seek the same information from employees in their individual capacity, thereby defeating the very essence of excluding Corporations from seek the same information. One may argue that the Act then is being misused for purposes which framer of this legislation did not envisage.

2. Change of opinion in the Supreme Court

The Law Commission in its 101 report submitted in the year 1984 did suggest that this dichotomy must be resolved. The Commission stated that freedoms under Art 19 cannot be restricted only to citizens as natural persons. Institutions and organization too must be allowed to exercise their

7 AIR 1963 SC 184.

8 AIR 1965 SC 40. Also see *Barium Chemicals Ltd v. Company Law Board*, AIR 1957 SC 295.

freedom of speech and expression thereby protecting their rights under the Constitution. Organization can be in the nature of a Company, owing newspapers, producing films and magazines or involved in several publication work. While we protect the freedom of the press under Art. 19 (1)(a), these organization must also be entitled to exercise their freedoms.

In *Bank Nationalization case*,⁹ the court reversed its earlier position. The result was that if the action of the State impairs the right of the Company thereby affecting the rights of individual shareholders the protection of Art. 19 will be available for him. The reason is that the shareholder's rights are equally and necessarily effected if the rights of the company are effected.¹⁰ This case was followed by the *Bennett Coleman and Co. v. Union of India*,¹¹ wherein the question was whether the shareholders, the editor and the printer have freedom under Article 19. Relying on the Bank Nationalization case, the Court held that the rights of shareholders were manifested by the newspaper owned and controlled by the shareholders through the medium of the corporation. Individual rights of speech and expression of editors, directors and shareholders are all exercised through their newspaper through which they speak. The press reaches the public through the newspaper. The shareholders speak through their editor. Thus companies and Corporations can file writ petition complaining denial of fundamental rights freedom guaranteed under Art. 19. In *D. C and G. M. v. Union of India*,¹² Desai, J. held, that this is the modern trend [that the rights of shareholders are coextensive with that of the Corporation, hence denial of to one of their fundamental freedom would be denial to the other] and suggested that the controversy on the point should be put to an end by passing appropriate legislation.¹³ While J. Desai's suggestion has not been incorporated, the RTI Act has opened new floodgates.

Issue 1: Can a shareholder seek information under RTI on behalf of the Corporation? Issue 2: If in a Corporation, the majority shareholder are foreign nationals, can the minority Indian shareholder seek information under RTI on behalf of the Corporation?

9 AIR 1970 SC 564.

10 Dr. J N Pandey; Constitutional Law of India (45th Edition, Central Law Agency, Allahabad) at p. 49.

11 AIR 1973 SC 106.

12 AIR 1983 SC 937.

13 Supra note 10 at p. 50.

Few unanswered questions remain:

1. Can a Company/Corporation can file a writ petition under Article 226 in the High Court stating that denial of information under RTI has thereby violated the rights of its shareholders under Article 19?
2. If the Government is disclosing some information that is third party, belonging to a Corporation or a Company, Can the Corporation seek a injunction or stay order, prohibiting the Public Information officer from disclosing the same information?

For example, suppose Rajeev, a citizen of India, is seeking some information from the Company Law Board, Government of India, about Reliance Energy Ltd, a public ltd. Company. The PIO, Company Law Board, is expected to write to Reliance Energy Ltd as a third party and seek objections to the disclosure of information. Reliance Energy writes to the PIO and objects to the disclosure of information, citing, breach of Intellectual Property rights. Nevertheless the PIO, Company Law Board, overrules the objections raised by Reliance Energy and is ready to part with the Information. Fearing loss of IPR and danger of the business, what remedies does Reliance Energy have against the PIO deliberately disclosing the information?

- a. Reliance should file a appeal with the First Appellate Authority, Company Law Board; or
- b. Reliance should be allowed to file a writ petition in the High Court after exhausting all the local remedies under RTI Act [That is after the CIC also overrules the objections of Reliance Energy]

Issue: What violation of rights does Reliance Energy claim at the Appellate stage? Can it rely on violation of Art. 19, freedom of speech and expression, thereby violation of the right to information?

Information: Proper or Improper

Section 2(f) - "Information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers,

samples, models, data material held in any electronic form, and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

Section 2(g) - "Prescribed" means prescribed by rules made under this Act by the appropriate government or the competent authority, as the case may be.

Under the RTI Act, the citizen has been given the Right to Information, which means the right to obtain information from all public authorities. The right to information has been defined quite elaborately; it includes the right to: -

- Inspect works, documents and records.
 - Take notes, extracts or certified copies of documents/records/samples.
- Obtain information in printed or electronic form, e.g., printouts, diskettes, floppies, tapes, etc.

In the case of *Jarnail Singh v. Registrar, Cooperative Societies Delhi*,¹⁴ the applicant had sought some information from the Registrar, Cooperative Societies (RCS) regarding the alleged irregularities in the allotment of a house to him by a cooperative group housing society. However, the information pertaining to these issues was available with the management of the cooperative society, which could not be treated as a public authority in terms of the definition of public authority under the RTI Act. The Commission held that a cooperative society is not a public authority, but because the information sought by the applicant/appellant is available to the Registrar under the Delhi Cooperative Societies Act, such information can be provided to the applicant, under Sections 2(f) and 2(g) of the RTI Act. It was also ordered by the Commission that the applicant will be provided the required information from the office records of the cooperative society under the supervision of a competent officer of the RCS.

In the case of *S.K. Ranga v. Container Corporation of India Ltd*,¹⁵ the applicant had asked for inspection of all Dak registers of the Corporation from 1/1/2003 onwards, pertaining to various departments, i.e., HRD, Vigilance, MD's office, as well as the General Dak Register. The CIC noted that the

14 Complaint No.CIC/WB/C/2006/00302, decided on 9/4/2007.

15 Appeal No.CIC/OK/A/2006/00260, dated 2/1/2007.

information asked by the appellant from the public authority was vague. The Commission held that the applicant under the RTI Act should clearly specify the information sought in terms of Section 2(f) of the RTI Act. The appellant was directed to specify the information he seeks to inspect from the records. Similarly in *Shri Sanjay Singh v. P.W.D*¹⁶ the right to inspect the work on increase in the width of road through video-graphy was permitted.

If information are delayed, then such information shall be given free of cost [Sec. 7(6)]. The question arises as to 'what' type of information is important and the gravity of its importance. In the case of *Sarabjit Roy v. Delhi Development Authority*,¹⁷ the applicant had sought certain information in a particular form, from the PIO of a public authority. The CIC held that if the information is not available in the particular form requested, it does not have to be created in the form sought by the applicant, and information under Section 2(f) includes information in any form available with a public authority and accessible. In the present case, the Commission held that the applicant may be allowed, if he desires, to inspect the original records at the office. Information specifically asked may be provided in the form of printouts and certified photocopies of original documents and records.

Disproportionately divert the resource. How do you apply Section 7(9) of the RTI Act?

In the case of *Prem Prakash Kumar v. National Fertilizers Limited*¹⁸ the applicant asked for information in which he made 89 queries. The Commission decision had been to advise the applicant to prioritize and specify the documents that he still needs. The CIC held that the applicant had sought huge information which could have been denied u/s 7(9) of the Act. He had moreover sought the opinion of the CPIO on issues of personal interest that partly relate to his service matters. Even this could be denied. Yet, the applicant was expecting a compensation of Rs. 10 lakhs without any justifiable reason.

Similarly in the case of *Chetan Kothari, Mumbai v. President's Sect, Vice President's Secretariat, Prime Minister's Office*,¹⁹ the applicant sought the

16 Appeal No. CIC/WB/A/2006/00144.

17 10/01/2005-CIC, dated 25/2/2006.

18 CIC/MA/A/2006/00374 & 375 dt. 28.8.2006.

19 Appeal No. WBA-8-658, WBA-8-1453 & 1454, WBA/09/667 decided on 24-4-2008 & 16-6-2009.

information regarding travel and medical expenses of the present and previous President of India, Vice President of India and the Prime Minister of India.²⁰ CPIO stated that the information asked for would have to be compiled and would disproportionately divert the resources of public authority and will be detrimental to the normal functioning of the office. Citing this reason, application was rejected under section 7 (9) of the RTI Act, 2005. The CIC stated that Sub-section (9) of section 7 does not authorize a CPIO to refuse information under the RTI Act but only allows him to provide the information sought in a form other than that sought. The best way of doing this is to interact with the appellant and provide him the information in alternative form. The decision of the CPIO in both applications to the President's Secretariat is, therefore, invalid. At the same time it is not open to the applicant under the RTI Act to bundle a series of requests into one application unless these requests are treated separately and paid for accordingly. In our experience in disposing of applications is that in fact many such have been treated as one application even though they contain a multiplicity of requests. However, CIC has conceded that a request may be comprised of a question with several clarificatory or supporting questions stemming from the information sought. Such an application will indeed be treated as a single request and charged for accordingly. Therefore, an application u/s 6 (1) to qualify for the necessary fee cannot contain a multiplicity by requests.

Can Advocate represent the parties at the CIC?

In the case of *Dr. Ganga Agnihotri, Professor in Electrical Engineering v. Maulana Azad National Institute of Technology, Bhopal*²¹ the applicant insisted on being represented by a lawyer. The CIC observed that the advocate's pleading the matter was avoidable because the scheme of the Right to Information Act does not require complex interpretation of law. So it would have preferred if the Appellant presented the case herself. However, the Commission allowed the advocate to present the case as an exception.

20 In Chetan Kothari case there are at least two requests per application – one being for medical expenses and another for travel expenses. CIC held that 'although, it may be conceded that supporting questions flow from this single request and therefore may be treated as part of one application, the CPIOs in the office of Vice President of India and Prime Minister of India were justified in advising applicant, Kothari to apply to the concerned Ministries to obtain the information sought.

21 Appeal No. CIC/MA/A/2005/00004 – Order dated 02-05-2006.

What are Certified Copies?

In the case of *Mallu Ram Jakhar v. Joint Commissioner of Police (Crime Branch), Police Headquarters, Delhi*²² the applicant sought information as certified copies. The CIC held that it is quite clear that there is no right under the RTI Act to obtain certified true copies of any document held by a public authority. There are different laws that govern entitlements for certified copies of documents and records. The Jt. Commissioner Crime and the Addl. Commissioner have no objection to giving it to the appellant, photocopies of the information requested by him.

How much fee to receive and when to reject application ?

In *Dr. Reeta Jayasankar v. Deputy Secretary (P) & PIO, Indian Council of Agricultural Research, Krishi Bhawan, Delhi*,²³ the applicant paid a fee of Rs 50, whereas it is Rs 10. The PIO rejected the application on the ground that exact fee was not paid. CIC held that, the PIO was not right in concluding that the appellant's application for information could be returned at the admission stage itself for her failure to enclose the exact fee amount instead of remitting a larger sum which she apparently did. The PIO interpreted the rules rather narrowly and literally, whereas what was needed was to inform the interpretation with a clearer understanding of the purpose and the intent of the Act, which is to facilitate easy transmission of information to those who seek it. This context, Section 5(3) is the key to the understanding of the approach to be adopted by the Information Officers. This Section states that the CPIO “..... shall deal with requests from persons seeking information and render reasonable assistance to the persons seeking such information.” Thus, the PIO is required to assist the information seeker to obtain the information sought by him and to help him comply with the procedures. A highly restrictive interpretation of the modalities of fee remittance surely goes counter to the spirit of Section 5(3) of the Act.

Information not traceable

In *R. Sharma v. Director (E) & CPIO, Ministry of Defence*²⁴ the applicant sought information about “equivalent status of Defence Accounts Staff/Civilian Govt. employees and Army Officers (from General/Head of

22 Appeal No. CIC/AT/A/2006/00029 – Order dated 07-04-2006.

23 FNo.CIC/AT/C/2006/00052 –decided on 04/09,/2006.

24 FNo. CIC/AT/A/2006/00073, decided on 04/07/2006.

Army Staff to N.C.O.)". Despite of diligent search in all relevant sections of the public authorities concerned, it was not possible to locate any Govt. instructions determining the equivalence between the civilian officers and the officers of the Armed Forces. The public authority was not in a position to confirm or deny that such information existed. After satisfying itself that there was no intention from the public authority to withhold or deny the information without reasonable cause, the CIC held that the information 'not being traceable cannot be provided'.

In *Santosh Mathew v. DOPT*²⁵ the applicant sought State wise number of IAS officers against whom disciplinary proceedings are pending annually from 1997-98 to 2004-05. Information from 1999-00 to 2004-05 was provided as it is available. The issue was Whether the CPIO should collect the information, which is not available in his office, from other public bodies and furnish to the applicant. In an earlier case the Commission had observed that:²⁶

Transparency in functioning of public authorities is expected to be ensured through the exercise of right to know, so that a citizen can scrutinize the fairness and objectivity of every public action. This objective cannot be achieved unless the information that is created and generated by public bodies is disclosed in the form in which it exists with them. Therefore, information is to be provided in the form in which it is sought, u/s 7(9) of the Act. And, if it does not exist in the form in which it is asked for and provided to the applicant, there is no way that proper scrutiny of public action could be made to determine any deviations from the established practices or accepted policies.

Thus, a CPIO is expected to provide the information available with him. He is not required to collect and compile the information on the demand of a requester nor is he expected to create a fresh one merely because someone has asked for it. Because, such attempts would not allow for scrutiny of public action to detect and determine the nature and extent of deviation from the accepted policies.

25 Decision No. 236/IC(A)/2006 - F. No. CIC/MA/2006/00636, decided on 11/09/2006.

26 Decision No. 216/IC(A)2006.

Opinion and Information

In *Kuldip Kumar v. Police Headquarters, New Delhi*²⁷ the appellant asked the PIO to furnish the following information relating to: 1. the dates on which the Investigating officer actually investigated the case; 2. Dates on which actions, such as, searches etc., connected with the investigation, were taken; 3. A gist of the depositions of those examined by the police without disclosing names or details which could compromise witness/source confidentiality and safety. The CIC reject the applicant's appeal and held that the case diary of a Police officer is not 'information' or 'record' which can be disclosed under the RTI Act. A Case diary is an investigate tools and has opinions which are excluded under RTI

Self-disclosure by public authorities (Section 4 of RTI Act, 2005)

The RTI Act not only requires governments to provide information upon request, it also imposes a duty on public authorities to actively disclose, disseminate and publish information, as widely as possible. The RTI 2005 also requires all public authorities covered under the law to publish *suo motu* or proactively a wide range of information on their own, even if no one has specifically requested it.

Section 4 of the Right to Information Act, 2005, requires all the public authorities to routinely publish 17 categories of information. This provision clearly specifies that all public authorities must make constant efforts to provide as much information *suo motu* to the public, at regular intervals, through various means including the Internet, so that the public have minimum need to use this Act to obtain information. In addition, self-disclosure by the public authorities should be disseminated with considerations about the local language, cost-effectiveness and the most effective means of communication, so that it reaches large sections of citizens. This ensures that citizens always have access to authentic, useful and relevant information. This is a key provision because it recognizes that some information is so useful and important to the community at large, that it should be given out regularly, without anyone specifically requesting it. Self-disclosure enables promotion of transparency and accountability in governance, and also reduces the demand for information by the citizens from public authorities, as most of the important information is available in

27 FNO.CIC/AT/A/2006/00071.

the public domain. Further Section 4(1)(d) states that every public authority shall provide reasons for its administrative or quasi-judicial decisions to affected persons.

In Appeal No. 24/IC (A)/2006, dated 16 April 2006, before the Central Information Commission, it was held by the Commission that: "Every public authority is required to make pro-active disclosures of all the information required to be given as per the provisions of Section 4(1)(b), unless the same is exempt under the provisions of Section 8(1). In fact, an information system should be created so that citizens would have easy access to information without making any formal request for it". This judgment re-emphasized the mandatory nature of disclosure of information on 17 points by every public authority according to the RTI Act.

Response Time in Office over RTI

Section 7(6) - Notwithstanding anything contained in sub-section (5), the person making a request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified in section 7(1). Section 7(1):- Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request under Section 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sections 8 and 9.

On the issue of Record Management to be improved by all public authorities,²⁸ in the case of *Paramveer Singh v. Punjab University*,²⁹ the applicant had applied for information regarding the merit list for selection of candidates to a particular post in the university. However, no proper information was supplied to him due to the negligence of the university's PIO in identifying and collecting the proper information. As a result, the applicant was given misleading information. The Commission held that every public authority, particularly after the implementation of the Right to Information Act, must take all measures in pursuance of Section 4(1)(a),³⁰

28 Sec. 4(1)(a) of the RTI Act.

29 CIC/OK/A/2006/00016 decided on 15/6/06.

to implement efficient record management systems in their offices so that the requests for information can be dealt with promptly and accurately. In the above case, the Commission further held, that the university should streamline its university record management system in such a manner that information can be provided to the citizens without any delay.

In *Smt. Dasharathi v. Food & Civil Supplies Dept., Govt. of NCT, Delhi*³¹ an application was filed regarding Kerosene oil. The applicant was informed that the PIO was not present and her application could only be accepted after he returns. After waiting for 2 to 3 hours, she was told that the officer would not return that day. She, therefore, complained to the Information Commission that her time was wasted together with Rs. 100/- in travel costs. Under Sec. 19(8)(b) the Public Authority will pay Rs. 100/- as damages suffered to the applicant Smt. Dasharathi. This may be either directly or through recovery from the erring officials, as deemed appropriate by the PIO. One practical problem faced by PIO is what happens when a PIO goes on leave? Will the 30 day period still continue to operate and will it hold him responsible. The CIC has held that the PIO must ensure the proper and efficient functioning of this department, so that even during his absence his subordinate officers shall be mandated under RTI to continue supplying information. Thus, despite the absence of the PIO, RTI stands to process information within the stipulated time of 30 days.

Requests for obtaining information (Section 6 of RTI 2005, Act)

A citizen shall submit the application for obtaining the information to a PIO or assistant PIO of the public authority. The application should be submitted to the PIO of the public authority under whose jurisdiction the subject matter of the application falls. When an application is submitted to a public authority for information, which is held by another public authority, then the public authority to which the application has been made is under duty to transfer the application to the public authority, which has the information. If a citizen asks for certain information, which is with three or four public authorities, then the PIO of the first public authority

30 Section 4(1)(a) - Every public authority shall maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act, and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated.

31 CIC/WB/C/2006/00145.

shall provide the information of the part, which lies in his subject jurisdiction, then transfer the other parts to the PIOs of the relevant public authorities. While transferring the application's parts, he should be careful in identifying the public authorities on the basis of the application's subject matter.

If the application is to be transferred to another public authority, the public authority to which the application is made shall transfer the application to the other public authority within five days of the receipt of the application. As soon as the PIO of a public authority transfers the application to another public authority, then he should immediately inform the applicant about such a transfer. The application procedure for seeking the information is very simple and citizen-friendly (Section 6 of the RTI Act). The application can be written in English or Hindi or the state's official language. Oral requests shall be reduced in writing with the assistance of the PIO, if the applicant is not literate. The applicant must clearly specify the information, which he is seeking. Last but not the least the application should be accompanied by the necessary application fees as prescribed under the respective state rules. In a large number of states, it can be paid in the form of cash/demand draft/postal order/treasury challan /non-judicial stamp, etc.

The application can be made on a plain paper, and there is no prescribed form or format for writing it. The applicant is not required to give any reasons for requesting the information; he is only required to give his contact details/addresses, so that the information sought can be sent to him by the PIO.

The procedure for obtaining the information has been made very simple in the Act in order to enable the poor and marginalised sections of society to make the most use of it.³² In the case of *Madhu Bhaduri v. Director, DDA*,³³ the applicant wanted some information from the Delhi Development Authority (a public authority). She was, however, asked by the authority to apply for the information asked in a particular proforma, prescribed by the authority. She was also asked to provide the reasons for applying for the information from the public authority. The Commission, interpreting Section 6(1) of the RTI Act, held that any direction to prescribe a particular

32 For more see. PRIA, New Delhi. October 2007; <http://cic.gov.in>.

33 Complaint No. CIC/C/1/2006, decided on 16/1/06.

format for seeking information cannot be mandatory and override the requirement of a simple application, as laid down in this section. The Commission ordered the public authority to provide her with the information asked. It was also held that asking the reasons for filing the applications is a clear violation of the principle embodied in Section 6(2)³⁴ of the Act.

It was, however, observed by the Commission, that retention of a clause in the rules of the public authority for asking reasons may be permitted if such a clause is necessary to ensure privacy under Section 8(j), as also the interest of a third party under Section 11(1)³⁵ of the Act.

34 Section 6(1) - A person, who desires to obtain any information under this Act, shall make a request in writing or through electronic means in English or Hindi, or in the official language of the area in which the application is being made, accompanying such fee as may be prescribed, to-

(a) the Central Public Information Officer or State Public Information Officer, as the case may be, of the concerned public authority;

(b) the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, specifying the particulars of the information sought by him or her:

Provided that where such a request cannot be made in writing, the Central Public Information Officer or State Public Information Officer, as the case may be, shall render all reasonable assistance to the person making the request orally to reduce the same in writing. Section 6(2) - An applicant making a request for information shall not be required to give any reason for requesting the information or any other personal details except those that may be necessary for contacting him.

35 Section 11(1) - Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to, or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall within five days from the receipt of the request, give a written notice to such a third party of the request, and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about the disclosure of information: Provided that except in the case of trade or commercial secrets protected by law, a disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

In *Veerasha Brashtachara Nirmoolana Vedike v. Canara Bank*,³⁶ applicant sought information in soft copy (on a CD) about Income Tax and service Tax and expenditure incurred by the Bank in renovation of their head office building in Bengaluru. While the CPIO gave the details in paper, the applicant insist on softcopy. CIC held that there was NO obligation on a public authority to generate information in the format sought by the citizen. CIC held that "CPIO is not required to collect and compile the information, nor is he expected to create fresh one merely because someone has asked for it".

Response time for Application

The RTI Act clearly sets the time limit for the disposal of requests by the PIOs so that the citizens do not have to run around the public authorities for information endlessly. It is important for the applicants to know the time limits for different categories of information, the method by which the time limit is calculated by a PIO, and the requirement of payment of additional fees, so that the applicant can easily get the information he/she requires.

Under Section 7 of the Act, information must be provided to the citizens within 30 days of receipt of the application by the PIOs. But if the information relates to life and liberty of a person, then the PIOs must provide the information within 48 hours. Citizens also have the option of submitting the application for information to an assistant PIO, who shall transfer the application within five days of its receipt to the PIOs. If the PIO decides to provide the information then he shall send intimation to the applicant clearly specifying the details of further fees (photo-copy, cost of sample/printed material/inspection fees, etc), which is to be paid for obtaining the information. He should also inform the applicant about the date and time, when the information can be collected by the applicant after the payment of fees. It is important for the citizens to know how the time limit for disposal of the request for information is calculated by the PIOs. The counting of 30 days starts from the date when the PIO receives the application; counting stops when the PIO intimates the applicant about the payment of further fees (photocopy, etc.), and counting resumes when the citizen has paid the required fees for obtaining the information.

36 14/ICA/2006.

Thus, the time limit between intimation of the information for the payment of further fees by the PIO, and the payment of such fees by the applicant shall not be included in the prescribed time limit of 30 days. If the PIO does not provide the information asked within the time limits above, the information asked would be treated as being refused. If the PIO does not provide the information within the time limits fixed under this section, the information will be supplied to the applicant free of charge (NO further fees). It is important to know that no application fees or further fees are to be charged from the RTI applicants who belong to the BPL category of citizens.

The PIO has the right to deny some information to the applicant, which are covered in the Section 8(1) of the Right to Information Act. If the information is refused to an RTI applicant, the PIO is duty bound to inform the applicant about such a refusal, and the reasons for not providing such information. At the same time, the PIO must inform the applicant about the time limit within which the applicant can file an appeal against THE refusal by a PIO to the appellate authority (AA) of the public authority; he must also provide the name and address of the AA to the applicant. Section 7 of the RTI Act, thus clearly specifies the provisions in respect of processing or disposal of a request to provide information and the time limits for providing the information by the public authorities.³⁷

Third Party Information

The Right to Information Act also covers individuals/firms/organizations which directly do not fall within the scope of the Act but they have submitted some of their information related to contracts, business deals or financial details to government agencies (public authorities). Such information can be accessed under the Right to Information Act by the citizens. These individuals/firms/organizations are covered under the definition of third-party under the RTI Act. The definition of a third-party under Section 11 of the RTI Act covers anyone other than the public authority dealing with the application and the requester (applicant) for information as shown below:

First-party: The person submitting an application or appeal. Second-party: The public authority responsible for processing the application. Third-party: Any other person or body including another public authority. The records

³⁷ Supra note 32.

supplied by a third party but held by a public authority are included within the definition of “information” under the RTI Act, and can be the subject matter of request for information. Section 11 of the RTI Act requires that if the information asked by a citizen relates to a record that has been supplied by a third party, and is not treated as confidential by that party, the PIO of a public authority is at liberty to provide such information to an applicant. If the information is treated as ‘confidential’ by a third party, then the following steps will have to be taken by the PIOs: The PIO has to give a written notice to the third party within five days of the receipt of an application for information seeking his opinion, whether the information should be disclosed to the applicant or not. The third party has to make a submission to the PIO within 10 days, whether to disclose the information or not. Within 40 days of the receipt of the application, the PIO has to make a decision. Should the information related to the third party be provided to the applicant or not, and then convey his decision to the third party. The third party can appeal against the decision of the PIO to disclose information relating to him/her to an RTI applicant to appellate authorities. A PIO should use his discretion in dealing with the application seeking information related to a third party. While using his discretion, he should keep in mind trade and commercial secrets protected by law, protection of the violation of privacy of individuals and public interest outweighing the harm to the interests of the third party. Under Section 11 (third party) of the Act, all the private industries, banks or any other firms, which has some kind of business dealings/contractual relationships with the public authorities, are covered. Citizens can ask for information about these firms from the public authorities, which maintain their records.³⁸

In *Anil Tyagiv v. Discom*, the appellant wanted the information regarding supplying of power to Reliance Company and at what rate. The issue was whether Department of Power has an obligation to supply information relating to a contract with Reliance [a third party]. The Information Commission has held that DISCOM must take measures to ensure that public authority must take information from private players and supply to citizen. The principle that the information from a non-public authority can be obtained indirectly from the concerned public authority which has the power to access such information under any other law for the time being in

38 Ibid.

force was subsequently reaffirmed in the case of *Surendra v. Directorate of Education, Delhi Government*.³⁹

Any information which affects the trade interest of a third party is not discloseable. This provision regarding third Party is a protection of 'trade secret'⁴⁰ 'information', and hence proper exercise of notice to the third party is a must.

No Duty to Collect Information which other Public Authorities can supply to the Citizen

The Department of Personnel and training [the nodal agency in-charge of implementing the RTI Act 2005] has issued a circular in which it has stated that PIO is not obligated to collect information from other public authority and provide to the citizen. His duty ends once he has supplied the requisite information pertaining to his public Authority. The Circular states:

It is beyond the scope of the Act for a public authority to create information. Collection of information, parts of which are available with different public authorities, would amount to creation of information which a public authority under the Act is not required to do." The Central Information Commission while deciding an appeal has observed that collection of information cannot amount to creation of information and desired that the above referred OM should be modified so as to avoid any confusion among public authorities. The above referred statement has been made to emphasize that the public authority to whom the application is made is not required to collect information from different public authorities to supply it to the applicant.⁴¹

39 Appeal No.CIC/WB/A/2006/00521, decided on 5/4/2007.

40 The term trade secrets has been defined in Black's Law Dictionary as "A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information-including a formula, pattern, compilation, program, device, method, technique, or process-that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy".

41 Circular No. 10/2/2008 -IR Dated 1st June 2009.

Information to be provided free if there is delay/reimbursement to be provided in cases of delay: Section 7(6)

In the case of *Gita Dewan Verma v. Urban Development Department, Delhi*,⁴² the applicant had applied for certain information regarding slum clearance from the Urban Development Department of the Delhi Government. She was not provided any information within the maximum time limit, as the public authority could not ascertain the information which was asked by the applicant. The CIC held that since there was a delay in replying to the information sought, the appellant should be provided information without costs as per the stipulation under Section 7(6),⁴³ as there was delay in providing the information. In the above case, the appellant was held entitled to reimbursement under Section 19(8)(b)⁴⁴ of the Act. The CIC in this case also issued a show cause notice to the State Public Information Officer (SPIO) as to why the penalties prescribed under Section 20(1)⁴⁵ of the Act be not imposed on him.

42 Appeal No.CIC/WB/C/2006/00182, dated 29/6/2006.

43 Section 7(6) - Notwithstanding anything contained in sub-section (5), the person making a request for the information shall be provided the information free of charge where a public authority fails to comply with the time limits specified in section 7(1).

44 Section 19(8)(b) - In its decision, the Central Information Commission or State Information Commission, as the case may be, has the power to require the public authority to compensate the complainant for any loss or other detriment suffered.

45 Section 20(1) - Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information, or has not furnished information within the time specified under sub-section (1) of Section 7, or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till the application is received or the information is furnished, so however, the total amount of such a penalty shall not exceed twenty-five thousand rupees: Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him: Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be.

Information concerning life and liberty [Sec. 7(1) of the RTI Act]

In *Jiwan v. Commissioner, Central Excise and Customs, Surat*,⁴⁶ the applicant sought Information relating to sanction of leave and payment of salaries to one of his colleagues. Applicant contended that due to non-payment of salary his colleague is facing financial hardship and therefore concerns life and liberty u/sec. 7(1). The contention of the applicant was the non payment of salary would affect the life of the individual, hence the information sought must be provided within 48 hours. CIC rejected the contention of life and liberty and held that the arguments were misplaced and in such cases information cannot be provided Sections 7(1). In the case of *Shekhar Singh v. Prime Minister's Office*⁴⁷ the appellants had applied for information about the recommendations of the Group of Ministers for the rehabilitation of the project affected persons of the Narmada Project, according to the provisions of Section 7(1) of the Right to Information Act. Section 7(1) deals with providing information within 48 hours in the case where there is a threat to life and liberty of a person/s. The applicants contended that there is an immediate threat as the protestors were on an indefinite hunger strike. The report of the ministers which was made public was supplied to the applicants. The Commission, however, held that for an application to be treated as one concerning life and liberty under Section 7(1),⁴⁸ it must be accompanied with substantive evidence that a threat to life and liberty exists. In the present case, the Commission rejected the application under Section 7(1). However, the Commission held that agitation with the use of ahimsa must be recognized as a bonafide form of protest, and therefore even if the claim of concern for life and liberty is not accepted, in a particular case by the public authority, the reasons for not doing so must be given in writing in disposing the application. The Commission also held that an application u/sec. 7(1) must be attached with a medical report about the threat to the life and liberty of the applicant. Only in such cases will a PIO be liable to give information within 48 hours.

47 Decision No.CIC/WB/C/2006/00066, decided on 19/4/2006.

48 Section 7(1) - Subject to the proviso to sub-section (2) of Section 5 or the proviso to subsection (3) of Section 6, the Central Public Information Officer or State Public Information Officer, as the case may be, on receipt of a request under Section 6 shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in Sections 8 and 9: Provided that where the information sought for concerns the life or liberty of a person, the same shall be provided within forty-eight hours of the receipt of the request.

In the case of *Ram Chander Singh v. Delhi Jal Board*,⁴⁹ the applicant had applied for some information to the PIO of a public authority (Delhi Jal Board) regarding the meter-readings he had received for his water connection. In order to be provided the relevant information sought, he was asked to deposit further fees by the concerned Public Information Officer (PIO). According to the applicant he could not get the information sought within 30 days of his application being accepted. The CIC in the appeal before it, held that in counting the 30 days time limit for providing the information under the RTI Act, the period between asking for the additional/further fees by the PIO and its final payment by the applicant is excluded in calculating the period of thirty days stipulated in Section 7 (1) of the RTI Act as per Section 7(3)(a).⁵⁰

United State Freedom of Information Act [FOIA]: Searching for Records

The adequacy of an agency's [Public Authority in our case] search under the FOIA is determined by a test of "reasonableness," which may vary from case to case. As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." The reasonableness of an agency's search depends, in part, on how the agency conducted its search in light of the scope of the request and the requester's description of the records sought particularly if the description includes specific details about the circumstances surrounding the agency's creation or maintenance of the records. The reasonableness of a search also depends on the standards the agency used in determining where responsive records were likely to be found, especially if the agency fails to locate records it has, reason to know might exist, or if the search requires agency employees to distinguish "personal" records from "agency" records. Nevertheless, an agency's inability to locate every single responsive record does not undermine an otherwise reasonable search.

50 Section 7(3)(a) - Where a decision is taken to provide the information on payment of any further fee representing the cost of providing the information, the Central Public Information Officer or State Public Information Officer, as the case may be, shall send an intimation to the person making the request, giving—

- (a) the details of further fees representing the cost of providing the information as determined by him, together with the calculations made to arrive at the amount in accordance with the fee prescribed under subsection (1), requesting him to deposit that fees, and the period intervening between the dispatch of the said intimation and the payment of fees shall be excluded for the purpose of calculating the period of thirty days referred to in that sub-section.

Information to be provided free to BPL applicants under RTI Act

In the case of *Shama Parveen v. National Human Rights Commission*,⁵¹ the applicant, belonging to the BPL category, had filed a petition in the National Human Rights Commission (NHRC). She applied to the NHRC to seek information in regard to the processes, procedures and policies of the NHRC. She also wanted the certified copies of the file noting and orders passed by the members of the commission on the admittance of her case. The PIO of the NHRC intimated to her that the complete information was available at the NHRC's office, and could be supplied to her and asked her to deposit further fees of Rs.444 for obtaining the required documents. She filed an appeal before the Appellate Authority of the NHRC, that since she belonged to the BPL category, she could not afford to pay the further fees. The Commission referred to the Proviso to Section 7(5) of the Act, and held that when as per the RTI Act, the applicant was not required to pay the application fees of Rs. 10, she cannot be expected to pay Rs. 444, and therefore she should be provided information free of charges. The Commission, however, laid down an important condition, that any public authority which provides information sought by a BPL applicant must ensure that such an applicant is a genuine seeker of information, and is not working as a proxy for someone else who merely wants to save money to obtain information.

Public authority to disclose information if public interest outweighs the harm to the protected interests

In the case of *S.R. Goyal v. PIO, Services Department, Delhi*,⁵² the appellant had sought a copy of the letter received by the public authority regarding his suspension, from the CBI, which was investigating the case. The public authority replied that the information requested by the applicant was exempted from disclosure by virtue of Sections 8(1)(g) and 8(1)(h) of the RTI Act. The Commission, rejecting the appeal of the applicant, held that the exemptions from disclosing information, under Section 8(1)(h) of the RTI Act as well as under the relevant provisions of the Official Secrets Act, would apply. The Commission further said that if the public authority, decides that public interest in the disclosure would outweigh the harm to the protected interests, it can disclose the information, which was not the position in this case.

51 Appeal No.CIC/OK/2006/00717, dated 18/4/2007.

52 Appeal No.CIC/WB/A/20060523, decided on 26/3/2007.

In the case of *Divya Ragbunendan v. Deptt. Of Biotechnology*⁵³ the applicant had asked for information about the field trials of genetically modified (GM) crops, conducted by the Department of Biotechnology, to look into the feasibility of growing these crops and to assess their harmful impact if any, i.e., their toxicity or allergenicity. The seeds of these crops were developed by a multinational company. The DBT (public authority) refused to provide the appellant with the required information. The DBT argued that the findings of the trials could not be disclosed, as it would amount to impinging the commercial secrets of the companies according to Section 8(1)(d) of the RTI Act.

The Commission, in its order, held that the information sought concerned the interests of a large number of farmers and other communities, therefore such information has to be disclosed in public interest. The Commission further held that the information sought does not concern commercial secrets as per the terms of Section 8(1)(d) of the RTI Act, and is therefore not exempted from disclosure.

In the case of *Mukesh Kumar v. Addl. Registrar of the Supreme Court*,⁵⁴ the applicant filed an RTI application with the Supreme Court of India. He wanted information regarding the exchange of communication between the Chief Justice of India and the President of India regarding the appointment of Supreme Court and High Court judges. The information sought by the applicant was refused by the Supreme Court. The CIC held in the appeal that the entire process of consultation between the President of India and the Supreme Court of India cannot be disclosed. The CIC held that such a process of consultation is exempted under Sections 8(1)(e) and 11(1) of the RTI Act, 2005. Moreover, under Article 124(2) of the Constitution of India, this is barred from disclosure.

Matter sub judice, can be disclosed if no bar from the Court

In the case of *N. B. S. Manian v. Department of Post*,⁵⁵ the appellant, a retired employee sought some information from the public authority about the denial of promotion to him while he was in service. The matter was pending in a judicial body (Central Administrative Commission). The public authority refused to provide him the information asked by him on the

54 Court Decision No.CIC/AT/A/2006/00113, dated 10/7/2006.

55 Appeal No.267/ICPB/2006, decided on 10/1/2007.

ground that since the matter is pending in a judicial forum, the information cannot be provided to the applicant.

The Commission held that if a matter is *sub-judice* the same is not prohibited from disclosure as per the law in Section 8(1)(b), which prohibits the disclosure of any information which has been banned from disclosure by a court of law. As it is applicable only in cases where there is an express order from the court that information sought should not be disclosed, which was not the position in the present case, therefore such information should be supplied to the appellant. However, the Commission upheld the decision of the public authority, for not disclosing the Confidential Report (CR) of the appellant, and held that Section 8(1)(h) permits such a prohibition.

In *Ravinder Kumar v. A K Sinha*⁵⁶ information sought by the applicant was with the High Court in a matter. CPIO refused to give the information stating the matter is pending before the court, hence exempted sec. 8(1) (h). CIC held that unless courts have expressly barred disclosure of certain documents, or unless the disclosure impedes the process of investigation, public authorities must give information under RTI.

Partial Disclosure of information (Section 10 of RTI Act)

Citizen can have partial access to that information which is covered under exemptions from disclosure [Section 8(1) of RTI Act]. If the request for information has been rejected by a PIO on the ground that it relates to information, which is exempt from disclosure [under Section 8(1) of the RTI Act], then some part of the information, which is not covered in the exemption list, can be disclosed. Such information should be reasonably severed from the information, which falls in the exemption list. This means if a document or record contains information, part of which is exempted from disclosure under the RTI Act while the other part is not exempted from disclosure, then the PIO of a public authority can severe (separate) the parts and provide information which is not exempted to the applicant.

Where partial access to information is provided to an applicant, the PIO must inform the applicant:

- a. Only part of the information after separating it from the record, which falls under the exemption list [Section 8(1)].

⁵⁶ CIC/At/A/2006/00005.

- b. The reasons for providing only part of the requested information.
- c. The name and designation of the person (PIO) giving this decision.
- d. The details of additional fees, which the applicant has to pay to obtain the partial information.
- e. The details of the Appellate Authority and the time limits for filing such an appeal in case the applicant is not satisfied with the partial information and he wants full information. Section 10(1) of the Act emphasizes the fact that an applicant can have access to partial access to even those records and information on documents under exemption list [Section 8(1)]. It is the responsibility of the PIO to reasonably separate that part of information from the main part, which falls in the exemption list.

Information can be severed and supplied (Section 10(1) of the RTI Act)

In the case of *Paramveer Singh v. Punjab University*,⁵⁷ the applicant had applied for information regarding the merit list for selection of candidates to a particular post in the University. However, the information regarding this was contained in some document, which also contained some information, which was exempted from disclosure, as per the RTI Act. But no proper information was supplied to the applicant, due to negligence of the University's PIO in identifying and collecting the proper information. In the above case, the Commission held that the University should streamline its record management system, in such a manner that information, which is to be disclosed, could be easily provided. The University may then deny information that are exempted as per Sec.10 (1)⁵⁸ of the RTI Act. The Commission held that every public authority, particularly after the implementation of the Right to Information Act must take all measures in pursuance of pro-active disclosure requirements, to implement efficient record management systems in their offices so that the requests for information can be dealt with promptly and efficiently.

57 Appeal No.CIC/OK/A/2006/00016 dated 15.6.06.

58 Section 10(1) - Where a request for access to information is rejected on the ground that it is in relation to information which is exempt from disclosure, then, notwithstanding anything contained in this Act, access may be provided to that part of the record which does not contain any information which is exempt from disclosure under this Act and which can reasonably be severed from any part that contains exempt information.

In *Jayasankar v. Deputy Secretary Indian Council of Agricultural Research, Krishi Bhawan Delhi* ⁵⁹ applicant paid a fee of Rs 50 which was higher than the required fee for application. CPIO rejected the application for non-payment of exact fee. CIC held under sec. 5(3) A CPIO Shall deal with requests from persons seeking information and render reasonable assistance to persons seeking such information' CPIO was wrong in rejection the application.

It is beyond the scope of the Act for a public authority to create information. Collection of information, parts of which are available with different public authorities, would amount to creation of information which a public authority under the Act is not required to do.

The Central Information Commission while deciding an appeal has observed that collection of information cannot amount to creation of information and desired that the above referred OM should be modified so as to avoid any confusion among public authorities. The undersigned is directed to clarify that the OM dated 12.6.2008 does not propose to say that collection of information per se amounts to creation of information. The above referred statement has been made to emphasize that the public authority to whom the application is made is not required to collect information from different public authorities to supply it to the applicant.⁶⁰

Where Information sought is voluminous, providing alternative right of inspection

In *Kishur J. Agarwal v. Indian Rare Earths Ltd. (Dept. of Atomic Energy), Mumbai*,⁶¹ the applicant sought details of advertisement expenses, which turned out be voluminous, hence the PIO rejected the application questioning the motive "It is beyond the scope of the Act for a public authority to create information. Collection of information, parts of which are available with different public authorities, would amount to creation of information which a public authority under the Act is not required to do." The Central Information Commission while deciding this appeal observed that collection of information cannot amount to creation of information. The above statement emphasizes that the public authority to which the

59 CIC/AT/C/200600052.

60 DoPT Circular No. 10/2/2008 -IR dated 01/06/2009.

61 Appeal No: CIC/WB/A/2006/00015, decided on 02/06/'06.

application is made is not required to collect information from different public authorities so as to supply it to the applicant.⁶² The CIC observed that the findings of the PIO, questioning as they do, the intentions of the applicant in seeking the information, are not sound in light of Sec 6(2). The CIC held that the information should be provided to the appellant. If providing the information is found disproportionately diverting of resources, allowing applicant to inspect the record as requested by him could amount to facilitating the right to information.

Destroying Information: Whether Information can be sought?

In *Satish Kumar v. Haryana Staff Selection Commission, Panchukla*,⁶³ the applicant sought information regard the examination conducted by HSSC for the post of Excise Inspector/Auditors. Applicant sought the following information:

1. Marks obtained by him in the written test as well as interview [marks were later provided]
2. Names of the selected candidates
3. Marks secured by the selected candidates, written and interview
4. Criteria adopted by the HSSC for viva voce
5. The details of educational qualification and other qualifications of selected candidates.

While most of the information could be provided, the PIO gave the same to the applicant. Later, the applicant sought additional information in the form of photocopy of the answer sheets of the written examination. Photocopy of the question paper and key of right answers. The PIO rejected the said information stating that all used/unused question paper booklet were destroyed as per their department rules. The State Information Commission held that as the 'information' is destroyed the same cannot be provided. The Commission directed HSSC to rectify its practices so that the information are not destroyed and maintained to enable to effective implementation of the RTI Act.

Frivolous applications not to be entertained: Section 8 of the RTI Act

In the case of *S.K. Lal v. Ministry of Railways*⁶⁴ the appellant had filed five

62 DOPT Circular No. 10/2/2008 -IR dated 01/06/2009.

63 Case No. 1118 and 1119 of 2006, Haryana SIC.

64 Appeal No.CIC/OK/A/2006/00268-272, dated 29/12/2006.

applications to the railway authorities asking for "all the records" regarding the various services and categories of staff in the railways. The public authority, however, did not provide him with the information requested. The Central Information Commission observed that though the RTI Act allows citizens to seek any information other than the 10 categories exempted under Section 8, it does not mean that the public authorities are required to entertain to all sorts of frivolous applications. The CIC held that asking for "all the records" regarding various services and categories of staff in the railways, "only amounts to making a mockery of the Act." While dismissing the appeal, the CIC recorded its appreciation of the efforts made by the Railways to provide the applicant with the information sought.

It must be submitted that a PIO cannot refuse to accept an RTI application or provide information in most of the cases, and the RTI Act makes it compulsory that every public authority is duty bound to accept all RTI applications. The public authorities are also not supposed to question the applicant under the RTI Act about the reasons for filing an application and asking for particular information. Only in the rarest of rare circumstances, where it is clearly established that an applicant has filed an RTI application just to harass the public authority, an application can be termed frivolous.⁶⁵

In *Kishur J Agarwal v. Indian Renewable Energy Development Agency*,⁶⁵ applicant sought voluminous information in car and traveling expenses, copies of vouchers and bills. CIC held, the above applicant was filing too many RTI applications because he was a journalist and the same was without any public purpose. This makes a clear case of misusing RTI. Decision of CPIO that the information sought was voluminous and not easily available, held valid. Unless the applicant proves that corruption or public interest is larger, the denial of information is justified.

In another case, *Ved Prakash Arya v. KVIC*, the government employees facing enquiries and investigations have attempted to use the RTI Act, to impede or to impair the progress of investigation, by demanding premature disclosure of the contents of an investigation.⁶⁷

65 Supra note 32.

66 27/ICA/06.

67 Prabodh Saxena, The Flip Side of the RTI Act, THE ADMINISTRATOR, Vol. 1 June 2007, p. 25.

Reasons for rejection of requests for information must be clearly provided

In the case of *Dhananjay Tripathi v. Banaras Hindu University*, the applicant had applied for information relating to the treatment and subsequent death of a student in the university hospital due to alleged negligence of the doctors attending him. The appellant was, however, denied the information by the PIO of the university saying that the information sought could not be provided under Section 8(1)(g) of the RTI Act, without providing any further reasons as to how the information sought could not be provided under the RTI Act. The Commission held that quoting the provisions of Section 8(1) of the RTI Act to deny the information without giving any justification or grounds as to how these provisions are applicable is simply not acceptable, and clearly amount to malafide denial of legitimate information. The public authority must provide reasons for rejecting the particular application. The Commission further held that not providing the reasons of how the application for information was rejected according to a particular provision of the Act would attract penalties under Section 20(1) of the Act.

Conclusion

A major grouse of the complainants as well as right's activists is that the CIC is loath to impose penalties on defaulting PIOs as compulsorily required by the Act. If the bureaucracy is defying the RTI Act with impunity, the reason is the CIC. Commission officials admit that so far they have imposed penalty in a small fraction of cases and soon they will be strict with erring PIOs.

It doesn't help that the CIC has to contend with hostile government. The issue of file noting, over which the two sides took opposing position, continuous to fester. CIC cannot ban a public authority much less the central government from holding a certain view. The pity is the CIC is bound hand and foot as it is, though it has taken some far reaching decisions.

* * * * *

68 Decision No.CIC/OK/A/00163, dated 7/7/2006.

DEFINITION OF 'INFORMATION' UNDER THE RIGHT TO INFORMATION ACT, 2005: A CASE LAW ANALYSIS

Deva Prasad M*

Abstract

Section 2(f) of the Right to Information Act, 2005 provides definition of the term 'information'. Though an extensive definition of information is being provided in the legislation, the decisional jurisprudence has provided new dimensions to the existing definition. The case law jurisprudence that has evolved based on the adjudication of Central Information Commission, High Courts and Supreme Court need to be analysed in the context of enabling access to information and improving transparency. Since the Right to Information Act, 2005 has been in existence for a decade, it is now an appropriate time for analysing the definition of 'information' in Right to Information Act, 2005.

Against this background, the present article attempts to analyse the following significant decisions relating to understanding of Section 2(f) of the Right to Information Act, 2005: 1) PoornaPrajna Public School v. Central Information Commission (Delhi High Court, 2009)- Deals with the information which is not available, but can be accessed by the public authority from a private authority. 2) Bhoj Raj Sabu v. SEBI (Central Information Commission, 2009) - Deals with the power of SEBI to seek information from BSE under section 2(f) of RTI Act, 2005. 3) Dr.Celsa Pinto v. Goa State Information Commission (Bombay High Court)- The definition of information does not provide for answers to question like 'why'. 4) Mr. Ebtesham Qutubuddin Siddiqui v. Ministry Of Culture (Central Information Commission, 2012)- Whether priced publication could be sought as information under Section 2(f). 5) Unknown v. Pritam Roj (Calcutta High Court, 2009)- Whether answer sheet is information under Section 2(f). 6) M.P. Gupta v. CGHS, New Delhi (Central Information Commission, 2009) & Sunil Kumar v. Pgimer, Chandigarh (Central Information Commission, 2010) – Whether certified sample could be sought as information. 7) CBSE v. Aditya Bandopodhyay (Supreme Court, 2011)-Observation regarding frivolous and voluminous information sought through RTI.

Introduction

Right to Information Act, 2005 (henceforth referred to as “RTI Act”) as a legislative measure provided the much needed enabling framework for informational transparency and good governance in India. Ensuring access to information in the hands of public authority to the citizens and thus ensuring accountability and transparency in governance is the main

* Assistant Professor, National Law School of India University, Bengaluru.

objective of RTI Act.¹ In this regard, how the RTI Act defines the term ‘information’ is significant. Section 2(f) of the Right to Information Act, 2005 provides the definition of term ‘information’. It reads as follows:

Information means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

It is interesting to note that the very definition of ‘information’ has been a matter of contest before various State Information Commissions, Central Information Commission as well as the High Courts and Supreme Court. Within one decade of existence, the decisional jurisprudence provides a rich insight as to how ‘information’ under the RTI Act is perceived by the various judicial fora. This paper attempts to analyse various decisions on the definition and contours of the term ‘information’ to understand whether these decisions enable access to information and improving transparency, as required by the objective of RTI Act.

Case Law Analysis

*PoornaPrajna Public School v. Central Information Commission (Delhi High Court, 2009)*²

Mr. D.K.Chopra had filed an RTI application with the Public Information Officer, Department of Education under Government of New Delhi. The information seeker wanted the minutes of Executive Committee Meeting of PoornaPrajna Public School along with the action taken report from 1988. The pertinent information was not available on records with the Department of Education, New Delhi. When the Department of Education, New Delhi sought for the information from the PoornaPrajna Public School, the school authorities raised objection stating that the school being a private unaided institution, it does not come under the RTI Act and the information seeker has no locus *standi* to ask for information.

Hence, the main contention from the side of PoornaPrajna Public School was that the minutes of Executive Committee Meeting of the school would

2 Writ Petition (Civil) No. 7265 of 2007, available at <http://cic.gov.in/HC-Rulings/PoornaPublicSchool-Vs-CICandOrs.pdf> (last accessed on May 1, 2016).

fall outside the ambit of information under the RTI Act, 2005 as it is a private unaided institution and hence the information seeker would not have authority to access this information. Aggrieved by the lack of opportunity to access the information, the information seeker approached the Central Information Commission. The Central Information Commission took the view that “the Petitioner School was indirectly funded by the Government as it enjoyed income tax concessions; was provided with land at subsidized rates etc”.³ Central Information Commission also mentioned that the Education Department of Government of Delhi has control over the functioning of the school. Hence, it was held that Education Department can “ask for information from the school and therefore the public information officer should have collected the information with regard to the minutes of the managing committee from the Petitioner School and furnished”.⁴

PoornaPrajna Public School appealed the matter to the High Court of Delhi. The High Court of Delhi scrutinized the definition of information under section 2(f) of RTI Act and observed that “information relating to any private body which can be accessed by a public authority under any other law for the time being in force” is also to be considered under the category of information that could be accessed under the RTI Act. The High Court observed that: “The last part of section 2 (f) broadens the scope of the term ‘information’ to include information which is not available, but can be accessed by the public authority from a private authority. Such information relating to a private body should be accessible to the public authority under any other law”. Based on the provisions of Delhi School Education Act, 1973 and Delhi School Education Rules,⁵ the High Court came to the conclusion that, the Department of Education, Government of Delhi have power to seek the information and pass it to the information seeker.

3 Ibid.

4 Ibid.

5 Under Rule 50(xviii) of the DSE Rules, the Directorate of Education can issue instructions and can call upon the school to furnish information required on conditions mentioned therein being satisfied. Rule 50 therefore authorizes the public authority to have access to information or records of a private body i.e. a private unaided school.

Bhoj Raj Sahu v. SEBI (Central Information Commission, 2009)⁶

The information seeker had sought information, which requires Securities Exchange Board of India (SEBI) to access the information from various stock exchanges including Bombay Stock Exchange (BSE). The question before the Central Information Commission was whether SEBI has regulatory jurisdiction to access the information that is held by the stock exchanges. Further, BSE also raised an interesting legal issue that the SEBI cannot access the information for the sole purpose of transmitting it to an RTI-applicant.

The Central Information Commission observed that:

The responsibility of the public authority as contained in RTI Act is two-fold in cases where such public authority is known not to 'hold' the information sought by an application - One, to transfer the request for information to another public authority under Section 6(3), when it is known that the other public authority holds the information; and two, to obtain the information from a private body if the public authority is authorized under any law to access such information in the hands of that private body.⁷

Central Information Commission clearly notes that SEBI has the power within the meaning of the SEBI Act to access the information from BSE and other stock exchanges. This decision is in consonance with the above discussed case *PoornaPrajna Public School v. Central Information Commission* (Delhi High Court, 2009).

CIC also observes that once BSE “have conceded the point that the requested information could be accessed by SEBI within SEBI laws, it was not open to BSE to demand that SEBI should make use of that information depending upon what BSE considered appropriate and provide the information to another person or party only after obtaining BSE's approval. The power of SEBI as a market regulator to access certain information in the hands of BSE could not be circumscribed by BSE's own interest. In other words, BSE could not dictate to SEBI as to how SEBI should use certain information, which BSE was obliged to provide to the SEBI under SEBI Act. Thus, the Central Information Commission makes it clear that the private entity cannot unnecessarily object to the information

⁶ FNo.CIC/AT/A/2008/01083.

⁷ Ibid.

shared with RTI applicant. Any information the private entity is obliged to provide to a regulator or government body under a pertinent legislation could be sought by an information seeker under RTI Act.

This clearly points out to the fact that Section 2(f) definition has wide implications not only upon the public authorities, but also upon private entities regulated and overseen by a regulatory body. Thus the decisions mentioned above have played an important role in ensuring that the Right to Information Act is an enabling legislation for information transparency by extending the application to private entities regulated and controlled by statutory authority.

*Dr. Celsa Pinto v. Goa State Information Commission (Bombay High Court, 2008)*⁸

Information seeker has inter alia sought for information as to “why the post of Curator was not filled up by promotion and why the Librarian from the Engineering College was not considered for promotion”. The pertinent question that came before the Bombay High Court was that whether the definition of information needs to provide for answers to question like ‘why’. After scrutiny of the Section 2(f) of RTI Act, the Bombay High Court observed that the definition of information does not cast any obligation to provide the reasoning. The Bombay High Court stated, “The definition cannot include within its fold answers to the question ‘why’ which would be the same thing as asking the reason for a justification for a particular thing. The Public Information Authorities cannot expect to communicate to the citizen the reason why a certain thing was either done or not done in the sense of a justification because the citizen makes a requisition about information. Justifications are matters within the domain of adjudicating authorities and cannot properly be classified as information”⁹. Hence, the main take away from this judgment would be the fact that explanations cannot be sought as information.

With ‘why’ questions being ruled out from the ambit of information, it becomes imperative that explanations for taking a particular decision cannot be sought through the right to information request. There could be two diverging viewpoints that may emerge from this scenario. One is the point of view that non-inclusion of ‘why’ questions to be made part of the

8 2008 (110) Bom L R 1238.

9 Ibid.

definition of information stands in way of providing for more accountable and transparent form of governance. On the other hand, there is clear understanding that the RTI Act, 2005 itself does not conceive the definition of information to include the rationale and reasoning of decision making. Also the need for providing rationale and reasoning of the decision making for all and every decision could lead to the situation of inefficiency in governance process.

Ehtesham Qutubuddin Siddiqui v. Ministry Of Culture (Central Information Commission, 2012)¹⁰

Information seeker by way of a RTI request has sought for copies of nine books published by the Archaeological Survey of India. The Public Information Officer sought for demand draft towards the price of the books sought. In this regard, the information seeker sought for the books free of cost under the right to information as he belongs to below poverty line category. The Central Information Commission decision observed that “once an information is brought into the public domain by means of a priced publication, the said information cannot be said to be “held by” or “under the control of” the CPIO and hence would cease to be information accessible under the RTI Act.”¹¹ Further, it was also observed by the Central Information Commission that the “In the instant case, information is available without the need for a request as these are priced publications. Therefore, to cast an obligation on the public authority to provide copies of the same under the RTI Act will not only be onerous but may also violate the Copyrights Act and may not be saved even under Section 9 of the Act as copyright may subsist in a person other than the State”.¹² The Central Information Commission has made a pertinent observation that in case of the publications of books or other materials by government for a particular price, then it no longer becomes information held by or under the control of the public authority. Further, the issue of intellectual property over the publication by way of copyright also comes into picture. Many a times, even though the government is bringing out the publication, the copyright over the matter may vest with a private individual, whose rights have to be protected.

10 File No. CIC/SM/A/2011/001713/BS & CIC/SM/A/2012/000239/BS/0284.

11 Ibid.

12 Ibid.

*Unknown v. PritamRooj (Calcutta High Court, 2008)*¹³

The Calcutta High Court in this matter analysed the question that whether evaluated answer paper could be considered as information under Section 2(f) of RTI Act, 2005. The Calcutta High Court held that “an assessed/evaluated answer script of an examinee writing a public examination conducted by public bodies like the CBSE or the Universities, which are created by statutes, does come within the purview of 'information' as defined in the RTI Act. There is no justifiable reason to construe Section 2(f) of the RTI Act in a constricted sense. Apart from it being a material and thus comprehended within the exhaustive aspect of the definition, an assessed/evaluated answer script is also a document, a paper, and a record”¹⁴.

The Calcutta High Court refused to accept the contention that accessing the evaluated answer sheets would not serve any public interest. The Calcutta High Court observed that “disclosure of assessed/evaluated answer scripts would definitely be conducive to improvement of quality of assessment/evaluation”. It is an important decision, which has been followed and made remarkable impact in the field of university and public service commission answer paper evaluation process.

Many further decisions, including the recent decision of Supreme Court in *Kerala Public Services Commission v. The State Information Commission*¹⁵ has reiterated the fact that the evaluated answer papers and marks have to be disclosed to the candidates and the same cannot be denied on ground of fiduciary capacity. In the interest of fair play, evaluated answer sheets are necessarily to be provided to the information seeker.

*M.P. Gupta v. CGHS, New Delhi, (Central Information Commission, 2009)*¹⁶

The information seeker by way of RTI application has inter alia sought for samples of medicine for testing. It was contented by the public information officer that there is no provision to allow for sample of medicines for testing, thus denying the access to sample of medicine to the information

13 W.P. No. 22176 (W) of 2007.

14 Ibid.

15 Civil Appeal No. 823-854 of 2016.

16 CIC/AD/C/09/00083.

seeker. Section 2(f) read with Section 2(j) (iii) of the RTI Act, 2005 clearly points out that the information is widely construed to include sample of a material. The Central Information Commission observed that “under Section 2(j) (iii) of the RTI Act, every citizen has the right to information accessible under the Act, which is held by or under the control of any Public Authority and includes the right to take certified samples of material.”¹⁷ It is important to note that by way of this decision, the Central Information Commission has furthered the understanding of information to include sample materials also.

Sunil Kumar v. Pgimer, Chandigarh (Central Information Commission, 2010)¹⁸

The issue that came before the Central Information Commission was that whether the sample material used in the construction could be considered as information. The Central Information Commission observed that it is clear from Section 2(f) that samples are information. Regarding the question of samples of building material as information, Central Information Commission observed that samples could be taken from any “product/article/material,etc” and hence “such samples can be taken from the under-construction building and would, thus, fall in the ambit of section 2 (f) of the RTI Act”¹⁹.

CBSE v. Aditya Bandapodyay (Supreme Court, 2011)²⁰

The Supreme Court in this case makes a significant observation regarding the frivolous RTI applications being filed for voluminous information. The Supreme Court observed that “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 work of 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

17 Ibid.

18 File No.CIC/LS/C/2009/000617.

19 Ibid.

20 Civil Appeal No.6454 of 2011.

citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty.”²¹ This observation is very pertinent in the light of misuse of RTI for hindering the work at government offices by filing frivolous RTI applications seeking voluminous information without proper public interest attached with the information sought. The Supreme Court while emphasizing on the accountability and transparency aspect of RTI has provided a clear message to the frivolous information seekers who are creating a burden upon the government mechanism to refrain from seeking information without any public interest being attached to it.

Conclusion

The case law analysis of decisions pertaining to the definition of information under the section 2(f) of the RTI Act, 2005 provides a pragmatic picture of how the right to information is being operationalized in the Indian legal framework. The decisions on definition of information under the section 2(f) of the RTI Act, 2005 have infact contributed to ensure that public authorities do not restrict the understanding of what information could be provided under the right to information. The decisions analysed in the article have clarified that the decisional jurisprudence has helped in reiterating the wide definition of information under the Section 2(f) of RTI Act, 2005 for providing the access to samples as information, information accessible by a public authority from private entity and evaluated answer sheets. Apart from ensuring to reiterate the section 2(f) definition of information, the decisions have also helped in ensuring that practical level issues of seeking priced publication as information, asking reasons as information through “why” questions and seeking voluminous information through frivolous request for information could be greased out.

* * * * *

21 Ibid.

JUDICIAL INTERPRETATION OF RTI ACT

Rajdeep Banerjee & Joyeeta Banerjee***

Abstract

*The Right to Information Act, 2005 is a revolutionary piece of legislation. The Central Information Commission and the respective State Information Commissions are continuously enlarging the scope of the Act with a view to bring in more transparency and much needed accountability in our system. In this short span of ten years, various decisions have been pronounced on the subject which consists of the orders of the Commissions and the judgments of various High Courts under the writ jurisdiction and the Supreme Court. This Article discusses the approach of the High Courts and the Supreme Court in dealing with the writ petitions against the orders of the Commissions. Though the High Courts have been interpreting various sections of the Act, few sections are being litigated more frequently like the definition of 'Public Authority', exemptions from disclosure of the Act, concept of 'fiduciary relationship', Third Party Information, appeal provisions, penalty provisions and the overriding effect of the Act. The Supreme Court has also delivered few important rulings on certain provisions of the Act, the most recent one is related to fiduciary relationship in the RBI case. The Supreme Court in *Namit Sharma (II)* has also deliberated on the nature of the functions of the Information Commissions holding it to be administrative and not a judicial one. The High Courts have been gradually taking the view that almost all information under the control of public authorities has to be supplied to the applicant unless the information is exempted under the provisions of the Act.*

Introduction

Access to information is considered vital to the functioning of a democracy, as it creates an informed citizenry. Transparency of information is considered vital to contain corruption and to hold Government and its instrumentalities accountable to the governed citizens of this country. The source of right to information does not emanate from the Right to Information Act. It is a right that emerges from the constitutional guarantees under Article 19(1)(a) of Constitution of India. The Supreme Court recognized that the right to know is the right that flows from the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.¹ The Supreme Court has time and again

*BSc(Maths Hons), Advocate & Legal Consultant, New Delhi.

** BE(Mechanical), Advocate & Legal Consultant, New Delhi.

1 State of U.P. v. Raj Narain and others, (1975) 4 SCC 428; AIR 1975 SC 865.

reiterated its position that it is a facet of freedom of speech and expression contained in Article 19(1)(a).² Article 19 of the Universal Declaration of Human Rights too recognizes right to information. A vibrant and thriving democracy requires transparency. Right to Information Act, 2005 recognizes the right of the citizen to secure access to information under the control of public authority, in order to promote transparency and accountability in the working of every public authority. Section 3 of the Act confers right to information to all citizens and a corresponding obligation under section 4 on every public authority to maintain the records so that the information sought for can be provided. The thrust of the legislation is to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority.³ But absolute or uncontrolled individual rights do not and cannot exist in any modern State.

Right to privacy is not expressly guaranteed under the Constitution of India, the Supreme Court has recognized the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.⁴ Right to privacy is also recognized as a basic human right under Article 12⁵ of the Universal Declaration of Human Rights Act, 1948 as well as Article 17 of the International Covenant on Civil and Political Rights Act, 1966. Both Right to information and Right to privacy are not absolute rights. The first one falls under Article 19(1)(a) whereas the second falls under Article 21 of the Constitution of India. As per the constitutional provisions, both can be regulated and restricted in larger public interest.

The Right to Information Act is not repository of the right to information.

-
- 2 Bennet Coleman and Co. and others v. Union of India and others, (1972) 2 SCC 788; AIR 1973 SC 106, Union of India v. Association of Democratic Reforms and another, (2002) 5 SCC 294; AIR 2002 SC 2112, People's Union for Civil Liberties (PUCL) and others v. Union of India and another, (2003) 4 SCC 399; AIR 2003 SC 2363.
 - 3 Jamia Millia Islamia v. Sh. Ikramuddin, AIR 2012 Del 39.
 - 4 Kharak Singh v. State of U.P. and Ors., AIR 1963 SC 1295, R. Rajagopal @ R.R. Gopal and Anr. v. State of Tamil Nadu and Ors., (1994) 6 SCC 632; AIR 1995 SC 264, People's Union for Civil Liberties (PUCL) v. Union of India and Anr., (1997) 1 SCC 301; AIR 1997 SC 568 and State of Maharashtra v. Bharat Shanti Lal Shah and Ors., (2008) 13 SCC 5; AIR 2009 SC (Supp) 1135.
 - 5 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attack upon his honour and reputation. Everyone has the right to the protection of law against such interference or attacks.

Its repository is the constitutional rights guaranteed under Article 19(1)(a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. In construing such a statute, the court ought to give it widest operation which its language will permit.⁶ But the provisions of the Act cannot be used as a tool to give vent to the frustration and dissatisfaction of a citizen. Where the examinations have long been concluded and appointments already made, a dissatisfied candidate who is disbelieving in the process of a constitutional body ought not be allowed to seek information which can affect the efficient working and discharge of its constitutional obligations without any corresponding benefit or relationship to any public interest or activity.⁷

"Record" includes any document and file. Neither the definition clause, nor any provision of the Act postulates that information, prior to enforcement of the Act, cannot be supplied to a citizen. The only fetters prescribed are under sections 8, 9, 11 and 24 of the Act.⁸ There is no bar under the Act, against the information being supplied by the appropriate authority, in relation to acts or events which have occurred and stand recorded prior to the Act being notified in the year 2005. The Act was enacted to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. The Preamble specifically takes note of the fact that the Democratic Republic established by the Constitution of India, requires an informed citizenry and transparency of information, vital for its functioning, not only to contain corruption, but also hold Governments and their instrumentalities accountable to the governed. The conflicting interest between the Government and the citizenry, while preserving the paramountcy of the democratic ideal, stands considered.⁹ Right of a citizen to seek information emanates from section 6 of the Act. He need not

6 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Delhi 159 (Full Bench).

7 Rajasthan Public Service Commission v. Ms. Pooja Meena and Anr., AIR 2012 Raj 52.

8 State Bank of India v. Central Information Commission and another, AIR 2014 HP 21.

9 Ibid.

assign any reasons for seeking such information.¹⁰ An applicant seeking information does not have to give any reasons why he needs such information except such details as may be necessary for contacting him. There is no requirement of locus standi for seeking information.¹¹ The Act does not impose fetters with regard to supply of record, which may be voluminous.¹²

Public Authority

Lot many cases have been decided by various High Courts and even the Supreme Court of India regarding the contours of the definition of the 'Public Authority'. This assumes significance as the very applicability of the Act hinges on this basic issue.

Mother Dairy Fruit and Vegetable Pvt. Ltd., being a company constituted by the National Dairy Development Board (NDDB), a Central Government body, for implementation of its objectives and the basic infrastructure of the undertaking being promoted by funds provided by Central Government through NDDB, was held to be a public authority on account of being substantially financed by Central Govt.¹³ The Delhi High Court has held that once it is found that an authority or body or institution of self government is established or constituted in any manner prescribed in clauses (a) to (d) of section 2(h), then there is no further requirement of such a body to be either owned or controlled or substantially financed by an appropriate Government. The question before the High Court was whether SGPC was 'public authority'. It was a statutory body constituted under section 3 of Delhi Sikh Gurdwaras Act, 1971. As it was a body under any law and not a body made by the law, it was a 'public authority'. It held that the words 'and includes' are not part of clause (d), but they are placed separately, independently and away from clause (d) of section 2(h). The categories of bodies or institutions or authorities covered by sections 2(h) (a), (b), (c) and (d) are therefore "stand alone" authorities or bodies. The

11 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

12 Surupsingh Harya Naik v. State of Maharashtra, AIR 2007 Bom 121.

13 Mother Dairy Fruit and Vegetable Private Limited v. Hatim Ali and Anr., AIR 2015 Del 132, the High Court further observed that there was nothing in language of S. 2(h) (d) (i) which indicated that appropriate Government had to directly control the public authority, as it can do so by appointing its representatives as managers of said body too.

words "and includes" beginning in a fresh line from the left margin is intended to indicate another set of bodies which may not fall within the categories of section 2(h) (a), (b), (c) and (d).¹⁴

Chandigarh University, being a body established by law made by State Legislature, has been held to be a 'Public Authority'. Once it is shown that a body has been constituted by an enactment of the State Legislature, then nothing more is needed to be shown to demonstrate that such a body is a "public authority" within the meaning of section 2(h)(c).¹⁵ Co-operative Society registered under T. N. Co-operative Societies Act has been held not to be a 'public authority' within meaning of S. 2(h) of the Act.¹⁶ As a co-operative housing society was not covered by any of the four categories mentioned in the definition of 'Public Authority' and the information sought like resolutions passed and minutes of books of society was not in possession of Registrar of Co-operative Societies, a co-operative housing society was thus not a 'public authority'.¹⁷

The burden to show that a body is owned, controlled or substantially financed or that a non-government organization is substantially financed directly or indirectly by the funds provided by the appropriate Government is on the applicant who seeks information or the appropriate Government and can be examined by the State Public Information Officer, State Chief Information Officer, State Chief Information Commissioner, Central Public Information Officer etc. A body or NGO is also free to establish that it is not owned, controlled or substantially financed directly or indirectly by the appropriate Government.¹⁸

Where the petitioner-trust was constituted under section 5 of Shri Sanwaliaji Temple Act, 1992 and section 6 of the Act provided for composition of the Board, which included the President, Collector of Chittorgarh district, the Devsthan Commissioner, Chief Executive Officer and seven other members, such trust was held as a 'public authority' notwithstanding that it was neither funded by nor did it receive any aid from

15 Chandigarh University, Village Gharuan v. State, AIR 2013 P&H 187.

16 PIO, Illayankudi Co-operative Urban Bank Ltd., Sivagangai District v. Registrar, Tamil Nadu Information Commission, Chennai and Ors., AIR 2015 Mad 169.

17 Sainik Co-operative House Building Society Limited, Goa v. Bismark Facho and Ors., AIR 2015 Bom 153.

18 Thalappalam Ser. Co-op. Bank Ltd. and Ors. v. State of Kerala and Ors., AIR 2013 SC (Supp) 437.

the Central Government or the State Government in any manner whatsoever.¹⁹ The expression "public authority" is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for Chief Justice of India.²⁰

The Supreme Court in *Thalappalam Ser. Co-op. Bank Ltd. and others v. State of Kerala and Ors.*,²¹ has held that the meaning of expression "controlled" which figures in between the words "body owned" and "substantially financed", means that the control by the appropriate government must be a control of a substantial nature. The mere 'supervision' or 'regulation' as such by a statute or otherwise of a body would not make that body a "public authority". Powers exercised by the Registrar of Co-operative Societies and others under the Co-operative Societies Act are only regulatory or supervisory in nature, which will not amount to dominating or interfering with the management or affairs of the society so as to be controlled. Management and control are statutorily conferred on the Management Committee or the Board of Directors of the Society by the respective Co-operative Societies Act and not on the authorities under the Co-operative Societies Act.

The mere fact that the college was established with permission of State without anything more, cannot lead to the conclusion that College is controlled by them and hence is not a public authority. The position of the term "controlled" in section 3(h)(d)(I) of the Act is indicative of the fact that control contemplated therein must take its colour from preceding and subsequent words i.e. "owned" and "substantially financed".²²

Interpreting the term "substantially financed", the Supreme Court observed that merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which

19 Sanwaliaji Mandir Mandal, Rajasthan v. The Chief Information Commissioner, Rajasthan, Jaipur, AIR 2016 Raj 16.

20 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

21 AIR 2013 SC (Supp) 437.

22 Raid Laban College Society and Anr v. State of Meghalaya and Anr., AIR 2010 Gau 173.

practically runs by such funding and but for such funding, it would struggle to exist.²³

The question whether an NGO²⁴ has been substantially financed or not by the appropriate Government is a question of fact to be examined by the RTI authorities. Such organization can be substantially financed either directly or indirectly by funds provided by the appropriate Government. Government may not have any statutory control over the NGO, still it can be established that a particular NGO has been substantially financed directly or indirectly by the funds provided by the appropriate Government, in such an event, that organization will fall within the scope of section 2(h)(d)(ii) of the RTI Act. Thus private organizations which are, though not owned or controlled but substantially financed by the appropriate Government will also fall within the definition of "public authority" under section 2(h)(d)(ii).²⁵ Order by the State Information Commission to furnish all information related to utilization of grant/aid received from State Government and related to staff engagement was not interfered by the High Court as the NGO was receiving substantial amount as funds from the Government agencies and hence was held public authority. It could not be said that the NGO was not substantially financed by the Government, whatever may be the extent of finance in the budget of the NGO. Also the Public Information Officer, Assistant Public Information Officer and first Appellate Authority of the NGO had already been designated and in some of the cases it had already furnished information.²⁶

The Bombay High Court observed that Right to Information Act would apply to market committee constituted under APMC Act (1964) which is an institution of self government, established and constituted by a law made by state legislature. The Market Committee is brought into existence not by virtue of an act of any person to register a Market Committee like a Society and then bring it into existence, but Market Committee comes into

23 Thalappalam Ser. Co-op. Bank Ltd. and Ors. v. State of Kerala and Ors., AIR 2013 SC (Supp) 437, even floating schemes generally for the betterment and welfare of the cooperative sector by the Government like deposit guarantee scheme, etc., cannot bring the body within the fold of "public authority" under Section 2(h)(d)(i).

24 The term "Non-Government Organizations" has not been defined under the Act.

25 Thalappalam Ser. Co-op. Bank Ltd. and Ors. v. State of Kerala and Ors., AIR 2013 SC (Supp) 437.

26 Professional Assistant for Development Action (PRADAN), Ranchi v. Jharkhand State Information Commission and Ors., AIR 2010 Jharkhand 147.

existence by virtue of operation of the provisions of the APMC Act (1964) which is the law made by State Legislature. Also it is deemed to be a local authority as per provisions of section 12(2) of the APMC Act.²⁷

Information

Only that information can be supplied which is accessible and under the control of the public authority. The words 'held by' or 'under the control of' under Section 2(j) will include not only information under legal control of public authority but also all such information which is otherwise received or used or consciously retained by the public authority in the course of its functions and its official capacity. Where there is no legal obligation to provide information to public authorities, but where such information is provided, the same would be accessible under the Act.²⁸ The words 'information accessible' in section 2(j) means information which is accessible to a public authority and not information to which the public authority is denied access. If there is an absolute or complete bar on the public authority's right to access information then such information cannot be supplied.²⁹ Any other information where the public authority is prohibited to have access cannot be directed to be supplied without prior permission of the civil court or the competent authority.³⁰ The Act contemplates furnishing of information which is available on records, but it does not go so far as to require an authority to first carry out an enquiry and thereby 'create' information. In a case where the appellant had made substantial compliance by furnishing the information, the High Court observed that the supplementary information supplied by the appellant's successor was clearly not available on the records so long as the appellant was posted at Biharsharif and as such it could not be said that information had been withheld by him.³¹ Recently, the Supreme Court observed that the Legislature's intent is to make available to the general public such information which had been obtained by the public authorities from the

27 *Agriculture Produce Market Committee, Wardha v. Meghraj Pundlikrao Dongre and Ors.*, AIR 2011 Bom 48.

28 *Secretary General, Supreme Court of India v. Subhash Chandra Agarwal*, AIR 2010 Del 159.

29 *Block Development and Panchayat Officer v. State Information Commissioner and Anr.*, AIR 2015 P&H 191.

30 *Ibid.*

31 *Shekhar Chandra Verma v. State*, AIR 2012 Pat 60.

private body. Had it been the case where only information related to public authorities was to be provided, the Legislature would not have included the word "private body".³²

Where any record or information is required to be destroyed under the rules and regulations of a public authority prior to twenty years, section 8(3) will not prevent destruction in accordance with the Rules. Section 8(3) of the Act, is not a provision requiring all 'information' to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority. Where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which requires drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in section 2(f), only refers to such material available in the records of the public authority.³³ Unless specifically excluded, 'information' under section 2(f) includes file notings which are in the form of the views and comments expressed by the various officials during disciplinary proceedings.³⁴ Notes taken by the Judges while hearing a case cannot be treated as final view expressed by them of the case. They are meant only for the use of Judges and cannot be held to be a part of a record 'held' by the public authority. However, if the Judge turns in notes along with the rest of his files to be maintained as a part of the record, the same may be disclosed. It would be thus retained by the registry. Even the draft judgment signed and exchanged is not to be considered as final

32 Reserve Bank of India v. Jayantilal N. Mistry, AIR 2016 SC 1, RBI was held liable to provide information regarding inspection report and other documents to the general public.

33 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

34 Union of India v. R.S. Khan, AIR 2011 Del 50.

judgment but only tentative view liable to be changed, thus a draft judgment cannot be said to be information held by a public authority.³⁵

Whether the certified copy of documents obtained under the Act can be admitted as secondary evidence has been answered in the affirmative by the Madhya Pradesh High Court. As per clause (f) of section 65 of Evidence Act a certified copy permitted under the Evidence Act or by any other law in force can be treated as secondary evidence. Right to Information Act falls within the ambit of 'by any other law in force in India'.³⁶ In a case relating to will, the Kerala High Court has observed that on the question of disputed signature of the executant, comparison of copies of documents containing admitted signature of executant obtained under the Act can be done for the limited purpose of comparing with signature of the attester in disputed document.³⁷ In a case of claim for damages for defamation, the claim was based upon various letters issued in relation to proceeding under the Act. The letters alleged that fraud was committed by plaintiff's company in sale of property and because of certain vested interests, necessary information and documents have not been supplied to him for his future course of action. The High Court observed that in the absence of any evidence produced by the plaintiff to prove that such libelous statements have caused harm to his reputation and affected goodwill of company and such statements being made in legally recognized proceeding, plaintiff cannot succeed in action.³⁸

Where the judgment by State Consumer Dispute Redressal Commission was in English language and the applicant asked for supply of information in translated version (in Hindi), the High Court observed that the applicant could not seek translation of judgment in Hindi as there was no duty cast upon the public authority to provide information in a translated language. The fact that the applicant did not understand English language, could not be ground to supply information (judgment) in Hindi translation as inaccuracies could flow from any attempted translation.³⁹

35 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

36 Narayan Singh v. Kallaram alias Kalluram Kushwaha and Ors., AIR 2015 MP 186.

37 C. G. Raveendran and Ors. v. C.G. Gopi and Ors., AIR 2015 Ker 250.

38 Gardenreach Shipbuilders and Engineers Ltd v. Akshat Commercial Pvt. Ltd and Anr., AIR 2015 Cal 103.

39 State Consumer Disputes Redressal Commission v. Uttarakhand State Information Commission and Ors.,

Interpreting section 7(6) of the Act, which states that if the public authority fails to comply within the time limit prescribed, then the person making the request for information has to be provided with the information free of charge, the High Court of Chhattisgarh held that the stage of providing information free of cost would occasion only when the Public Information Officer (PIO) fails to pass any order disposing off the application by rejecting the same within 30 days or in other words, when the PIO fails to take up application for taking decision in the matter within 30 days, he has to provide information free of cost, but in case where the PIO has passed an order within 30 days rejecting the application and the first appellate authority set aside the order and directs providing of information, an occasion for providing information free of cost would not arise. It would be different if the first appellate authority itself directs the PIO to provide information free of cost.⁴⁰ In a Madras High Court case, the applicant requested for supply of copies of affidavits, counter-affidavits and final order in writ petitions from PIO of Madras High Court and it was replied that the applicant could obtain copies of documents sought for by filing copy application as per Madras High Court Appellate Side Rules, 1965. Order by the Tamil Nadu Information Commission directing the High Court to furnish copies of documents free of cost under S. 7(6) of the Act was thus set aside.⁴¹

Information was sought regarding names, educational qualifications of certain candidates called for interview and of those who were selected. Also further information was sought for disclosure of such candidates who were holding gold medals and certain qualifications. In relation to the second category of information, it was held that if such information was being not consolidated and maintained but has to be made available from the forms of individual applicants, that could certainly be denied in view of S.7(9) of the Act.⁴²

Exemptions

Section 8 enumerates the conditions which justify non disclosure of information. Courts are regularly grappling with the interpretation of this

40 S. K. Shrivastava v. State and Ors., AIR 2016 Chhattisgarh 1.

41 Registrar General, High Court of Madras, Chennai v. A. Kanagaraj and Anr., AIR 2013 Mad 186.

42 RPSC v. Jagdish Narain Pande, AIR 2012 Raj 170.

section as few of the clauses like 8(1)(e) and 8(1)(j) have seen many disputes arising in the courts. Section 8 begins with a non-obstante clause, which gives the section an overriding effect, in case of conflict, over the other provisions of the Act. Even if there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (a) to (j). In one case, information was sought relating to names and designation of suspended employees of the Bank. It was observed that such information was likely to harm reputation of persons involved and also no public interest would be served. Information being personal in nature, was held it could not be disclosed when employer-employee relationship subsist.⁴³ In *Institute of Chartered Accountants of India v. Shaunak H. Satya and Ors.*,⁴⁴ the Supreme Court opined that examining bodies like ICAI should change their old mindsets and tune them to the new regime of disclosure of maximum information. As the examining bodies have not been exempted, and as the examination processes of examining bodies have not been exempted, the examining bodies will have to comply with the provisions of the Act.

It was further held that public authorities should realize that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. Parliament has enacted the RTI Act, providing access to information, after great debate and deliberations by the Civil Society and the Parliament. Additional workload is not a defence. If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the Government for consideration so that any changes to the Act can be deliberated upon.⁴⁵

But, it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach

43 Syndicate Bank, Manipal v. Smt. Jayalaxmi and Anr., AIR 2015 Kar 165.

44 AIR 2011 SC 3336.

45 Ibid.

unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.⁴⁶

There have been plethora of cases where students or applicants have asked for supply of their answer sheets from the concerned authorities. Such requests were frequently turned down citing relevant rules/ regulations of the respective Board/University. Post the enactment of the Act, Information Commissions started passing orders directing the Board/ Universities to supply the answer sheets. The Supreme Court had the opportunity to dwell on this particular issue in the case of *Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors.*⁴⁷ Rejecting CBSE's various contentions against providing of the required information, the Supreme Court observed that examining bodies (Universities, Examination Boards, CBSE etc.) are neither security nor intelligence organisations and therefore the exemption under section 24 will not apply to them. The disclosure of information with reference to answer-books does not also involve infringement of any copyright and therefore section 9 will also not apply. Resultantly, unless the examining bodies are able to demonstrate that the evaluated answer-books fall under any of the categories of exempted 'information' enumerated in clauses (a) to (j) of sub-section (1) section 8, they will be bound to provide access to the information and any applicant can either inspect the document/record, take notes, extracts or obtain certified copies thereof.⁴⁸ The Supreme Court rejected the argument that the evaluated answer-books were exempted from disclosure under section 8(1)(e), as the same was 'information' held in its fiduciary relationship. It thus, held that every examinee will have the right to access his evaluated answer-books, by either inspecting them or taking certified copies thereof.⁴⁹ The Delhi High Court has held that the CJI cannot be a fiduciary vis-a-vis Judges of the Supreme Court as the Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations relating to their assets are not

46 Ibid.

47 2011 AIR SCW 4888.

48 *Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors.*, 2011 AIR SCW 4888.

49 Followed in *Public Service Commission, U.P v. State Information Commission and anr.*, AIR 2014 All 38.

furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest and thus cannot be held that the asset information shared with the CJI was held by him in the capacity of fiduciary, which if directed to be revealed, would result in breach of such duty.⁵⁰

In *Union Public Service Commission v. Gourhari Kamila*,⁵¹ where the applicant asked for the certified copies of experience certificates of all the candidates called for the interview who claimed the experience in the relevant field as per records available in the UPSC, the Supreme Court held that the CIC committed a serious illegality by directing UPSC to disclose the information sought. It reasoned that neither the CIC nor the High Court came to the conclusion that disclosure of the information relating to other candidates was necessary in larger public interest and thus the case was not covered by the exception carved out in Section 8(1)(e) of the Act.

The Supreme Court in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi & Anr*,⁵² held that the disclosure of names and addresses of the members of the Interview Board would ex facie endanger their lives or physical safety as the possibility of a failed candidate attempting to take revenge from such persons could not be ruled out. Such disclosure would likely expose the members of the Interview Board to harm and would not serve any public purpose. It rejected the view of the High Court that element of bias could be traced only if the names and addresses of the examiners/interviewers were furnished as bias was not a ground which could be considered for or against a party making an application to which exemption under section 8 was pleaded as a defence.

The Supreme Court held that oral and verbal instructions, if not recorded, could not be provided. By acting on oral directions, not recording the same, the rights guaranteed to the citizens under the Right to Information Act, could be defeated. The practice of giving oral directions/instructions by the administrative superiors, political executive etc; would defeat the object and purpose of RTI Act and would give room for favoritism and corruption.⁵³

50 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

51 Civil Appeal No. 6362 of 2013 dated August 6, 2013, Supreme Court of India.

52 Civil Appeal No. 9052 of 2012, dated December 13, 2012, Supreme Court of India.

53 T. S. R. Subramanian v. Union of India and Ors., AIR 2014 SC 263.

Once a decision is taken in the matter of grant of tender, there is no justification to keep it secret. People have a right to know the basis on which the decision has been taken. If tenders are invited by the public authority and on the basis of tender documents, the eligibility of a tender or a bidder is decided, then those tender documents cannot be kept secret, that too, after the tender is decided and work order is issued on the ground that it will amount to disclosure of trade secret or commercial confidence. A citizen has a right to know the genuineness of a document submitted by the tenderer in the matter of grant of tender for consultancy work or for any other work. A contract entered into by the public authority with a private person cannot be treated as confidential after completion of contract.⁵⁴ When brother of the deceased wanted to know the name of the nominee nominated by his late brother in his PF and Gratuity, arguing that his brother had only one legally wedded wife but somehow on the basis of forgery done by some officers of the respondents and some other lady has been shown in the column of nominee in the service book and it was done due to some corruption, CIC's order allowing the same was held proper.⁵⁵

Where information was sought for requisite details with regard to opening of bank account of an institution imparting education which was a registered society, and the application was rejected in view of Section 8(j) read with Section 13 of the Banking Companies Act, 1970, it was held that as the purpose of obtaining such information was to misuse or threaten the institution, such type of litigation was required to be discouraged as it was not related to public interest nor intention was for any public interest.⁵⁶ The Delhi High Court, while dealing with the expression 'personal information' used in Section 8(1)(j) of the Act, has observed that no public authority can claim that any information held by it is 'personal' as there is nothing 'personal' about any information, or thing held by a public authority in relation to itself. The expression 'personal information' can mean information personal to any other 'person', that the public authority may hold. That other 'person' may or may not be a juristic person, and may or may not be an individual. It further held that the use of the words 'invasion of the privacy of the individual' instead of 'an individual' showed that the

54 State of Jharkhand and Anr. v. Navin Kumar Sinha and Anr., AIR 2008 Jharkhand 19.

55 Smt. Vimleshwari Devi v. Central Information Commission and Ors., AIR 2016 Uttarakhand 7.

56 Hardev Arya v. Chief Manager (Public Information Officer) and Other, AIR 2013 Raj 97.

legislative intent was to connect the expression 'personal information' with 'individual'. The expression 'individual' included a juristic person as well as an individual. Thus, the expression 'personal information' used in Section 8(1)(j), does not relate to information pertaining to the public authority to whom the query for disclosure of information is directed.⁵⁷

Where disclosure of information sought was not personal information but pertained to individual CBI officers in respect of their duty, order of the Commission directing the Central Bureau of Investigation to supply such information was held proper.⁵⁸ The information provided by applicant of the passport to the Regional Passport Office, as proof of his address and identity, would be a 'personal information', though its disclosure may not necessarily impinge on his privacy. The view of the Commission that a person providing information relating to his address and identity, while seeking issue of passport to him is engaged in a public activity was not sound. No element of public duty was involved in providing information in proof of the address and identity of the applicant, while seeking a passport.⁵⁹

Information such as date of birth and residential address of the passport holder has been held to constitute personal information within the meaning of section 8(1)(j) which could not be disclosed. Since neither the applicant sought disclosure of the said documents in special circumstances, such as existence of any public interest nor the Commission recording found that the larger public interest required disclosure, the said information was held exempt from disclosure under Section 8(1)(j). However, the passport number and the date of issue and expiry of the passport could be provided to the applicant. The birth certificate as well as the documents of his education and the documents submitted as proof of his residential address were personal information which could not be disclosed to the applicant, particularly when no special circumstances warranting such disclosure were indicated in the application nor did the Commission come to the conclusion that disclosure of the aforesaid personal information was warranted in the larger public interest.⁶⁰

57 *Jamia Millia Islamia v. Sh. Ikramuddin*, AIR 2012 Del 39.

58 *Central Bureau of Investigation v. Central Information Commission and Anr.*, AIR 2015 Cal 21.

59 *Union of India v. Hardev Singh*, W.P(C) No.3444/2012 decided on 23.8.2013, Delhi High Court.

60 *Union of India v. Anita Singh*, AIR 2014 Del 23.

On the issue of communication of ACR, the Supreme Court in *Sukhdev Singh v. Union of India and others*⁶¹ held that the view taken in *Dev Dutt case*⁶² that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving many objectives.⁶³ The Court thus observed that every entry in ACR has to be communicated to him/her within a reasonable period.⁶⁴ Orders of suspension in relation to employees of the SGPC alongwith the grounds of suspension, reasons for reinstatement, punishments awarded, etc; has been held to be personal information exempted under section 8(1)(j).⁶⁵

Where information sought was in nature of personal information in respect of IAS Officers which was not relatable to discharge of their duties in official capacity like information in the nature of the account number/name of the Bank in which the salary of the Officers is being sent, copies of TA bills, GPF/PPF statements, LTC bills and supply of PAN number of the officers, the court observed that no public interest was involved justifying disclosure of information that would outweigh right of privacy of individuals concerned and information sought was with clear object to denigrate officers concerned solely and settle personal scores and thus the information was held exempt from disclosure.⁶⁶ The certified copy of service book and personal record of the third party which was sought on the allegation that he had taken benefit of two advance increments in lieu of sterilization, cannot be supplied as these would contain annual confidential reports and other information like details of family and nomination thereof. A Government servant has a right to guard these

61 (2013) 9 SCC 566, AIR 2013 SC 2741.

62 *Dev Dutt v. Union of India and others* (2008) 8 SCC 725, AIR 2008 SC 2513.

63 The communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. On being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR and communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice.

64 Supreme Court overruled its following earlier judgments: *Satya Narain Shukla v. Union of India and others*, (2006) 9 SCC 69, AIR 2006 SC 2511, and *K.M. Mishra v. Central Bank of India and others*, (2008) 9 SCC 120, AIR 2009 SC 1114.

65 *Avtar Singh v. State*, AIR 2013 P&H 192.

66 *K. K. Sharma v. State*, AIR 2013 P&H 198.

information as they are personal in nature. The information has no relationship to any public activity and if parted with will certainly lead to the unwarranted invasion of the privacy of a Government servant.⁶⁷

The Punjab and Haryana High Court observed that the conflict between the right to personal privacy and the public interest in the disclosure of personal information stands recognized by the legislature in terms of exempting purely personal information under section 8(1)(j). Under such exemption clause, the disclosure may be refused if the request pertains to personal information, the disclosure of which has no relation to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual. Thus, personal information including tax returns/medical records are not liable to be disclosed.⁶⁸ Disclosure was sought regarding name of agency which had conducted Additional District and Sessions Judge Examination. The Court observed that such information would cause inroad into privacy of not only examiners, but also evaluators, invigilators etc. Disclosure was held exempted under section 8(1)(j) as conduct of examination is not mere public activity rather it is sacrosanct process, based on the touchstone of confidentiality and purity.⁶⁹

Recently, the Supreme Court has held that RBI is not in any fiduciary relationship with the banks. Analyzing the duties of the RBI, the Court held that it is supposed to uphold public interest and not the interest of individual banks, and has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. In fact, RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus RBI ought to act with transparency and not hide information that might embarrass individual banks. The Financial institutions have an obligation to provide all the information to the RBI and such an information shared under an obligation/ duty cannot be considered to come under the purview of being shared in fiduciary relationship. One of the main characteristic of a fiduciary relationship is 'Trust and Confidence' which is lacking. The RBI was thus held liable to provide

67 Shrikant Pandya v. State, AIR 2011 MP 14.

68 K. K. Sharma v. State, AIR 2013 P&H 198, relying on Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

69 Joint Registrar (Judicial)-cum-Public Information Officer, High Court of Judicature at Patna v. State, AIR 2010 Pat 176.

information regarding inspection report and other documents to the general public.⁷⁰

Third Party Information

On the importance of the salutary provision of section 11, the Delhi High Court in *R. K. Jain v. Union of India and Anr.*,⁷¹ held that procedure under section 11 (1) is mandatory and has to be followed which includes giving of notice to the concerned officer whose ACR was sought for. If that officer pleads private defence, such defence has to be examined while deciding the issue as to whether the private defence is to prevail or there is an element of overriding public interest which would outweigh the private defence. Also where the applicant did not specify documents in respect of which information was sought, the High Court agreed with the Commissioner that providing information on basis of such vague request without hearing third party and without considering his objections was not proper.⁷² Information relating to third party cannot be supplied without hearing him and without joining him as party respondent. If such information is ordered to be supplied without hearing third party, third party would be losing his right to prefer first appeal under section 19 of Act and second appeal under section 19(4) and therefore third party ought to be joined as party respondent.⁷³ But in a Bombay case where the information sought was concerning Memorandum of Understanding to which the Government of Maharashtra was also a party, such information was held not to be exclusively related to third party and the order of the Commissioner directing to provide such information without hearing third party was held justified.⁷⁴ Applicant was interviewed by a Board and she subsequently requested for supply of certain information even when the result was not declared. On refusal, the

70 *Reserve Bank of India v. Jayantilal N. Mistry*, AIR 2016 SC 1.

71 AIR 2013 Del 2, applicant sought information about some entries made in the ACR of a member of CESTAT and the follow up action. On refusal, writ petition was filed which was disposed of by remitting the matter back to the CIC to consider afresh after following the procedure prescribed in s 11. The inter court appeal filed by the applicant was also dismissed.

72 *Sunflag Iron and Steel Company Ltd., Nagpur v. State Information Commission, Nagpur and Ors.*, AIR 2015 Bom 38.

73 *High Court of Gujarat v. State Chief Information Commission and Anr.*, AIR 2008 Guj 37.

74 *Sunflag Iron and Steel Company Ltd., Nagpur v. State Information Commission, Nagpur and Ors.*, AIR 2015 Bom 38.

High Court disagreed holding that even where final decision in any ongoing process had not been taken, those portions of file which do not affect any secrecy could be disclosed.⁷⁵ When an information seeker files an application which relates to or has been supplied by third party, the PIO has to examine whether the said information is treated as confidential or can be treated as confidential by the third party. If the answer is in the possible sphere of affirmative or "maybe yes", then the procedure prescribed in section 11 has to be followed for determining whether the larger public interest requires such disclosure. When information per se or ex facie cannot be regarded as confidential, then the procedure is not to be followed. All information relating to or furnished by a third party need not be confidential for various reasons including the factum that it is already in public domain or in circulation, right of third party is not affected or by law required to be disclosed; etc.⁷⁶

Administrative and not Judicial Function

Regarding the nature of the work of the Information Commissions, the earlier view of the Courts was that it was a quasi judicial and not merely an administrative one.⁷⁷ Overruling its earlier position, the Supreme Court in *Namit Sharma (II)*⁷⁸ observed that under section 18, the Information Commission has the power and function to receive and inquire into a complaint from any person who is not able to secure information from a public authority, under section 19 it decides appeals against the decisions of the Central Public Information Officer or the State Public Information Officer relating to information sought by a person, and under section 20 it can impose a penalty only for the purpose of ensuring that the correct information is furnished to a person seeking information from a public authority. Hence, the functions of the Information Commissions are limited to ensuring that a person who has sought information from a public authority in accordance with his right to information conferred under Section 3 of the Act is not denied such information except in accordance with the provisions of the Act. Section 2(j) defines "Right to Information" conferred on all citizens under Section 3 of the Act to mean the right to

75 Smt. Supriya Das v. State of Tripura and Ors., AIR 2015 Tri 33.

76 Arvind Kejriwal v. Central Public Information Officer and Anr., AIR 2012 Del 29.

77 Namit Sharma v. Union of India, AIR 2012 SC (Supp) 867.

78 AIR 2014 SC 122.

information accessible under the Act, "which is held by or under the control of any public authority". While deciding whether a citizen should or should not get a particular information "which is held by or under the control of any public authority", the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority. This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions.⁷⁹

79 The Supreme Court recalled the directions and declarations given in *Namit Sharma v. Union of India*, AIR 2012 SC (Supp) 867 with the following:

- (i) Sections 12(5) and 15(5) of the Act are not ultra vires the Constitution.
- (ii) Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner.
- (iii) Only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment as Information Commissioner and Chief Information Commissioner.
- (iv) Persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.
- (v) Committees under Sections 12(3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.
- (vi) Wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.

The constitutional principles of separation of powers and independence of judiciary have been held not applicable in the appointment of the Information Commissions. The Supreme Court has now held that the Information Commissions need not be manned by persons with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court. Distinguishing the RTI Act from other Acts creating tribunals, it observed that in other cases when judicial powers vested in the High Court were sought to be transferred to tribunals or judicial powers were vested in tribunals by an Act of the legislature, the Supreme Court had insisted that such tribunals be manned by persons with judicial experience and training, such as High Court Judges and District Judges of some experience.⁸⁰

By the impugned order, the High Court had allowed the writ petition preferred by a respondent S.Vijayalakshmi whereby the notification appointing the State Information Commissioners was quashed on the ground that the manner in which the date for convening the Meeting of the Selection Committee was fixed and the decision of the Committee recommending respondents for appointment as State Information Commissioners was wholly arbitrary, capricious and against the methodology to be followed in the matter of such appointments. The Supreme Court observed that the High Court ought to have decided the question relating to the nature and scope of consultation with the Leader of Opposition in matters relating to the appointment of Information Commissioner of a State as envisaged under Section 15(3) of the Right to Information Act and was also required to decide the effect of selection, in case of Opposition Leader without any valid reason chosen not to attend the meeting or refused to attend the meeting and in such case whether such selection/appointment can be held to be vitiated for non-consultation. After setting aside the order passed by the High Court, the matter was remitted back to the High Court for fresh decision on merit.⁸¹

Powers, Appeal and Penalty

Section 18 deals with the powers and functions of the Information Commissions. The Courts have given a restrictive interpretation to the

80 Union of India v. Namit Sharma, AIR 2014 SC 122.

81 C. Manoharan v. S. Vijayalakshmi & Ors., Civil Appeal No. 1790 of 2014, dated January 31, 2014, Supreme Court of India.

power of the Commissions to receive and enquire into complaints directly. According to the prevailing judicial view, the Information Commission is an appellate body and can hear appeals under section 19 of the Act. Regarding the power of the Commission under section 18, the Manipur High Court has observed that on refusal or non-providing of information by the PIO, complaint preferred under S. 18 cannot give the Commission power under S. 18 to provide access to information sought but can only order penalty. Thus order passed by Information Commission directing furnishing of information sought by complainant was set aside.⁸² The Supreme Court has observed that the obligation under the RTI Act is only to make available or give access to existing information or information which is expected to be preserved or maintained. If the rules and regulations governing the functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information will be entitled to such information only if he seeks the information when it is available with the public authority. The power of the Information Commission under section 19(8) to require a public authority to take any such steps as may be necessary to secure compliance with the provision of the Act, does not include a power to direct the public authority to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority.⁸³

On the interpretation of penalty provisions, various High Courts have observed that in cases mentioned in section 20(1), it is the duty of the Commission to impose a Rs. 250 daily penalty till the application for information is received or the information is given and the total penalty amount should not exceed Rs. 25,000. The Calcutta High Court observed that the proportionality principle based on the gravity of the proven charge concept cannot apply to a case under section 20 as that would amount to unauthorised reduction of the penalty amount. A section 20 case can be a case of penalty or no penalty, but not a case of reduced penalty.⁸⁴ Again there is no provision in the Act which empowers the Commission to either reduce or enhance penalty. If the Commission comes to the conclusion that

82 Board of Secondary Education, Manipur and Anr. v. State Chief Information Commissioner, Manipur and Ors., AIR 2015 Manipur 19, relying on AIR 2012 SC 864.

83 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

84 Madhab Kumar Bandhopadhyay v. State, AIR 2013 Cal 128.

there are reasonable grounds for delay or that the PIO concerned has satisfactorily explained the delay then no penalty can be imposed. Otherwise the penalty has to be levied as per the provisions of the Act.⁸⁵ Where the Information Commissioner showed some degree of leniency in imposing the penalty and the findings were based on evidence and after affording the petitioner a reasonable opportunity of being heard, the writ court refused to interfere.⁸⁶

The reason for delay in providing the information that entire staff of Municipal Board was engaged in collection of data, preparation of voter identity cards under order of Collector and was busy in rescue work after the natural calamity, was held reasonable. Moreover at the time of appeal, the appellant had already received the information, thus imposition of penalty on the ground that information was not supplied within thirty days was held unjustified and arbitrary.⁸⁷ In another case a file allotting space for a kiosk was not supplied as the file was lost for which FIR had been filed. The Court observed that as the loss caused to applicant was because of removal of kiosk and not because of non-supply of required information, damages and penalty were held not proper.⁸⁸ Where the Commission directed an Institute to designate PIO and First Appellate Authority in respect of the Institute and also provide certain information to the applicant, on non-furnishing of all the information, the Commission issued show cause notice to the Principal of the Institute calling upon her as to why contempt proceedings should not be initiated against her. As the Institute was subsequently brought under the ambit of the Act through an order passed by the State Government, on the concession made by the State that the Commission had no jurisdiction to pass the impugned order, the High Court quashed the order.⁸⁹

Interpreting section 20(2) of the Act, the Supreme Court in *Manohar Manikrao Anchule v. State of Maharashtra and Anr.*,⁹⁰ observed that every

85 Sanjay Hindwan v. State, AIR 2013 HP 30.

86 Johnson B. Fernandes v. Goa State Information Commission, Panaji, Goa and Anr., AIR 2012 Bom 56.

87 Narender Kumar v. The Chief Information Commissioner, Uttarakhand, AIR 2014 Uttarakhand 40.

88 Nagar Nigam, Dehradun v. Chief Information Commissioner and Anr., AIR 2015 Uttarakhand 118.

89 Principal, Nirmala Institute of Education, Goa v. State, AIR 2013 Bom 28.

90 AIR 2013 SC 681.

default on the part of the concerned officer may not result in issuance of a recommendation for disciplinary action. The case must fall in any of the specified defaults and reasoned finding has to be recorded by the Commission while making such recommendations. 'Negligence' per se is not a ground on which proceedings under Section 20(2) of the Act can be invoked. The Commission must return a finding that such negligence, delay or default is persistent and without reasonable cause. It is a penal provision as it vests the delinquent with civil consequences of initiation of and/or even punishment in disciplinary proceedings.⁹¹ Information was sought about the basis on which teachers were appointed on the post reserved for handicapped persons. The petitioner neither supplied the required information nor he made any such statement that the said teacher was appointed without any handicap certificate issued by the government. The petitioner concealed the necessary facts and did not comply with the specific repeated directions of the Commission and absented himself on the dates fixed in the case and the Commission was thus held justified in passing the impugned order against the petitioner.⁹²

In *Nagar Nigam, Dehradun v. Chief Information Commissioner and Anr.*,⁹³ the Chief Information Commissioner in the impugned order had held that lodging of an FIR for a missing file was no ground for non- supply of

91 The Supreme Court further observed that all the attributable defaults of a Central or State Public Information Officer have to be without any reasonable cause and persistently. Besides, the finding that any of the stated defaults have been committed by such officer, the Commission has to further record its opinion that such default in relation to receiving of an application or not furnishing the information within the specified time was committed persistently and without a reasonable cause. There could be cases where there is reasonable cause shown and the officer is able to demonstrate that there was no persistent default on his part either in receiving the application or furnishing the requested information. In such circumstances, the law does not require recommendation for disciplinary proceedings to be made. It is not the legislative mandate that irrespective of the facts and circumstances of a given case, whether reasonable cause is shown or not, the Commission must recommend disciplinary action merely because the application was not responded to within 30 days, the Central or the State Commission have no jurisdiction to add to the exhaustive grounds of default mentioned in the provisions of Section 20(2). The case of default must strictly fall within the specified grounds of the provisions of Section 20(2). This provision has to be construed and applied strictly. Its ambit cannot be permitted to be enlarged at the whims of the Commission.

92 Lakshmi Narayan Singh v. State, AIR 2011 Pat 32.

93 AIR 2015 Uttarakhand 118.

information or non-supplying of file for perusal of the applicant and thus applicant should be paid compensation as well as penalty should be paid by the guilty officer. But the High Court held that penalty could be imposed under section 20 (2) only when information was supplied with undue delay without there being any sufficient reason or information was declined to be supplied without any sufficient reason. As the file was not made available for inspection as the same was missing and FIR had already been lodged, therefore, non- furnishing of file for perusal was justified and consequently penalty ought not to have been imposed.

Overriding Effect of the Act

Section 22 has been interpreted by different courts under various circumstances. When information is accessible to a public authority and is held or under its control, then the information must be furnished to the information seeker under the RTI Act, even if there are conditions or prohibitions under another statute already in force or under the Official Secrets Act that restricts or prohibits access to information to public. Prohibition or conditions which prevent a citizen from having access to information in view of the non obstante clause in Section 22 of the RTI Act do not apply. Regarding the issue whether the examinee is entitled to inspect his evaluated answer-books or take certified copies thereof, the Supreme Court observed that the right is claimed by the students, not with reference to the rules or bye-laws of examining bodies, but under the RTI Act which enables them and entitles them to have access to the answer books as 'information' and inspect them and take certified copies thereof. Because of section 22, the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. Unless, the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of section 8(1), the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations.⁹⁴

When access to information by a public authority itself is prohibited or is accessible subject to conditions, then the prohibition is not obliterated and the pre-conditions are not erased. Section 22 of the RTI Act is a key which

94 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

unlocks prohibitions/limitations in any prior enactment on the right of a citizen to access information accessible to a public authority. It is not a key with the public authority that can be used to undo and erase prohibitions/limitations on the right of public authority to access information.⁹⁵ But the Punjab and Haryana High Court has recently held that marked copy of voters list which was sealed under Election Rules at time of declaration of result cannot be supplied to the applicant under the Act as Section 22 has no overriding effect on Haryana Panchayati Raj Act, 1994 and the corresponding Haryana Panchayati Raj Election Rules. Thus the State Public Information officer has no right to access documents under the relevant Election Rules.⁹⁶

Miscellaneous

Section 24 of the Act exempts certain intelligence and security organizations from the application of the Act. Where information pertaining to the applicant's service record was sought from Defence Research and Development Organisation (DRDO), a Central Government Organisation which was exempted from providing information as per section 24(1), DRDO was held not compelled to supply required information.⁹⁷ The State Government is empowered under section 24(4) to notify in the Official Gazette that nothing contained in the Right to Information Act shall apply to such intelligence and security organization being organizations established by the State Government. But the power to exempt from the provisions of the Act is not available to the State Government even in case of intelligence and security organizations in

95 Election Commission of India v. Central Information Commission and Others, 2009 (164) DLT 205.

96 Block Development and Panchayat Officer v. State Information Commissioner and Anr., AIR 2015 P&H 191, agreeing with the Delhi High Court's observation in Election Commission of India v. Central Information Commission and Others, 2009 (164) DLT 205 that as per the Election Rules, once the ballot papers or control unit or EVMs is sealed, no one can have any access to the same except on an order passed by a competent court. Even the Election Commission does not have right to access the control unit of the EVMs, to encode or download and re-examine the data without permission of the competent court. There is a prohibition and/or restriction on the right of the public authority to have access to the information. Satisfaction of the conditions for encoding and downloading of data stored in the control unit is mandatory before the said information is said to be held by or under the control of the Election Commission of India.

97 Dr. Neelam Bhalla v. Union of India and ors., AIR 2014 Del 102.

respect of the information pertaining to the allegations of corruption and human rights violations. The information sought was the particulars relating to the number of investigations completed and the number and name of persons convicted, the post held by them when the act of corruption was done, the charges framed and the recommendations given to the Vigilance Commissioner after investigation. The Madras High Court observed that all these particulars related to corruption and hence the Government Order prohibiting the application of the Act had no application in the present case.⁹⁸

The Act does not prohibit providing of fees for filing first or second appeal and hence relevant Rules of Chhattisgarh Right to Information (Appeal) Rules (2006) providing for charging fees for first and/or second appeal neither contravenes any provision of Act nor is it beyond rule making power.⁹⁹ Also Rule 3 of Chhattisgarh Right to Information (Submission of Application) Rules (2009) merely envisages filing of separate applications for seeking information in more than one subject. The rule does not bar seeking information in more than 150 words, it merely provides that normally it should be done in less than 150 words, so that information is sought in concise words does not prohibit seeking of information in more than one subject. The rule was thus held valid.¹⁰⁰ The Karnataka High Court has observed that information relating to assets and liabilities statements of MLAs and MLCs cannot be construed as relating to one subject-matter and hence cannot be disclosed in single application.¹⁰¹

The Central Information Commission in its various orders has clearly held that the Information Commission has no power to examine the legality of any Rule. Also it is not within the purview of the Commission to examine the manner in which a competent authority in exercise of its powers to frame Rules under Section 28 of the RTI Act has drawn such Rules. Thus the State Information Commission had no power to examine the legality and validity of the Meghalaya High Court (RTI) Rules, framed by the

98 Superintendent of Police, Central Range Office of the Directorate of Vigilance and Anti-Corruption, Chennai v. R. Karthikeyan and Anr., AIR 2012 Mad 84.

99 Sanjay Singh Thakur v. State of Chhattisgarh and ors., AIR 2014 Chhattisgarh 65.

100 Ibid.

101 Registrar, Office of the Karnataka Lokayukta, Bengaluru v. Karnataka Information Commission, Bengaluru and anr., AIR 2014 Kar 68, case on Karnataka Right to Information Rules (2005).

competent authority and the High Court can quash the appeal pending before the State Chief Information Commissioner who has no jurisdiction to decide the issue.¹⁰²

Conclusion

As more and more orders of the Commissions come before the writ courts for scrutiny, the courts are analyzing the provisions of the Act and expounding the law. The Supreme Court has also in the last few years delivered few important judgments in this field. Scope of 'Public Authority' is now quite wide unlike few years back when the scope was limited. The courts do not disturb the orders of the Commissions lightly. As has been aptly held by the Supreme Court, the Act seeks to bring about a balance between two conflicting interests. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability.

Citizens' right to get information is statutorily recognized by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble of the Act. The provisions of RTI Act should be enforced strictly and all efforts should be made to disclose as much information as possible. But importance and emphasis will have to be given to other public interests like confidentiality of sensitive information, fiduciary relationships, efficient operation of governments and right to privacy too.

* * * * *

102 B. Bhattacharjee v. The Appellate Authority, High Court of Meghalaya, Shillong and Ors., AIR 2016 Meghalaya 1.

AMBIT OF RIGHT TO INFORMATION ACT, 2005 - WIDE ENOUGH TO COVER PRIVATE AIDED COLLEGES ?

Anjana Girish*

Abstract

This paper is a critical analysis of the judgment rendered by the Hon'ble High Court of Kerala in the case of V.S. Lee, Principal v. State of Kerala, represented by chief, the State Information Commission and The Registrar, University of Kerala¹ Connected cases, wherein the Court was called upon to examine whether an aided private college in the State of Kerala would be a 'public authority' as defined in Section 2 (b)(d) of the Right to Information Act, 2005 so as to attract the applicability of the provisions of the said Act to these institutions. The Right to Information Act, 2005 is based on the right to information recognized by judicial decisions as part of the fundamental right to free speech and expression under Article 19 (1)(a) of the Constitution. A perusal of the scheme of the Act and the statement of objects and reasons leave no doubt that the legislature by this Act intended to hold Government and Government instrumentalities alone accountable to the governed. Accordingly, the instrumentality as falling within the definition of 'public authority' has to be understood as only an instrumentality of the Government and has to be one over which the appropriate Government has deep and pervasive control. Therefore, if an institution is not an instrumentality in terms of Article 12 of the Constitution of India, it cannot be brought within the definition of 'public authority' under the Act.

Introduction

Private aided colleges in the State are not owned or controlled by the Government. The administration is in the hands of a manager elected by the educational agency. The governing body is free from governmental control in the discharge of its functions. All the employees including the principal and teachers are employees of the colleges and all of them are appointed by and on behalf of the Colleges and the Government has no say or control over it. These Colleges are not 'substantially financed' by funds provided by the appropriate Government. The inclusiveness provided by Section 2 (h) of the Act does not enlarge the scope of the earlier limb of the definition in as much as what is added in as inclusions should be read by applying the rule of construction: *noscitur a sociis*, which means that the meaning of a word is to be judged by the company it keeps as well as the rule of *eiusdem generis*. The elements brought into the definition of public

*Assistant Professor, Inter University Center for IPR Studies, Cochin University of Science and Technology.

authority by using the legislative device 'includes' should be read to be compatible with what is provided for in the earlier limb. Therefore a body owned, controlled or substantially financed or a non governmental organization substantially financed directly or indirectly by funds provided by the appropriate Government can fall within the definition of 'public authority' under the RTI Act, only if it is one established or constituted by notification issued or order made by the appropriate government. These Colleges would not be 'public authority' under the Act as they are neither established or constituted by or under the Constitution of India or by any law made by Parliament or State Legislature, nor by Notification issued or order made by appropriate Government. It is neither a body owned, controlled or substantially financed by the Government, nor is a Government organization. The critical analysis of the judgment rendered by the Hon'ble High Court of Kerala in the case of *V.S. Lee, Principal v. State of Kerala*¹, which upheld the aforesaid position of law follows.

Brief facts of the case

The Kerala State Information Commission vide letter No. 1084/SIC-Gen/06 intimated all the Universities in Kerala to furnish details of Government colleges and aided colleges under the Universities along with the details of name and designation of the Assistant public information officers and public information officers appointed by the Colleges under the provisions of the Right to Information Act, 2005. Pursuant thereto, the universities issued letters to the principals of the colleges affiliated to the universities calling upon them to furnish the name and designation of the Public Information Officer and Assistant Public Information Officer of the Colleges, directly to the Kerala State Information Commission with intimation to the university on or before 15.05.2006. The explanations submitted by the colleges that they do not fall within the ambit of the Act of 2005 came to be rejected by the Kerala State Information Commission stating that these private aided Colleges are controlled and substantially financed by the Government of Kerala and they are public authorities as defined in Section 2 (h) (d) (i) of Act 22 of 2005. Accordingly, the colleges were once again directed to designate officers for the posts of Assistant Public Information Officer, Public Information Officer and Appellate Authority as per the RTI Act within 10 days, notify the same and intimate the particulars for consideration of the Commission. The Colleges preferred various Writ Petitions before the Hon'ble High Court of Kerala

challenging the directions of the Kerala State Information Commission and also praying for a declaration that the Colleges are not public authorities as defined in Section 2 (h) of the Act and also to restrain the authorities from enforcing the provisions of the Act against the Colleges.

Issues

- 1) Whether an aided private college in the State of Kerala would be a 'public authority' as defined in Section 2 (h) (d) of the Right to Information Act, 2005 so as to attract the applicability of the provisions of the said Act to these institutions?
- 2) In the case of an aided college established by a minority, whether the interpretation given by the Hon'ble High Court that colleges without substantial state control are not government entities, would be violative of the fundamental right guaranteed under Articles 19 (1) (g), 26 (a) and 29 of the Constitution of India?

Judgement

All the writ Petitions were heard together and the learned Single Judge vide common judgment and order dated 04.07.2007 dismissed all the writ petitions holding that these colleges are public authorities as defined in Section 2 (h)(d) of the Right to Information Act, 2005. Appeals preferred by the Colleges came to be dismissed by the Division Bench of the Hon'ble Court.

Ratio of the case

Only where there is ample and unimpeachable evidence to conclude that the private aided colleges are 'in fact' substantially financed by the Government, would they fall within the definition of 'public authority' as contained in Section 2 (h) of Act of 2005. To delve upon this it has to be further examined if apart from the day to day and managerial expenses, other expenses including the infrastructure facilities such as providing class room with modern facilities, electronic equipment, play grounds, sports infrastructure, computerized laboratory and libraries, computer facilities and various other facilities in tune with the modern day requirements are all provided with aid or funding from the Government or is left to the college Management itself without any support from the government.

Analysis by the author

The Right to Information Act is based on the right to information recognized by judicial decisions as part of the fundamental right to free speech and expression under Article 19 (1)(a) of the Constitution. The said Act was enacted in 2005 to provide for information to citizens under the control of Public Authority. A perusal of the scheme of the Act and the statement of objects and reasons leave no doubt that the legislature by this Act intended to hold Governments and Government instrumentalities alone accountable to the governed.

The judgment raises a very substantial question of law as to whether a private aided college established in the State of Kerala is not a 'public authority' as defined under Section 2 (h) of the Right to Information Act, 2005? Section 2 (h) of the Act of 2005 defines public authority as :

- (h) *"public authority" means any authority or body or institution of self-government established or constituted—*
 - (a) *by or under the Constitution;*
 - (b) *by any other law made by Parliament;*
 - (c) *by any other law made by State Legislature;*
 - (d) *by notification issued or order made by the appropriate Government, and includes any—*
 - (i) *body owned, controlled or substantially financed;*
 - (ii) *non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.*

It appears that private aided Colleges in the State of Kerala are neither established nor constituted by or under the Constitution of India or by any law made by Parliament or State Legislature, nor by Notification issued or order made by appropriate Government. They are neither bodies owned, controlled or substantially financed by the Government, nor are they Government organizations. Moreover the expression 'non Government organizations substantially financed' has to be read in consonance with the earlier part of the definition which means an organization established or constituted under the Constitution, law made by Parliament or State Legislature. This is not the scenario in the case of these Colleges. While the

section makes it sufficient that the authority/body is established 'by' or 'under' the Constitution, it mandates that it has to be established 'by' any law made by the Parliament or State Legislature. It is not sufficient that it is established 'under' the law. This assumes importance because it is only the university alone which is established 'by' the University Act and these colleges are not authorities/bodies established or constituted 'by' the University Act. Nor are they establishments issued on order made by the appropriate Government. The intent and importance is to the establishment and the constitution and not its running. It further appears that most of the Colleges have been established by Societies/Trust and therefore would be beyond the ambit of the above definition. The definition of 'Public Authority' can have no wider meaning than 'the State' under Article 12 of the Constitution of India, especially when the right to information stems from Article 19 of the Constitution which can be enforced only against a 'State' as contained in Article 12. It has been held by the Hon'ble Supreme Court in a plethora of cases² that the Right to Information Act is based on the 'right to information' recognized by judicial precedents as part of the fundamental right to speech and expression guaranteed by Article 19 (1)(a) of the Constitution. Fundamental rights can be enforced only against the Government, government agency or government instrumentality. Thus what is to be primarily seen is whether the establishment/ institution satisfies all the requirements so as to become any of the above so as to attract the said Article. One needs to understand the difference between the phrases 'substantially financed' and 'financially controlled'. The phrase 'substantially financed' is an expression used for the provision of finances at the time of Constitution and establishment of the Institution. Attention is invited to the judgment of the Hon'ble Supreme Court in *Mysore Paper Mills Ltd v. Mysore Paper Mills Officers Assn*³ wherein the Court held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removed at the instance of the Government and carrying on important functions of Public Interest under the control of the Government alone will become 'an authority' within the meaning of Article 12. The same criteria has to be necessarily applied to determine if a body is a public authority for the purpose of the Act of 2005.

2 See *Namit Sharma v. Union of India* (2013) 1 SCC 745. Paras 24 to 41.

3 (2002) 2 SCC 167. Para 12.

The Hon'ble Supreme Court in the case of *Chander Mohan Khanna v. National Council of Educational Research and Training and Ors.*⁴ after considering the memorandum of association and rules came to the conclusion that NCERT was largely an autonomous body and its activities were not wholly related to Governmental functions and the governmental control was confined only to the proper utilization of the grants and since its funding was not entirely from government sources, the case did not satisfy the requirements of State under Article 12. If one was to adopt the same parameters, the real and prime question to be answered is whether private aided colleges which receive meager grant-in-aid from the Government, and where there is no other financial aid or funding from the Government and almost all the expenses are met by the college from its own funds, is it appropriate in law to proceed on the basis that the College is substantially financed by the Government. A reading of the judgment does not reflect that there is any aid from the government to these aided colleges under any of these heads and therefore the decision to categorise them as substantially financed by the Government may need a revisit.

The Hon'ble Supreme Court in the case of *Thalappalam Co-operative Society v. State of Kerala & Ors*⁵ held:

Merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist. The State may also float many schemes generally for the betterment and welfare of the cooperative sector like deposit guarantee scheme, scheme of assistance from NABARD etc., but those facilities or assistance cannot be termed as "substantially financed" by the State Government to bring the body within the fold of "public authority" under Section 2(h)(d)(i) of the Act".⁶

This leads to another question of vital importance as to whether in order to attract Section 2 (h) of the Act, there has to be deep and pervasive state Control over the institution. It is without any doubt that these private aided Colleges are not owned or controlled by the Government. The

4 AIR 1992 SC 76. Paras 4, 5 & 10.

5 (2013) 16 SCC 82. Paras 46 to 48.

6 Ibid., Para 38.

administration is in the hands of a manager elected by the educational agency. The governing body is free from governmental control in the discharge of its functions. Also, all the employees including the principal and teachers are employees of the college and all of them are appointed by and on behalf of the College and the Government has no say or control over it. It is also a fact that these colleges maintains complete records of the staff, their personal files, account of PFs, gratuity, leave encashment, etc. Further, these colleges have a set of well defined rules and regulations for the management and administration, especially financial and accounting. These rules have consistently stood the test of scrutiny by Courts in various cases. The financial support from the Government is without any unusual control. The entire fee collected by the College is remitted to the Government. The presence of a government representative in the select committee of the teaching staff or the conditions of affiliation in the University rules cannot be determinative of whether the College is Government controlled. But it appears that the Hon'ble High Court has considered only one limb of the definition namely the financial aid from the Government. i.e. the salary of the teachers. This, in law, alone is not sufficient to attract Section 2 (h). In the absence of any deep and pervasive state control, to categorise these colleges as 'public authorities' wouldnot be contrary to law.

It is also necessary that the words "controlled or substantially financed" has to be read along with the principal part in Section 2 (h) (d) and in the light of the long title and preamble as well as the statement of objects and reasons of the Act.

The statement of objects and reasons of the Act reads thus:

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

WHEREAS the Constitution of India has established democratic Republic;

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold

Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS; it is necessary to harmonise these conflicting interests while preserving the paramourcy of the democratic ideal;

NOW, THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

A reading of the above reflects that the predominant intention of the legislature in enacting the Act is to hold Governments and its instrumentalities accountable to the governed. Therefore, to make a private body amenable to the provisions of the Act and thereby restrict its autonomy would be contrary to the intention of the legislature and any such interpretation would be traveling beyond the scope and ambit of the legislation.

The Hon'ble Supreme Court in the case of *TMA Pai*⁷ held that the right to establish and administer the colleges/ schools is a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India and this right cannot be taken away or infringed by the State except in accordance with Article 19 (6). The Court further held that maximum/ complete autonomy in the matter of administration is required to be given to these institutions. Most importantly the Hon'ble Supreme Court held that the State should restrict its interference in the working of educational institutions only to the matter concerning the standards of education. The effect of the impugned judgment is that it wrongly classifies the private aided colleges as 'public authority' and thereby denude them of their autonomy and independency. Such an interpretation would be contrary to the judgments of the Hon'ble Supreme Court recognizing the autonomy and self governance of these institutions. However, if one were to assume that the condition to disclose information is attached to the conditions of receiving financial aid, still the same would be a case of excessive restriction on the rights of these aided institutions which cannot stand the test of reasonableness. Mere performing of public functions does not make an

7 TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 para 25.

entity/body a public authority. Any such interpretation would be widening the scope and width of the definition of 'public authority' as is defined in Section 2 (h) of the Act of 2005.

The judgment also raises another question of vital importance as to where an aided college established by a minority, whether the interpretation given by the Hon'ble High Court would be violative of the fundamental right guaranteed under Articles 19 (1) (g), 26 (a) and 29 of the Constitution of India. In the present case, some of the colleges are seen established by the religious wing of the Sree Narayana Dharma Paripalanam which is a religious denomination and therefore has the fundamental rights under Article 26 (a) of the Constitution to establish and maintain institutions for charitable purposes. The matters in respect of which the state authorities can regulate this fundamental right is provided by the said Article itself, and no such limitation not provided therein can be imposed. If the interpretation given by the Hon'ble High Court as to the meaning of public authorities is accepted, the provisions of RTI Act of 2005 and orders of state authorities would impose such restrictions which are alien to Article 26 and hence would be violative of the fundamental right guaranteed under Article 26 (a) of the Constitution of India. The Constitution of India guarantees a fundamental right under Article 29 (1) to all sections of citizens having distinct culture, language and script to establish educational institutions to conserve their distinct language, script or culture. There is no restriction on this right except as provided in Article 29 (2). Any interpretation which seeks to classify the minority run aided institution as 'public authority' would be restricting, limiting and interfering with the rights and autonomy guaranteed by Article 29 (1) and hence unconstitutional.

Impact of the case

The judgment has upheld the independence and autonomy of private educational institutions guaranteed by the Constitution of India. Limited supervisory control by the State cannot denude these institutions of their autonomous character so as to subject them to the rigor of the Act of 2005. Hence, the exclusion of such private educational institutions which are not substantially financed or controlled by the government from the

ambit of the Right to Information Act, 2005, is a welcome move as far as the independence of such educational institutions is concerned. At the same time it needs to be remembered that there are other governmental regulators which regulate the activities of such private education institutions, hence we cannot say that excluding an entity from the ambit of RTI would completely exclude the regulatory scrutiny of such institutions by the government.

* * * * *

DISCLOSURE OF INFORMATION IN CUSTODY OF FINANCIAL INSTITUTIONS: RESERVE BANK OF INDIA V. JAYANTILAL N MISTRY

*Sindhu Venkata Reddy**

Abstract

The regulatory regime in India is a complex system with multiple regulators set up for promoting “healthy and orderly development” and to “prevent malpractices” of private organizations such as companies, banks, stock markets etc. This healthy development is very closely related to the principle of transparency enshrined under the Right to Information Act, 2005 (“RTI Act”). It is however the case that even after the enactment of the RTI Act, government authorities and regulatory bodies have held back the information sought for, claiming the grounds of exemption under Section 8(1) of the RTI Act or on the grounds of holding the information in a fiduciary capacity. However, the ground of “fiduciary relationship” cannot be used anymore as in a recent judgement, Reserve Bank of India v. Jayantilal N Mistry (decided on December 16, 2015), the Supreme Court made it mandatory for the Reserve Bank of India (“RBI”) to disclose information about banks under the RTI Act. The aforesaid revolutionary judgement has been critiqued below.

Introduction

The Supreme Court in the case of *Reserve Bank of India v. Jayantilal N. Mistry*¹ came down heavily on the Reserve Bank of India (RBI for short) for depriving information under the RTI Act, 2005 in the name of fiduciary relationship between itself and the banks, the Supreme Court has in the aforesaid landmark decision declared that RBI does not place itself in a fiduciary relationship with the financial institutions because, the reports of the inspections, statements of the bank, information related to the business obtained by the RBI are not under the pretext of confidence or trust. In the aforesaid case, the Apex Court was considering a batch of transferred cases from various High Courts wherein the order passed by the Central Information Commission (CIC) directing the RBI to furnish the Information sought to the applicants under the RTI Act. Following, is the analysis of the aforesaid landmark judgment.

*Former Associate of Majmudar & Partners, Bengaluru.

1 2015 SCC Online SC 1326, Judgment rendered by the Hon’ble Supreme Court of India at New Delhi.

Facts

The respondent sought information regarding various financial institutions separately from RBI by filing multiple applications under the Right to Information Act, 2005. The respondent sought the aforesaid information on account of the suspension of operation of his trading account. RBI replied back saying that the aforesaid information cannot be released *interalia* because the disclosure of the information in the scrutiny report is held in fiduciary capacity and the disclosure of the same can affect the economic interest of the country and also affect the commercial confidence of the bank. It also gave the reason that such information is also exempt from disclosure under Section 8(1) (a) & (e) of the RTI Act, 2005. It was also reasoned that apart from the fact that information sought by the appellant is sensitive and cannot be disclosed, it could also harm the competitive position of the co-operative bank.

The respondent approached the Chief Information Commission which ordered RBI to disclose the aforesaid information as a result of Section 8(2) of the RTI Act, which mandated the disclosure of the relevant information.

Being aggrieved by the order of the appellate authority, RBI, moved second appeal before the CIC, who by the impugned order directed the CPIO of RBI to furnish information pertaining to Advisory Notes as requested by the respondent within a few days. RBI approached the respective high courts of Delhi and Bombay by way of writ petition being aggrieved by the decision of the Central Information Commission (CIC). The High Court, while issuing notice, stayed the operation of the aforesaid orders. Various transfer petitions were, therefore, filed seeking transfer of the writ petitions pending before different High Courts. The Supreme Court allowed the transfer petitions filed by Reserve Bank of India, which sought the various writ petitions filed by it in the High Courts of Delhi and Bombay. Aggrieved by the order issued by the High Court, RBI moved the Supreme Court.

Issues

- a) Whether all the information sought for under the Right to Information Act, 2005 can be denied by the Reserve Bank of India and other Banks to the public at large on the ground of economic

interest, commercial confidence, fiduciary relationship with other Bank on the one hand and the public interest on the other? If the answer to above question is in negative, then upto what extent the information can be provided under the RTI Act? ²

- b) The basic question of law is whether the Right to Information Act, 2005 overrides various provisions of special statutes which confer confidentiality in the information obtained by the RBI? ³
- c) Whether Section 8 of RTI Act provides that giving information to the general public would be detrimental to the economic interests of the country and to what extent the public should be allowed to get information? ⁴

Appellant's contention

The specific stand of the petitioner, the Reserve Bank of India is that the information sought for is exempted under Section 8(1) (a), (d) and (e) of the Right to Information Act, 2005. As the regulator and supervisor of the banking system, the RBI has discretion in the disclosure of such information in public interest as the disclosure of information would prejudicially affect the economic interest of the State. ⁵

The Right to Information Act, 2005 is a general provision which cannot override specific provisions relating to confidentiality in earlier legislations such as Section 44 of State Bank of India Act, 1955, Section 52, State Bank of India (Subsidiary Banks) Act, 1959, Section 13 of the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970⁶ in accordance with the principle that where there are general words in a later statute it cannot be held that the earlier statutes are repealed altered or discarded.⁷ It was argued that Section 22 of the Right to Information Act, 2005 cannot have the effect of nullifying and repealing earlier statutes in relation to confidentiality as well settled by earlier case laws of the Supreme Court. ⁸

2 RBI v. Jayantilal Mistry, 2015 SCC Online SC 1326, at para 1.

3 Ibid., at para 27.

4 Ibid., at para 63.

5 Ibid., at para 23.

6 Ibid., at para 32.

7 Ibid., at para 33.

8 Ibid., at para 34.

It was further argued that the Preamble of the RTI Act, 2005 itself recognizes the fact that since the revealing of certain information is likely to conflict with other public interests like “the preservation of confidentiality of sensitive information” and Section 8(1)(a) of the Right to Information Act, 2005 states that there is no obligation to give any information which pre-judiciously affects the economic interests of the States.⁹

In sum, it was argued that the RBI cannot be directed to disclose information relating to banking under the Right to Information Act, 2005 on the ground that such information is exempted from disclosure under Section 8(1)(a)(d) and (e) of the RTI Act.

Respondent’s Contentions

It was argued that, it was held in the case of the *Union of India v. Association for Democratic Reforms*,¹⁰ that it is part of the fundamental right of citizens under Article 19(1)(a) to know the assets and liabilities of candidates contesting election to the Parliament or the state legislatures.¹¹

It was further argued that RTI Act, 2005 contains a clear provision in the form of Section 22, by virtue of which it overrides all other Acts including Official Secrets Act. Thus, notwithstanding anything to the contrary contained in any other law like RBI Act or Banking Regulation Act, the RTI Act, 2005 shall prevail insofar as transparency and access to information is concerned.¹²

Moreover, the RTI Act 2005, being a later law, specifically brought in to usher transparency and to transform the way official business is conducted, would have to override all earlier practices and laws in order to achieve its objective. The only exceptions to access to information are contained in RTI Act itself in Section 8.¹³

Decision

The court decided that Central Information Commissioner has passed the impugned orders giving valid reasons and therefore, there was no need of

9 Ibid., at para 35.

10 AIR 2002 SC 2112.

11 Supra note 9, at para 41.

12 Ibid., at para 43.

13 Ibid.

interference by the court with respect to the orders and that there was no merit in all these cases and hence the writ petitions were dismissed.

Ratio

RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of ‘trust’ between them.¹⁴

RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country’s economy and the banking sector. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents.¹⁵

The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same.¹⁶

Observations by the court

The contention that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country’s economic security would be endangered, is not only absurd but is equally misconceived and baseless.

The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.¹⁷

The RBI and the banks have sidestepped the general public’s demand to give the requisite information on the pretext of “Fiduciary relationship”

14 Ibid., at para 60.

15 Ibid.

16 Ibid., at para 62.

17 Ibid.

and “Economic Interest”. This attitude of the RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the banks accountable for their actions.¹⁸

Surmising that many financial institutions have resorted to such acts which are neither clean nor transparent, the court slammed the RBI in association with them of trying to cover up their acts from public scrutiny. The court reminded the RBI of its responsibility to take rigid action against those banks which have been practicing disreputable business practices.¹⁹

Critique

a) A welcome move for greater transparency among regulators

This judgment rendered by the Supreme Court could impact the other regulatory bodies of India as well. Regulatory bodies like the Securities and Exchange Board of India (“SEBI”) and the Insurance Regulatory and Development Authority (“IRDA”) could now be asked to provide information through the RTI Act and they cannot deny information relating to regulated entities on the grounds of “fiduciary relationship”.²⁰

b) Need to publish orders arises with respect to RBI

Unlike SEBI, the RBI does not automatically release penalty orders, licence revocation orders, etc; on its website. It merely issues press releases but not reasoned orders imposing penalties or revoking licenses. This practice is arbitrary and improper. Automatic publication of these orders will render the functioning of the RBI transparent and aid in the development of banking law jurisprudence in India. The banking and financial sector has been habituated to working in an opaque system. This judgment would shake the foundations of the structure and force adoption of new way of working of the regulators.

c) Reputation of the regulators might be affected without a clear mechanism in place

Supreme Court has held that, irrespective of anything to the contrary contained in the RBI Act, 1934 or Banking Regulation Act, 1949, the RTI

18 Ibid., at para 65.

19 Ibid., at para 69.

20 Apoorva Charturvedi, *Fiduciary Capacity of Regulators and the Right to Information*, available at <http://indiacorplaw.blogspot.in/2016/01/fiduciary-capacity-of-regulators-and.html> (last accessed on May 13, 2016).

Act shall prevail in so far as transparency and access to information is concerned. This legal position may be problematic from a regulatory perspective. Disclosure of all kinds of enforcement actions as a blanket principle may not be the best solution in every case. For example, it would be inappropriate to publicly release a show-cause notice issued to a bank, if subsequently RBI did not follow it up with any action against such bank due to lack of sufficient evidence. Automatically releasing such a show-cause notice may unnecessarily cause irreparable damage to the commercial reputation of the bank.

Foreign jurisdictions have clear laws in this regard. For example, Section 395 of the UK Financial Services and Markets Act, 2000 empowers the regulator to issue warning notices, supervisory notices, and decision notices.²¹

The present Indian laws like the RBI Act, 1934, or the Banking Regulation Act, 1949 do not have similar provisions. Hence it should be required that orders passed by the regulator to be published, with the exception of those involving private warnings or if such publication prejudices consumers' interest. Enactment of the above exceptions can adequately balance the Supreme Court's concerns about the need for transparency in RBI as well as RBI's concerns about protecting sensitive information relating to banks. Until the quality of Indian financial laws is substantially improved, courts must not be blamed for judicial activism in the financial sector.²²

Aftermath of the judgment

The RBI's own Master Circular relating to customer service issued from time to time, makes its stance before the Hon'ble Supreme Court like an attempt to mislead. Paragraph 25 of this Master Circular reads as follows:

25. Customer Confidentiality Obligations

The scope of the secrecy law in India has generally followed the common law principles based on implied contract. The bankers' obligation to maintain secrecy arises out of the contractual relationship between the banker and customer, and as such no information should be divulged to third parties except under circumstances which are well defined. The following exceptions to the said rule are normally accepted:

- (i) *Where disclosure is under compulsion of law*

- (ii) *Where there is duty to the public to disclose*
- (iii) *Where interest of bank requires disclosure and*
- (iv) *Where the disclosure is made with the express or implied consent of the customer."* [emphasis supplied]

The RBI has issued this circular every year to all Indian and foreign banks that fall under its regulatory control updating information when necessary. However, the paragraph relating to "customer confidentiality" has remained the same, since at least 2011. The relevant Master Circular makes it clear that the term: "customer", includes both 'depositors' and 'borrowers'. Given its own annual exhortation to other banks, the characterization of a bank's relationship with its borrowers, particularly those who defaulted on repayment of loans as 'contractual' in nature clearly contradicts what it said before the Supreme Court.²³ RBI needs to harmonize the above clash of laws.

Importance of the judgment

The aforesaid case is a landmark judgment as it has laid the law with respect to the issues of whether all the information sought under RTI Act, 2005 with respect to banks can be denied by Reserve Bank of India ("RBI") on the grounds of economic interest, commercial confidence and fiduciary relationship with other banks and on account of public interest and to what extent such a disclosure is tenable. The case is also significant as it has for the first time, settled the law with respect to whether the RTI Act can override various provisions of special statutes, which confer confidentiality of information to the RBI.

Conclusion

The judgment has defined the relationship between RBI and the banks / financial institutions. There would be increased pressure on the RBI to uphold public interest and not the interest of individual banks. Hence, the expectation that the RBI ought to act with transparency and not hide information that might embarrass individual banks would in the near future see a lot of information about private banks coming into the public

23 Venkatesh Nayak, What about people's right to know who the bank defaulters are?available at <http://www.governancenow.com/news/regular-story/what-peoples-right-know-who-the-bank-defaulters-are> (last accessed on May 13, 2016).

domain. The rising NPAs and scams have created doubts about the strength of banking industry as a whole. Hopefully, more disclosure resulting from the impact of the judgment would clear the maze and repose confidence in the system. The sector is likely to face the gaze of increased public scrutiny. Hence, the RBI, as a statutory regulator, must pay attention to the developing case law and act in the larger public interest, namely, that of the citizenry rather than in favour of a narrow band of interests of a few entities.

* * * * *

DEFINITION OF 'INFORMATION' UNDER THE RIGHT TO INFORMATION ACT, 2005: A CASE LAW ANALYSIS

Deva Prasad M*

Abstract

Section 2(f) of the Right to Information Act, 2005 provides definition of the term 'information'. Though an extensive definition of information is being provided in the legislation, the decisional jurisprudence has provided new dimensions to the existing definition. The case law jurisprudence that has evolved based on the adjudication of Central Information Commission, High Courts and Supreme Court need to be analysed in the context of enabling access to information and improving transparency. Since the Right to Information Act, 2005 has been in existence for a decade, it is now an appropriate time for analysing the definition of 'information' in Right to Information Act, 2005.

Against this background, the present article attempts to analyse the following significant decisions relating to understanding of Section 2(f) of the Right to Information Act, 2005: 1) PoornaPrajna Public School v. Central Information Commission (Delhi High Court, 2009)- Deals with the information which is not available, but can be accessed by the public authority from a private authority. 2) Bhoj Raj Sabu v. SEBI (Central Information Commission, 2009) - Deals with the power of SEBI to seek information from BSE under section 2(f) of RTI Act, 2005. 3) Dr.Celsa Pinto v. Goa State Information Commission (Bombay High Court)- The definition of information does not provide for answers to question like 'why'. 4) Mr. Ebtesham Qutubuddin Siddiqui v. Ministry Of Culture (Central Information Commission, 2012)- Whether priced publication could be sought as information under Section 2(f). 5) Unknown v. Pritam Roj (Calcutta High Court, 2009)- Whether answer sheet is information under Section 2(f). 6) M.P. Gupta v. CGHS, New Delhi (Central Information Commission, 2009) & Sunil Kumar v. Pgimer, Chandigarh (Central Information Commission, 2010) – Whether certified sample could be sought as information. 7) CBSE v. Aditya Bandopodhyay (Supreme Court, 2011)-Observation regarding frivolous and voluminous information sought through RTI.

Introduction

Right to Information Act, 2005 (henceforth referred to as “RTI Act”) as a legislative measure provided the much needed enabling framework for informational transparency and good governance in India. Ensuring access to information in the hands of public authority to the citizens and thus ensuring accountability and transparency in governance is the main

* Assistant Professor, National Law School of India University, Bengaluru.

objective of RTI Act.¹ In this regard, how the RTI Act defines the term ‘information’ is significant. Section 2(f) of the Right to Information Act, 2005 provides the definition of term ‘information’. It reads as follows:

Information means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

It is interesting to note that the very definition of ‘information’ has been a matter of contest before various State Information Commissions, Central Information Commission as well as the High Courts and Supreme Court. Within one decade of existence, the decisional jurisprudence provides a rich insight as to how ‘information’ under the RTI Act is perceived by the various judicial fora. This paper attempts to analyse various decisions on the definition and contours of the term ‘information’ to understand whether these decisions enable access to information and improving transparency, as required by the objective of RTI Act.

Case Law Analysis

*PoornaPrajna Public School v. Central Information Commission (Delhi High Court, 2009)*²

Mr. D.K.Chopra had filed an RTI application with the Public Information Officer, Department of Education under Government of New Delhi. The information seeker wanted the minutes of Executive Committee Meeting of PoornaPrajna Public School along with the action taken report from 1988. The pertinent information was not available on records with the Department of Education, New Delhi. When the Department of Education, New Delhi sought for the information from the PoornaPrajna Public School, the school authorities raised objection stating that the school being a private unaided institution, it does not come under the RTI Act and the information seeker has no locus *standi* to ask for information.

Hence, the main contention from the side of PoornaPrajna Public School was that the minutes of Executive Committee Meeting of the school would

2 Writ Petition (Civil) No. 7265 of 2007, available at <http://cic.gov.in/HC-Rulings/PoornaPublicSchool-Vs-CICandOrs.pdf> (last accessed on May 1, 2016).

fall outside the ambit of information under the RTI Act, 2005 as it is a private unaided institution and hence the information seeker would not have authority to access this information. Aggrieved by the lack of opportunity to access the information, the information seeker approached the Central Information Commission. The Central Information Commission took the view that “the Petitioner School was indirectly funded by the Government as it enjoyed income tax concessions; was provided with land at subsidized rates etc”.³ Central Information Commission also mentioned that the Education Department of Government of Delhi has control over the functioning of the school. Hence, it was held that Education Department can “ask for information from the school and therefore the public information officer should have collected the information with regard to the minutes of the managing committee from the Petitioner School and furnished”.⁴

PoornaPrajna Public School appealed the matter to the High Court of Delhi. The High Court of Delhi scrutinized the definition of information under section 2(f) of RTI Act and observed that “information relating to any private body which can be accessed by a public authority under any other law for the time being in force” is also to be considered under the category of information that could be accessed under the RTI Act. The High Court observed that: “The last part of section 2 (f) broadens the scope of the term ‘information’ to include information which is not available, but can be accessed by the public authority from a private authority. Such information relating to a private body should be accessible to the public authority under any other law”. Based on the provisions of Delhi School Education Act, 1973 and Delhi School Education Rules,⁵ the High Court came to the conclusion that, the Department of Education, Government of Delhi have power to seek the information and pass it to the information seeker.

3 Ibid.

4 Ibid.

5 Under Rule 50(xviii) of the DSE Rules, the Directorate of Education can issue instructions and can call upon the school to furnish information required on conditions mentioned therein being satisfied. Rule 50 therefore authorizes the public authority to have access to information or records of a private body i.e. a private unaided school.

Bhoj Raj Sahu v. SEBI (Central Information Commission, 2009)⁶

The information seeker had sought information, which requires Securities Exchange Board of India (SEBI) to access the information from various stock exchanges including Bombay Stock Exchange (BSE). The question before the Central Information Commission was whether SEBI has regulatory jurisdiction to access the information that is held by the stock exchanges. Further, BSE also raised an interesting legal issue that the SEBI cannot access the information for the sole purpose of transmitting it to an RTI-applicant.

The Central Information Commission observed that:

The responsibility of the public authority as contained in RTI Act is two-fold in cases where such public authority is known not to 'hold' the information sought by an application - One, to transfer the request for information to another public authority under Section 6(3), when it is known that the other public authority holds the information; and two, to obtain the information from a private body if the public authority is authorized under any law to access such information in the hands of that private body.⁷

Central Information Commission clearly notes that SEBI has the power within the meaning of the SEBI Act to access the information from BSE and other stock exchanges. This decision is in consonance with the above discussed case *PoornaPrajna Public School v. Central Information Commission* (Delhi High Court, 2009).

CIC also observes that once BSE “have conceded the point that the requested information could be accessed by SEBI within SEBI laws, it was not open to BSE to demand that SEBI should make use of that information depending upon what BSE considered appropriate and provide the information to another person or party only after obtaining BSE's approval. The power of SEBI as a market regulator to access certain information in the hands of BSE could not be circumscribed by BSE's own interest. In other words, BSE could not dictate to SEBI as to how SEBI should use certain information, which BSE was obliged to provide to the SEBI under SEBI Act. Thus, the Central Information Commission makes it clear that the private entity cannot unnecessarily object to the information

⁶ FNo.CIC/AT/A/2008/01083.

⁷ Ibid.

shared with RTI applicant. Any information the private entity is obliged to provide to a regulator or government body under a pertinent legislation could be sought by an information seeker under RTI Act.

This clearly points out to the fact that Section 2(f) definition has wide implications not only upon the public authorities, but also upon private entities regulated and overseen by a regulatory body. Thus the decisions mentioned above have played an important role in ensuring that the Right to Information Act is an enabling legislation for information transparency by extending the application to private entities regulated and controlled by statutory authority.

*Dr. Celsa Pinto v. Goa State Information Commission (Bombay High Court, 2008)*⁸

Information seeker has inter alia sought for information as to “why the post of Curator was not filled up by promotion and why the Librarian from the Engineering College was not considered for promotion”. The pertinent question that came before the Bombay High Court was that whether the definition of information needs to provide for answers to question like ‘why’. After scrutiny of the Section 2(f) of RTI Act, the Bombay High Court observed that the definition of information does not cast any obligation to provide the reasoning. The Bombay High Court stated, “The definition cannot include within its fold answers to the question ‘why’ which would be the same thing as asking the reason for a justification for a particular thing. The Public Information Authorities cannot expect to communicate to the citizen the reason why a certain thing was either done or not done in the sense of a justification because the citizen makes a requisition about information. Justifications are matters within the domain of adjudicating authorities and cannot properly be classified as information”⁹. Hence, the main take away from this judgment would be the fact that explanations cannot be sought as information.

With ‘why’ questions being ruled out from the ambit of information, it becomes imperative that explanations for taking a particular decision cannot be sought through the right to information request. There could be two diverging viewpoints that may emerge from this scenario. One is the point of view that non-inclusion of ‘why’ questions to be made part of the

8 2008 (110) Bom L R 1238.

9 Ibid.

definition of information stands in way of providing for more accountable and transparent form of governance. On the other hand, there is clear understanding that the RTI Act, 2005 itself does not conceive the definition of information to include the rationale and reasoning of decision making. Also the need for providing rationale and reasoning of the decision making for all and every decision could lead to the situation of inefficiency in governance process.

Ehtesham Qutubuddin Siddiqui v. Ministry Of Culture (Central Information Commission, 2012)¹⁰

Information seeker by way of a RTI request has sought for copies of nine books published by the Archaeological Survey of India. The Public Information Officer sought for demand draft towards the price of the books sought. In this regard, the information seeker sought for the books free of cost under the right to information as he belongs to below poverty line category. The Central Information Commission decision observed that “once an information is brought into the public domain by means of a priced publication, the said information cannot be said to be “held by” or “under the control of” the CPIO and hence would cease to be information accessible under the RTI Act.”¹¹ Further, it was also observed by the Central Information Commission that the “In the instant case, information is available without the need for a request as these are priced publications. Therefore, to cast an obligation on the public authority to provide copies of the same under the RTI Act will not only be onerous but may also violate the Copyrights Act and may not be saved even under Section 9 of the Act as copyright may subsist in a person other than the State”.¹² The Central Information Commission has made a pertinent observation that in case of the publications of books or other materials by government for a particular price, then it no longer becomes information held by or under the control of the public authority. Further, the issue of intellectual property over the publication by way of copyright also comes into picture. Many a times, even though the government is bringing out the publication, the copyright over the matter may vest with a private individual, whose rights have to be protected.

10 File No. CIC/SM/A/2011/001713/BS & CIC/SM/A/2012/000239/BS/0284.

11 Ibid.

12 Ibid.

*Unknown v. PritamRooj (Calcutta High Court, 2008)*¹³

The Calcutta High Court in this matter analysed the question that whether evaluated answer paper could be considered as information under Section 2(f) of RTI Act, 2005. The Calcutta High Court held that “an assessed/evaluated answer script of an examinee writing a public examination conducted by public bodies like the CBSE or the Universities, which are created by statutes, does come within the purview of 'information' as defined in the RTI Act. There is no justifiable reason to construe Section 2(f) of the RTI Act in a constricted sense. Apart from it being a material and thus comprehended within the exhaustive aspect of the definition, an assessed/evaluated answer script is also a document, a paper, and a record”¹⁴.

The Calcutta High Court refused to accept the contention that accessing the evaluated answer sheets would not serve any public interest. The Calcutta High Court observed that “disclosure of assessed/evaluated answer scripts would definitely be conducive to improvement of quality of assessment/evaluation”. It is an important decision, which has been followed and made remarkable impact in the field of university and public service commission answer paper evaluation process.

Many further decisions, including the recent decision of Supreme Court in *Kerala Public Services Commission v. The State Information Commission*¹⁵ has reiterated the fact that the evaluated answer papers and marks have to be disclosed to the candidates and the same cannot be denied on ground of fiduciary capacity. In the interest of fair play, evaluated answer sheets are necessarily to be provided to the information seeker.

*M.P. Gupta v. CGHS, New Delhi, (Central Information Commission, 2009)*¹⁶

The information seeker by way of RTI application has inter alia sought for samples of medicine for testing. It was contented by the public information officer that there is no provision to allow for sample of medicines for testing, thus denying the access to sample of medicine to the information

13 W.P. No. 22176 (W) of 2007.

14 Ibid.

15 Civil Appeal No. 823-854 of 2016.

16 CIC/AD/C/09/00083.

seeker. Section 2(f) read with Section 2(j) (iii) of the RTI Act, 2005 clearly points out that the information is widely construed to include sample of a material. The Central Information Commission observed that “under Section 2(j) (iii) of the RTI Act, every citizen has the right to information accessible under the Act, which is held by or under the control of any Public Authority and includes the right to take certified samples of material.”¹⁷ It is important to note that by way of this decision, the Central Information Commission has furthered the understanding of information to include sample materials also.

*Sunil Kumar v. Pgimer, Chandigarh (Central Information Commission, 2010)*¹⁸

The issue that came before the Central Information Commission was that whether the sample material used in the construction could be considered as information. The Central Information Commission observed that it is clear from Section 2(f) that samples are information. Regarding the question of samples of building material as information, Central Information Commission observed that samples could be taken from any “product/article/material,etc” and hence “such samples can be taken from the under-construction building and would, thus, fall in the ambit of section 2 (f) of the RTI Act”¹⁹.

*CBSE v. Aditya Bandapodyay (Supreme Court, 2011)*²⁰

The Supreme Court in this case makes a significant observation regarding the frivolous RTI applications being filed for voluminous information. The Supreme Court observed that “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 work of 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

17 Ibid.

18 File No.CIC/LS/C/2009/000617.

19 Ibid.

20 Civil Appeal No.6454 of 2011.

citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty.”²¹ This observation is very pertinent in the light of misuse of RTI for hindering the work at government offices by filing frivolous RTI applications seeking voluminous information without proper public interest attached with the information sought. The Supreme Court while emphasizing on the accountability and transparency aspect of RTI has provided a clear message to the frivolous information seekers who are creating a burden upon the government mechanism to refrain from seeking information without any public interest being attached to it.

Conclusion

The case law analysis of decisions pertaining to the definition of information under the section 2(f) of the RTI Act, 2005 provides a pragmatic picture of how the right to information is being operationalized in the Indian legal framework. The decisions on definition of information under the section 2(f) of the RTI Act, 2005 have infact contributed to ensure that public authorities do not restrict the understanding of what information could be provided under the right to information. The decisions analysed in the article have clarified that the decisional jurisprudence has helped in reiterating the wide definition of information under the Section 2(f) of RTI Act, 2005 for providing the access to samples as information, information accessible by a public authority from private entity and evaluated answer sheets. Apart from ensuring to reiterate the section 2(f) definition of information, the decisions have also helped in ensuring that practical level issues of seeking priced publication as information, asking reasons as information through “why” questions and seeking voluminous information through frivolous request for information could be greased out.

* * * * *

21 Ibid.

JUDICIAL INTERPRETATION OF RTI ACT

Rajdeep Banerjee & Joyeeta Banerjee***

Abstract

*The Right to Information Act, 2005 is a revolutionary piece of legislation. The Central Information Commission and the respective State Information Commissions are continuously enlarging the scope of the Act with a view to bring in more transparency and much needed accountability in our system. In this short span of ten years, various decisions have been pronounced on the subject which consists of the orders of the Commissions and the judgments of various High Courts under the writ jurisdiction and the Supreme Court. This Article discusses the approach of the High Courts and the Supreme Court in dealing with the writ petitions against the orders of the Commissions. Though the High Courts have been interpreting various sections of the Act, few sections are being litigated more frequently like the definition of 'Public Authority', exemptions from disclosure of the Act, concept of 'fiduciary relationship', Third Party Information, appeal provisions, penalty provisions and the overriding effect of the Act. The Supreme Court has also delivered few important rulings on certain provisions of the Act, the most recent one is related to fiduciary relationship in the RBI case. The Supreme Court in *Namit Sharma (II)* has also deliberated on the nature of the functions of the Information Commissions holding it to be administrative and not a judicial one. The High Courts have been gradually taking the view that almost all information under the control of public authorities has to be supplied to the applicant unless the information is exempted under the provisions of the Act.*

Introduction

Access to information is considered vital to the functioning of a democracy, as it creates an informed citizenry. Transparency of information is considered vital to contain corruption and to hold Government and its instrumentalities accountable to the governed citizens of this country. The source of right to information does not emanate from the Right to Information Act. It is a right that emerges from the constitutional guarantees under Article 19(1)(a) of Constitution of India. The Supreme Court recognized that the right to know is the right that flows from the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.¹ The Supreme Court has time and again

*BSc(Maths Hons), Advocate & Legal Consultant, New Delhi.

** BE(Mechanical), Advocate & Legal Consultant, New Delhi.

1 State of U.P. v. Raj Narain and others, (1975) 4 SCC 428; AIR 1975 SC 865.

reiterated its position that it is a facet of freedom of speech and expression contained in Article 19(1)(a).² Article 19 of the Universal Declaration of Human Rights too recognizes right to information. A vibrant and thriving democracy requires transparency. Right to Information Act, 2005 recognizes the right of the citizen to secure access to information under the control of public authority, in order to promote transparency and accountability in the working of every public authority. Section 3 of the Act confers right to information to all citizens and a corresponding obligation under section 4 on every public authority to maintain the records so that the information sought for can be provided. The thrust of the legislation is to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of every public authority.³ But absolute or uncontrolled individual rights do not and cannot exist in any modern State.

Right to privacy is not expressly guaranteed under the Constitution of India, the Supreme Court has recognized the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India.⁴ Right to privacy is also recognized as a basic human right under Article 12⁵ of the Universal Declaration of Human Rights Act, 1948 as well as Article 17 of the International Covenant on Civil and Political Rights Act, 1966. Both Right to information and Right to privacy are not absolute rights. The first one falls under Article 19(1)(a) whereas the second falls under Article 21 of the Constitution of India. As per the constitutional provisions, both can be regulated and restricted in larger public interest.

The Right to Information Act is not repository of the right to information.

-
- 2 Bennet Coleman and Co. and others v. Union of India and others, (1972) 2 SCC 788; AIR 1973 SC 106, Union of India v. Association of Democratic Reforms and another, (2002) 5 SCC 294; AIR 2002 SC 2112, People's Union for Civil Liberties (PUCL) and others v. Union of India and another, (2003) 4 SCC 399; AIR 2003 SC 2363.
 - 3 Jamia Millia Islamia v. Sh. Ikramuddin, AIR 2012 Del 39.
 - 4 Kharak Singh v. State of U.P. and Ors., AIR 1963 SC 1295, R. Rajagopal @ R.R. Gopal and Anr. v. State of Tamil Nadu and Ors., (1994) 6 SCC 632; AIR 1995 SC 264, People's Union for Civil Liberties (PUCL) v. Union of India and Anr., (1997) 1 SCC 301; AIR 1997 SC 568 and State of Maharashtra v. Bharat Shanti Lal Shah and Ors., (2008) 13 SCC 5; AIR 2009 SC (Supp) 1135.
 - 5 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attack upon his honour and reputation. Everyone has the right to the protection of law against such interference or attacks.

Its repository is the constitutional rights guaranteed under Article 19(1)(a). The Act is merely an instrument that lays down statutory procedure in the exercise of this right. Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to help the governors accountable to the governed. In construing such a statute, the court ought to give it widest operation which its language will permit.⁶ But the provisions of the Act cannot be used as a tool to give vent to the frustration and dissatisfaction of a citizen. Where the examinations have long been concluded and appointments already made, a dissatisfied candidate who is disbelieving in the process of a constitutional body ought not be allowed to seek information which can affect the efficient working and discharge of its constitutional obligations without any corresponding benefit or relationship to any public interest or activity.⁷

"Record" includes any document and file. Neither the definition clause, nor any provision of the Act postulates that information, prior to enforcement of the Act, cannot be supplied to a citizen. The only fetters prescribed are under sections 8, 9, 11 and 24 of the Act.⁸ There is no bar under the Act, against the information being supplied by the appropriate authority, in relation to acts or events which have occurred and stand recorded prior to the Act being notified in the year 2005. The Act was enacted to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. The Preamble specifically takes note of the fact that the Democratic Republic established by the Constitution of India, requires an informed citizenry and transparency of information, vital for its functioning, not only to contain corruption, but also hold Governments and their instrumentalities accountable to the governed. The conflicting interest between the Government and the citizenry, while preserving the paramountcy of the democratic ideal, stands considered.⁹ Right of a citizen to seek information emanates from section 6 of the Act. He need not

6 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Delhi 159 (Full Bench).

7 Rajasthan Public Service Commission v. Ms. Pooja Meena and Anr., AIR 2012 Raj 52.

8 State Bank of India v. Central Information Commission and another, AIR 2014 HP 21.

9 Ibid.

assign any reasons for seeking such information.¹⁰ An applicant seeking information does not have to give any reasons why he needs such information except such details as may be necessary for contacting him. There is no requirement of locus standi for seeking information.¹¹ The Act does not impose fetters with regard to supply of record, which may be voluminous.¹²

Public Authority

Lot many cases have been decided by various High Courts and even the Supreme Court of India regarding the contours of the definition of the 'Public Authority'. This assumes significance as the very applicability of the Act hinges on this basic issue.

Mother Dairy Fruit and Vegetable Pvt. Ltd., being a company constituted by the National Dairy Development Board (NDDB), a Central Government body, for implementation of its objectives and the basic infrastructure of the undertaking being promoted by funds provided by Central Government through NDDB, was held to be a public authority on account of being substantially financed by Central Govt.¹³ The Delhi High Court has held that once it is found that an authority or body or institution of self government is established or constituted in any manner prescribed in clauses (a) to (d) of section 2(h), then there is no further requirement of such a body to be either owned or controlled or substantially financed by an appropriate Government. The question before the High Court was whether SGPC was 'public authority'. It was a statutory body constituted under section 3 of Delhi Sikh Gurdwaras Act, 1971. As it was a body under any law and not a body made by the law, it was a 'public authority'. It held that the words 'and includes' are not part of clause (d), but they are placed separately, independently and away from clause (d) of section 2(h). The categories of bodies or institutions or authorities covered by sections 2(h) (a), (b), (c) and (d) are therefore "stand alone" authorities or bodies. The

11 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

12 Surupsingh Harya Naik v. State of Maharashtra, AIR 2007 Bom 121.

13 Mother Dairy Fruit and Vegetable Private Limited v. Hatim Ali and Anr., AIR 2015 Del 132, the High Court further observed that there was nothing in language of S. 2(h) (d) (i) which indicated that appropriate Government had to directly control the public authority, as it can do so by appointing its representatives as managers of said body too.

words "and includes" beginning in a fresh line from the left margin is intended to indicate another set of bodies which may not fall within the categories of section 2(h) (a), (b), (c) and (d).¹⁴

Chandigarh University, being a body established by law made by State Legislature, has been held to be a 'Public Authority'. Once it is shown that a body has been constituted by an enactment of the State Legislature, then nothing more is needed to be shown to demonstrate that such a body is a "public authority" within the meaning of section 2(h)(c).¹⁵ Co-operative Society registered under T. N. Co-operative Societies Act has been held not to be a 'public authority' within meaning of S. 2(h) of the Act.¹⁶ As a co-operative housing society was not covered by any of the four categories mentioned in the definition of 'Public Authority' and the information sought like resolutions passed and minutes of books of society was not in possession of Registrar of Co-operative Societies, a co-operative housing society was thus not a 'public authority'.¹⁷

The burden to show that a body is owned, controlled or substantially financed or that a non-government organization is substantially financed directly or indirectly by the funds provided by the appropriate Government is on the applicant who seeks information or the appropriate Government and can be examined by the State Public Information Officer, State Chief Information Officer, State Chief Information Commissioner, Central Public Information Officer etc. A body or NGO is also free to establish that it is not owned, controlled or substantially financed directly or indirectly by the appropriate Government.¹⁸

Where the petitioner-trust was constituted under section 5 of Shri Sanwaliaji Temple Act, 1992 and section 6 of the Act provided for composition of the Board, which included the President, Collector of Chittorgarh district, the Devsthan Commissioner, Chief Executive Officer and seven other members, such trust was held as a 'public authority' notwithstanding that it was neither funded by nor did it receive any aid from

15 Chandigarh University, Village Gharuan v. State, AIR 2013 P&H 187.

16 PIO, Illayankudi Co-operative Urban Bank Ltd., Sivagangai District v. Registrar, Tamil Nadu Information Commission, Chennai and Ors., AIR 2015 Mad 169.

17 Sainik Co-operative House Building Society Limited, Goa v. Bismark Facho and Ors., AIR 2015 Bom 153.

18 Thalappalam Ser. Co-op. Bank Ltd. and Ors. v. State of Kerala and Ors., AIR 2013 SC (Supp) 437.

the Central Government or the State Government in any manner whatsoever.¹⁹ The expression "public authority" is of wide amplitude and includes an authority created by or under the Constitution of India, which description holds good for Chief Justice of India.²⁰

The Supreme Court in *Thalappalam Ser. Co-op. Bank Ltd. and others v. State of Kerala and Ors.*,²¹ has held that the meaning of expression "controlled" which figures in between the words "body owned" and "substantially financed", means that the control by the appropriate government must be a control of a substantial nature. The mere 'supervision' or 'regulation' as such by a statute or otherwise of a body would not make that body a "public authority". Powers exercised by the Registrar of Co-operative Societies and others under the Co-operative Societies Act are only regulatory or supervisory in nature, which will not amount to dominating or interfering with the management or affairs of the society so as to be controlled. Management and control are statutorily conferred on the Management Committee or the Board of Directors of the Society by the respective Co-operative Societies Act and not on the authorities under the Co-operative Societies Act.

The mere fact that the college was established with permission of State without anything more, cannot lead to the conclusion that College is controlled by them and hence is not a public authority. The position of the term "controlled" in section 3(h)(d)(I) of the Act is indicative of the fact that control contemplated therein must take its colour from preceding and subsequent words i.e. "owned" and "substantially financed".²²

Interpreting the term "substantially financed", the Supreme Court observed that merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which

19 Sanwaliaji Mandir Mandal, Rajasthan v. The Chief Information Commissioner, Rajasthan, Jaipur, AIR 2016 Raj 16.

20 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

21 AIR 2013 SC (Supp) 437.

22 Raid Laban College Society and Anr v. State of Meghalaya and Anr., AIR 2010 Gau 173.

practically runs by such funding and but for such funding, it would struggle to exist.²³

The question whether an NGO²⁴ has been substantially financed or not by the appropriate Government is a question of fact to be examined by the RTI authorities. Such organization can be substantially financed either directly or indirectly by funds provided by the appropriate Government. Government may not have any statutory control over the NGO, still it can be established that a particular NGO has been substantially financed directly or indirectly by the funds provided by the appropriate Government, in such an event, that organization will fall within the scope of section 2(h)(d)(ii) of the RTI Act. Thus private organizations which are, though not owned or controlled but substantially financed by the appropriate Government will also fall within the definition of "public authority" under section 2(h)(d)(ii).²⁵ Order by the State Information Commission to furnish all information related to utilization of grant/aid received from State Government and related to staff engagement was not interfered by the High Court as the NGO was receiving substantial amount as funds from the Government agencies and hence was held public authority. It could not be said that the NGO was not substantially financed by the Government, whatever may be the extent of finance in the budget of the NGO. Also the Public Information Officer, Assistant Public Information Officer and first Appellate Authority of the NGO had already been designated and in some of the cases it had already furnished information.²⁶

The Bombay High Court observed that Right to Information Act would apply to market committee constituted under APMC Act (1964) which is an institution of self government, established and constituted by a law made by state legislature. The Market Committee is brought into existence not by virtue of an act of any person to register a Market Committee like a Society and then bring it into existence, but Market Committee comes into

23 Thalappalam Ser. Co-op. Bank Ltd. and Ors. v. State of Kerala and Ors., AIR 2013 SC (Supp) 437, even floating schemes generally for the betterment and welfare of the cooperative sector by the Government like deposit guarantee scheme, etc., cannot bring the body within the fold of "public authority" under Section 2(h)(d)(i).

24 The term "Non-Government Organizations" has not been defined under the Act.

25 Thalappalam Ser. Co-op. Bank Ltd. and Ors. v. State of Kerala and Ors., AIR 2013 SC (Supp) 437.

26 Professional Assistant for Development Action (PRADAN), Ranchi v. Jharkhand State Information Commission and Ors., AIR 2010 Jharkhand 147.

existence by virtue of operation of the provisions of the APMC Act (1964) which is the law made by State Legislature. Also it is deemed to be a local authority as per provisions of section 12(2) of the APMC Act.²⁷

Information

Only that information can be supplied which is accessible and under the control of the public authority. The words 'held by' or 'under the control of' under Section 2(j) will include not only information under legal control of public authority but also all such information which is otherwise received or used or consciously retained by the public authority in the course of its functions and its official capacity. Where there is no legal obligation to provide information to public authorities, but where such information is provided, the same would be accessible under the Act.²⁸ The words 'information accessible' in section 2(j) means information which is accessible to a public authority and not information to which the public authority is denied access. If there is an absolute or complete bar on the public authority's right to access information then such information cannot be supplied.²⁹ Any other information where the public authority is prohibited to have access cannot be directed to be supplied without prior permission of the civil court or the competent authority.³⁰ The Act contemplates furnishing of information which is available on records, but it does not go so far as to require an authority to first carry out an enquiry and thereby 'create' information. In a case where the appellant had made substantial compliance by furnishing the information, the High Court observed that the supplementary information supplied by the appellant's successor was clearly not available on the records so long as the appellant was posted at Biharsharif and as such it could not be said that information had been withheld by him.³¹ Recently, the Supreme Court observed that the Legislature's intent is to make available to the general public such information which had been obtained by the public authorities from the

27 *Agriculture Produce Market Committee, Wardha v. Meghraj Pundlikrao Dongre and Ors.*, AIR 2011 Bom 48.

28 *Secretary General, Supreme Court of India v. Subhash Chandra Agarwal*, AIR 2010 Del 159.

29 *Block Development and Panchayat Officer v. State Information Commissioner and Anr.*, AIR 2015 P&H 191.

30 *Ibid.*

31 *Shekhar Chandra Verma v. State*, AIR 2012 Pat 60.

private body. Had it been the case where only information related to public authorities was to be provided, the Legislature would not have included the word "private body".³²

Where any record or information is required to be destroyed under the rules and regulations of a public authority prior to twenty years, section 8(3) will not prevent destruction in accordance with the Rules. Section 8(3) of the Act, is not a provision requiring all 'information' to be preserved and maintained for twenty years or more, nor does it override any rules or regulations governing the period for which the record, document or information is required to be preserved by any public authority. Where the information sought is not a part of the record of a public authority, and where such information is not required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non-available information and then furnish it to an applicant. A public authority is also not required to furnish information which requires drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in section 2(f), only refers to such material available in the records of the public authority.³³ Unless specifically excluded, 'information' under section 2(f) includes file notings which are in the form of the views and comments expressed by the various officials during disciplinary proceedings.³⁴ Notes taken by the Judges while hearing a case cannot be treated as final view expressed by them of the case. They are meant only for the use of Judges and cannot be held to be a part of a record 'held' by the public authority. However, if the Judge turns in notes along with the rest of his files to be maintained as a part of the record, the same may be disclosed. It would be thus retained by the registry. Even the draft judgment signed and exchanged is not to be considered as final

32 Reserve Bank of India v. Jayantilal N. Mistry, AIR 2016 SC 1, RBI was held liable to provide information regarding inspection report and other documents to the general public.

33 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

34 Union of India v. R.S. Khan, AIR 2011 Del 50.

judgment but only tentative view liable to be changed, thus a draft judgment cannot be said to be information held by a public authority.³⁵

Whether the certified copy of documents obtained under the Act can be admitted as secondary evidence has been answered in the affirmative by the Madhya Pradesh High Court. As per clause (f) of section 65 of Evidence Act a certified copy permitted under the Evidence Act or by any other law in force can be treated as secondary evidence. Right to Information Act falls within the ambit of 'by any other law in force in India'.³⁶ In a case relating to will, the Kerala High Court has observed that on the question of disputed signature of the executant, comparison of copies of documents containing admitted signature of executant obtained under the Act can be done for the limited purpose of comparing with signature of the attester in disputed document.³⁷ In a case of claim for damages for defamation, the claim was based upon various letters issued in relation to proceeding under the Act. The letters alleged that fraud was committed by plaintiff's company in sale of property and because of certain vested interests, necessary information and documents have not been supplied to him for his future course of action. The High Court observed that in the absence of any evidence produced by the plaintiff to prove that such libelous statements have caused harm to his reputation and affected goodwill of company and such statements being made in legally recognized proceeding, plaintiff cannot succeed in action.³⁸

Where the judgment by State Consumer Dispute Redressal Commission was in English language and the applicant asked for supply of information in translated version (in Hindi), the High Court observed that the applicant could not seek translation of judgment in Hindi as there was no duty cast upon the public authority to provide information in a translated language. The fact that the applicant did not understand English language, could not be ground to supply information (judgment) in Hindi translation as inaccuracies could flow from any attempted translation.³⁹

35 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

36 Narayan Singh v. Kallaram alias Kalluram Kushwaha and Ors., AIR 2015 MP 186.

37 C. G. Raveendran and Ors. v. C.G. Gopi and Ors., AIR 2015 Ker 250.

38 Gardenreach Shipbuilders and Engineers Ltd v. Akshat Commercial Pvt. Ltd and Anr., AIR 2015 Cal 103.

39 State Consumer Disputes Redressal Commission v. Uttarakhand State Information Commission and Ors.,

Interpreting section 7(6) of the Act, which states that if the public authority fails to comply within the time limit prescribed, then the person making the request for information has to be provided with the information free of charge, the High Court of Chhattisgarh held that the stage of providing information free of cost would occasion only when the Public Information Officer (PIO) fails to pass any order disposing off the application by rejecting the same within 30 days or in other words, when the PIO fails to take up application for taking decision in the matter within 30 days, he has to provide information free of cost, but in case where the PIO has passed an order within 30 days rejecting the application and the first appellate authority set aside the order and directs providing of information, an occasion for providing information free of cost would not arise. It would be different if the first appellate authority itself directs the PIO to provide information free of cost.⁴⁰ In a Madras High Court case, the applicant requested for supply of copies of affidavits, counter-affidavits and final order in writ petitions from PIO of Madras High Court and it was replied that the applicant could obtain copies of documents sought for by filing copy application as per Madras High Court Appellate Side Rules, 1965. Order by the Tamil Nadu Information Commission directing the High Court to furnish copies of documents free of cost under S. 7(6) of the Act was thus set aside.⁴¹

Information was sought regarding names, educational qualifications of certain candidates called for interview and of those who were selected. Also further information was sought for disclosure of such candidates who were holding gold medals and certain qualifications. In relation to the second category of information, it was held that if such information was being not consolidated and maintained but has to be made available from the forms of individual applicants, that could certainly be denied in view of S.7(9) of the Act.⁴²

Exemptions

Section 8 enumerates the conditions which justify non disclosure of information. Courts are regularly grappling with the interpretation of this

40 S. K. Shrivastava v. State and Ors., AIR 2016 Chhattisgarh 1.

41 Registrar General, High Court of Madras, Chennai v. A. Kanagaraj and Anr., AIR 2013 Mad 186.

42 RPSC v. Jagdish Narain Pande, AIR 2012 Raj 170.

section as few of the clauses like 8(1)(e) and 8(1)(j) have seen many disputes arising in the courts. Section 8 begins with a non-obstante clause, which gives the section an overriding effect, in case of conflict, over the other provisions of the Act. Even if there is any indication to the contrary, still there is no obligation on the public authority to give information to any citizen of what has been mentioned in clauses (a) to (j). In one case, information was sought relating to names and designation of suspended employees of the Bank. It was observed that such information was likely to harm reputation of persons involved and also no public interest would be served. Information being personal in nature, was held it could not be disclosed when employer-employee relationship subsist.⁴³ In *Institute of Chartered Accountants of India v. Shaunak H. Satya and Ors.*,⁴⁴ the Supreme Court opined that examining bodies like ICAI should change their old mindsets and tune them to the new regime of disclosure of maximum information. As the examining bodies have not been exempted, and as the examination processes of examining bodies have not been exempted, the examining bodies will have to comply with the provisions of the Act.

It was further held that public authorities should realize that in an era of transparency, previous practices of unwarranted secrecy have no longer a place. Accountability and prevention of corruption is possible only through transparency. Attaining transparency no doubt would involve additional work with reference to maintaining records and furnishing information. Parliament has enacted the RTI Act, providing access to information, after great debate and deliberations by the Civil Society and the Parliament. Additional workload is not a defence. If there are practical insurmountable difficulties, it is open to the examining bodies to bring them to the notice of the Government for consideration so that any changes to the Act can be deliberated upon.⁴⁵

But, it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach

43 Syndicate Bank, Manipal v. Smt. Jayalaxmi and Anr., AIR 2015 Kar 165.

44 AIR 2011 SC 3336.

45 Ibid.

unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources.⁴⁶

There have been plethora of cases where students or applicants have asked for supply of their answer sheets from the concerned authorities. Such requests were frequently turned down citing relevant rules/ regulations of the respective Board/University. Post the enactment of the Act, Information Commissions started passing orders directing the Board/ Universities to supply the answer sheets. The Supreme Court had the opportunity to dwell on this particular issue in the case of *Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors.*⁴⁷ Rejecting CBSE's various contentions against providing of the required information, the Supreme Court observed that examining bodies (Universities, Examination Boards, CBSE etc.) are neither security nor intelligence organisations and therefore the exemption under section 24 will not apply to them. The disclosure of information with reference to answer-books does not also involve infringement of any copyright and therefore section 9 will also not apply. Resultantly, unless the examining bodies are able to demonstrate that the evaluated answer-books fall under any of the categories of exempted 'information' enumerated in clauses (a) to (j) of sub-section (1) section 8, they will be bound to provide access to the information and any applicant can either inspect the document/record, take notes, extracts or obtain certified copies thereof.⁴⁸ The Supreme Court rejected the argument that the evaluated answer-books were exempted from disclosure under section 8(1)(e), as the same was 'information' held in its fiduciary relationship. It thus, held that every examinee will have the right to access his evaluated answer-books, by either inspecting them or taking certified copies thereof.⁴⁹ The Delhi High Court has held that the CJI cannot be a fiduciary vis-a-vis Judges of the Supreme Court as the Judges of the Supreme Court hold independent office, and there is no hierarchy, in their judicial functions, which places them at a different plane than the CJI. The declarations relating to their assets are not

46 Ibid.

47 2011 AIR SCW 4888.

48 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

49 Followed in Public Service Commission, U.P v. State Information Commission and anr., AIR 2014 All 38.

furnished to the CJI in a private relationship or as a trust but in discharge of the constitutional obligation to maintain higher standards and probity of judicial life and are in the larger public interest and thus cannot be held that the asset information shared with the CJI was held by him in the capacity of fiduciary, which if directed to be revealed, would result in breach of such duty.⁵⁰

In *Union Public Service Commission v. Gourhari Kamila*,⁵¹ where the applicant asked for the certified copies of experience certificates of all the candidates called for the interview who claimed the experience in the relevant field as per records available in the UPSC, the Supreme Court held that the CIC committed a serious illegality by directing UPSC to disclose the information sought. It reasoned that neither the CIC nor the High Court came to the conclusion that disclosure of the information relating to other candidates was necessary in larger public interest and thus the case was not covered by the exception carved out in Section 8(1)(e) of the Act.

The Supreme Court in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi & Anr*,⁵² held that the disclosure of names and addresses of the members of the Interview Board would ex facie endanger their lives or physical safety as the possibility of a failed candidate attempting to take revenge from such persons could not be ruled out. Such disclosure would likely expose the members of the Interview Board to harm and would not serve any public purpose. It rejected the view of the High Court that element of bias could be traced only if the names and addresses of the examiners/interviewers were furnished as bias was not a ground which could be considered for or against a party making an application to which exemption under section 8 was pleaded as a defence.

The Supreme Court held that oral and verbal instructions, if not recorded, could not be provided. By acting on oral directions, not recording the same, the rights guaranteed to the citizens under the Right to Information Act, could be defeated. The practice of giving oral directions/instructions by the administrative superiors, political executive etc; would defeat the object and purpose of RTI Act and would give room for favoritism and corruption.⁵³

50 Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

51 Civil Appeal No. 6362 of 2013 dated August 6, 2013, Supreme Court of India.

52 Civil Appeal No. 9052 of 2012, dated December 13, 2012, Supreme Court of India.

53 T. S. R. Subramanian v. Union of India and Ors., AIR 2014 SC 263.

Once a decision is taken in the matter of grant of tender, there is no justification to keep it secret. People have a right to know the basis on which the decision has been taken. If tenders are invited by the public authority and on the basis of tender documents, the eligibility of a tender or a bidder is decided, then those tender documents cannot be kept secret, that too, after the tender is decided and work order is issued on the ground that it will amount to disclosure of trade secret or commercial confidence. A citizen has a right to know the genuineness of a document submitted by the tenderer in the matter of grant of tender for consultancy work or for any other work. A contract entered into by the public authority with a private person cannot be treated as confidential after completion of contract.⁵⁴ When brother of the deceased wanted to know the name of the nominee nominated by his late brother in his PF and Gratuity, arguing that his brother had only one legally wedded wife but somehow on the basis of forgery done by some officers of the respondents and some other lady has been shown in the column of nominee in the service book and it was done due to some corruption, CIC's order allowing the same was held proper.⁵⁵

Where information was sought for requisite details with regard to opening of bank account of an institution imparting education which was a registered society, and the application was rejected in view of Section 8(j) read with Section 13 of the Banking Companies Act, 1970, it was held that as the purpose of obtaining such information was to misuse or threaten the institution, such type of litigation was required to be discouraged as it was not related to public interest nor intention was for any public interest.⁵⁶ The Delhi High Court, while dealing with the expression 'personal information' used in Section 8(1)(j) of the Act, has observed that no public authority can claim that any information held by it is 'personal' as there is nothing 'personal' about any information, or thing held by a public authority in relation to itself. The expression 'personal information' can mean information personal to any other 'person', that the public authority may hold. That other 'person' may or may not be a juristic person, and may or may not be an individual. It further held that the use of the words 'invasion of the privacy of the individual' instead of 'an individual' showed that the

54 State of Jharkhand and Anr. v. Navin Kumar Sinha and Anr., AIR 2008 Jharkhand 19.

55 Smt. Vimleshwari Devi v. Central Information Commission and Ors., AIR 2016 Uttarakhand 7.

56 Hardev Arya v. Chief Manager (Public Information Officer) and Other, AIR 2013 Raj 97.

legislative intent was to connect the expression 'personal information' with 'individual'. The expression 'individual' included a juristic person as well as an individual. Thus, the expression 'personal information' used in Section 8(1)(j), does not relate to information pertaining to the public authority to whom the query for disclosure of information is directed.⁵⁷

Where disclosure of information sought was not personal information but pertained to individual CBI officers in respect of their duty, order of the Commission directing the Central Bureau of Investigation to supply such information was held proper.⁵⁸ The information provided by applicant of the passport to the Regional Passport Office, as proof of his address and identity, would be a 'personal information', though its disclosure may not necessarily impinge on his privacy. The view of the Commission that a person providing information relating to his address and identity, while seeking issue of passport to him is engaged in a public activity was not sound. No element of public duty was involved in providing information in proof of the address and identity of the applicant, while seeking a passport.⁵⁹

Information such as date of birth and residential address of the passport holder has been held to constitute personal information within the meaning of section 8(1)(j) which could not be disclosed. Since neither the applicant sought disclosure of the said documents in special circumstances, such as existence of any public interest nor the Commission recording found that the larger public interest required disclosure, the said information was held exempt from disclosure under Section 8(1)(j). However, the passport number and the date of issue and expiry of the passport could be provided to the applicant. The birth certificate as well as the documents of his education and the documents submitted as proof of his residential address were personal information which could not be disclosed to the applicant, particularly when no special circumstances warranting such disclosure were indicated in the application nor did the Commission come to the conclusion that disclosure of the aforesaid personal information was warranted in the larger public interest.⁶⁰

57 *Jamia Millia Islamia v. Sh. Ikramuddin*, AIR 2012 Del 39.

58 *Central Bureau of Investigation v. Central Information Commission and Anr.*, AIR 2015 Cal 21.

59 *Union of India v. Hardev Singh*, W.P(C) No.3444/2012 decided on 23.8.2013, Delhi High Court.

60 *Union of India v. Anita Singh*, AIR 2014 Del 23.

On the issue of communication of ACR, the Supreme Court in *Sukhdev Singh v. Union of India and others*⁶¹ held that the view taken in *Dev Dutt case*⁶² that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving many objectives.⁶³ The Court thus observed that every entry in ACR has to be communicated to him/her within a reasonable period.⁶⁴ Orders of suspension in relation to employees of the SGPC alongwith the grounds of suspension, reasons for reinstatement, punishments awarded, etc; has been held to be personal information exempted under section 8(1)(j).⁶⁵

Where information sought was in nature of personal information in respect of IAS Officers which was not relatable to discharge of their duties in official capacity like information in the nature of the account number/name of the Bank in which the salary of the Officers is being sent, copies of TA bills, GPF/PPF statements, LTC bills and supply of PAN number of the officers, the court observed that no public interest was involved justifying disclosure of information that would outweigh right of privacy of individuals concerned and information sought was with clear object to denigrate officers concerned solely and settle personal scores and thus the information was held exempt from disclosure.⁶⁶ The certified copy of service book and personal record of the third party which was sought on the allegation that he had taken benefit of two advance increments in lieu of sterilization, cannot be supplied as these would contain annual confidential reports and other information like details of family and nomination thereof. A Government servant has a right to guard these

61 (2013) 9 SCC 566, AIR 2013 SC 2741.

62 *Dev Dutt v. Union of India and others* (2008) 8 SCC 725, AIR 2008 SC 2513.

63 The communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. On being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR and communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice.

64 Supreme Court overruled its following earlier judgments: *Satya Narain Shukla v. Union of India and others*, (2006) 9 SCC 69, AIR 2006 SC 2511, and *K.M. Mishra v. Central Bank of India and others*, (2008) 9 SCC 120, AIR 2009 SC 1114.

65 *Avtar Singh v. State*, AIR 2013 P&H 192.

66 *K. K. Sharma v. State*, AIR 2013 P&H 198.

information as they are personal in nature. The information has no relationship to any public activity and if parted with will certainly lead to the unwarranted invasion of the privacy of a Government servant.⁶⁷

The Punjab and Haryana High Court observed that the conflict between the right to personal privacy and the public interest in the disclosure of personal information stands recognized by the legislature in terms of exempting purely personal information under section 8(1)(j). Under such exemption clause, the disclosure may be refused if the request pertains to personal information, the disclosure of which has no relation to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual. Thus, personal information including tax returns/medical records are not liable to be disclosed.⁶⁸ Disclosure was sought regarding name of agency which had conducted Additional District and Sessions Judge Examination. The Court observed that such information would cause inroad into privacy of not only examiners, but also evaluators, invigilators etc. Disclosure was held exempted under section 8(1)(j) as conduct of examination is not mere public activity rather it is sacrosanct process, based on the touchstone of confidentiality and purity.⁶⁹

Recently, the Supreme Court has held that RBI is not in any fiduciary relationship with the banks. Analyzing the duties of the RBI, the Court held that it is supposed to uphold public interest and not the interest of individual banks, and has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of 'trust' between them. In fact, RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country's economy and the banking sector. Thus RBI ought to act with transparency and not hide information that might embarrass individual banks. The Financial institutions have an obligation to provide all the information to the RBI and such an information shared under an obligation/ duty cannot be considered to come under the purview of being shared in fiduciary relationship. One of the main characteristic of a fiduciary relationship is 'Trust and Confidence' which is lacking. The RBI was thus held liable to provide

67 Shrikant Pandya v. State, AIR 2011 MP 14.

68 K. K. Sharma v. State, AIR 2013 P&H 198, relying on Secretary General, Supreme Court of India v. Subhash Chandra Agarwal, AIR 2010 Del 159.

69 Joint Registrar (Judicial)-cum-Public Information Officer, High Court of Judicature at Patna v. State, AIR 2010 Pat 176.

information regarding inspection report and other documents to the general public.⁷⁰

Third Party Information

On the importance of the salutary provision of section 11, the Delhi High Court in *R. K. Jain v. Union of India and Anr.*,⁷¹ held that procedure under section 11 (1) is mandatory and has to be followed which includes giving of notice to the concerned officer whose ACR was sought for. If that officer pleads private defence, such defence has to be examined while deciding the issue as to whether the private defence is to prevail or there is an element of overriding public interest which would outweigh the private defence. Also where the applicant did not specify documents in respect of which information was sought, the High Court agreed with the Commissioner that providing information on basis of such vague request without hearing third party and without considering his objections was not proper.⁷² Information relating to third party cannot be supplied without hearing him and without joining him as party respondent. If such information is ordered to be supplied without hearing third party, third party would be losing his right to prefer first appeal under section 19 of Act and second appeal under section 19(4) and therefore third party ought to be joined as party respondent.⁷³ But in a Bombay case where the information sought was concerning Memorandum of Understanding to which the Government of Maharashtra was also a party, such information was held not to be exclusively related to third party and the order of the Commissioner directing to provide such information without hearing third party was held justified.⁷⁴ Applicant was interviewed by a Board and she subsequently requested for supply of certain information even when the result was not declared. On refusal, the

70 Reserve Bank of India v. Jayantilal N. Mistry, AIR 2016 SC 1.

71 AIR 2013 Del 2, applicant sought information about some entries made in the ACR of a member of CESTAT and the follow up action. On refusal, writ petition was filed which was disposed of by remitting the matter back to the CIC to consider afresh after following the procedure prescribed in s 11. The inter court appeal filed by the applicant was also dismissed.

72 Sunflag Iron and Steel Company Ltd., Nagpur v. State Information Commission, Nagpur and Ors., AIR 2015 Bom 38.

73 High Court of Gujarat v. State Chief Information Commission and Anr., AIR 2008 Guj 37.

74 Sunflag Iron and Steel Company Ltd., Nagpur v. State Information Commission, Nagpur and Ors., AIR 2015 Bom 38.

High Court disagreed holding that even where final decision in any ongoing process had not been taken, those portions of file which do not affect any secrecy could be disclosed.⁷⁵ When an information seeker files an application which relates to or has been supplied by third party, the PIO has to examine whether the said information is treated as confidential or can be treated as confidential by the third party. If the answer is in the possible sphere of affirmative or "maybe yes", then the procedure prescribed in section 11 has to be followed for determining whether the larger public interest requires such disclosure. When information per se or ex facie cannot be regarded as confidential, then the procedure is not to be followed. All information relating to or furnished by a third party need not be confidential for various reasons including the factum that it is already in public domain or in circulation, right of third party is not affected or by law required to be disclosed; etc.⁷⁶

Administrative and not Judicial Function

Regarding the nature of the work of the Information Commissions, the earlier view of the Courts was that it was a quasi judicial and not merely an administrative one.⁷⁷ Overruling its earlier position, the Supreme Court in *Namit Sharma (II)*⁷⁸ observed that under section 18, the Information Commission has the power and function to receive and inquire into a complaint from any person who is not able to secure information from a public authority, under section 19 it decides appeals against the decisions of the Central Public Information Officer or the State Public Information Officer relating to information sought by a person, and under section 20 it can impose a penalty only for the purpose of ensuring that the correct information is furnished to a person seeking information from a public authority. Hence, the functions of the Information Commissions are limited to ensuring that a person who has sought information from a public authority in accordance with his right to information conferred under Section 3 of the Act is not denied such information except in accordance with the provisions of the Act. Section 2(j) defines "Right to Information" conferred on all citizens under Section 3 of the Act to mean the right to

75 Smt. Supriya Das v. State of Tripura and Ors., AIR 2015 Tri 33.

76 Arvind Kejriwal v. Central Public Information Officer and Anr., AIR 2012 Del 29.

77 Namit Sharma v. Union of India, AIR 2012 SC (Supp) 867.

78 AIR 2014 SC 122.

information accessible under the Act, "which is held by or under the control of any public authority". While deciding whether a citizen should or should not get a particular information "which is held by or under the control of any public authority", the Information Commission does not decide a dispute between two or more parties concerning their legal rights other than their right to get information in possession of a public authority. This function obviously is not a judicial function, but an administrative function conferred by the Act on the Information Commissions.⁷⁹

79 The Supreme Court recalled the directions and declarations given in *Namit Sharma v. Union of India*, AIR 2012 SC (Supp) 867 with the following:

- (i) Sections 12(5) and 15(5) of the Act are not ultra vires the Constitution.
- (ii) Sections 12(6) and 15(6) of the Act do not debar a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or a person holding any other office of profit or connected with any political party or carrying on any business or pursuing any profession from being considered for appointment as Chief Information Commissioner or Information Commissioner, but after such person is appointed as Chief Information Commissioner or Information Commissioner, he has to discontinue as Member of Parliament or Member of the Legislature of any State or Union Territory, or discontinue to hold any other office of profit or remain connected with any political party or carry on any business or pursue any profession during the period he functions as Chief Information Commissioner or Information Commissioner.
- (iii) Only persons of eminence in public life with wide knowledge and experience in the fields mentioned in Sections 12(5) and 15(5) of the Act be considered for appointment as Information Commissioner and Chief Information Commissioner.
- (iv) Persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.
- (v) Committees under Sections 12(3) and 15(3) of the Act while making recommendations to the President or to the Governor, as the case may be, for appointment of Chief Information Commissioner and Information Commissioners must mention against the name of each candidate recommended, the facts to indicate his eminence in public life, his knowledge in the particular field and his experience in the particular field and these facts must be accessible to the citizens as part of their right to information under the Act after the appointment is made.
- (vi) Wherever Chief Information Commissioner is of the opinion that intricate questions of law will have to be decided in a matter coming up before the Information Commission, he will ensure that the matter is heard by an Information Commissioner who has wide knowledge and experience in the field of law.

The constitutional principles of separation of powers and independence of judiciary have been held not applicable in the appointment of the Information Commissions. The Supreme Court has now held that the Information Commissions need not be manned by persons with judicial training, experience and acumen or former Judges of the High Court or the Supreme Court. Distinguishing the RTI Act from other Acts creating tribunals, it observed that in other cases when judicial powers vested in the High Court were sought to be transferred to tribunals or judicial powers were vested in tribunals by an Act of the legislature, the Supreme Court had insisted that such tribunals be manned by persons with judicial experience and training, such as High Court Judges and District Judges of some experience.⁸⁰

By the impugned order, the High Court had allowed the writ petition preferred by a respondent S.Vijayalakshmi whereby the notification appointing the State Information Commissioners was quashed on the ground that the manner in which the date for convening the Meeting of the Selection Committee was fixed and the decision of the Committee recommending respondents for appointment as State Information Commissioners was wholly arbitrary, capricious and against the methodology to be followed in the matter of such appointments. The Supreme Court observed that the High Court ought to have decided the question relating to the nature and scope of consultation with the Leader of Opposition in matters relating to the appointment of Information Commissioner of a State as envisaged under Section 15(3) of the Right to Information Act and was also required to decide the effect of selection, in case of Opposition Leader without any valid reason chosen not to attend the meeting or refused to attend the meeting and in such case whether such selection/appointment can be held to be vitiated for non-consultation. After setting aside the order passed by the High Court, the matter was remitted back to the High Court for fresh decision on merit.⁸¹

Powers, Appeal and Penalty

Section 18 deals with the powers and functions of the Information Commissions. The Courts have given a restrictive interpretation to the

80 Union of India v. Namit Sharma, AIR 2014 SC 122.

81 C. Manoharan v. S. Vijayalakshmi & Ors., Civil Appeal No. 1790 of 2014, dated January 31, 2014, Supreme Court of India.

power of the Commissions to receive and enquire into complaints directly. According to the prevailing judicial view, the Information Commission is an appellate body and can hear appeals under section 19 of the Act. Regarding the power of the Commission under section 18, the Manipur High Court has observed that on refusal or non-providing of information by the PIO, complaint preferred under S. 18 cannot give the Commission power under S. 18 to provide access to information sought but can only order penalty. Thus order passed by Information Commission directing furnishing of information sought by complainant was set aside.⁸² The Supreme Court has observed that the obligation under the RTI Act is only to make available or give access to existing information or information which is expected to be preserved or maintained. If the rules and regulations governing the functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information will be entitled to such information only if he seeks the information when it is available with the public authority. The power of the Information Commission under section 19(8) to require a public authority to take any such steps as may be necessary to secure compliance with the provision of the Act, does not include a power to direct the public authority to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority.⁸³

On the interpretation of penalty provisions, various High Courts have observed that in cases mentioned in section 20(1), it is the duty of the Commission to impose a Rs. 250 daily penalty till the application for information is received or the information is given and the total penalty amount should not exceed Rs. 25,000. The Calcutta High Court observed that the proportionality principle based on the gravity of the proven charge concept cannot apply to a case under section 20 as that would amount to unauthorised reduction of the penalty amount. A section 20 case can be a case of penalty or no penalty, but not a case of reduced penalty.⁸⁴ Again there is no provision in the Act which empowers the Commission to either reduce or enhance penalty. If the Commission comes to the conclusion that

82 Board of Secondary Education, Manipur and Anr. v. State Chief Information Commissioner, Manipur and Ors., AIR 2015 Manipur 19, relying on AIR 2012 SC 864.

83 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

84 Madhab Kumar Bandhopadhyay v. State, AIR 2013 Cal 128.

there are reasonable grounds for delay or that the PIO concerned has satisfactorily explained the delay then no penalty can be imposed. Otherwise the penalty has to be levied as per the provisions of the Act.⁸⁵ Where the Information Commissioner showed some degree of leniency in imposing the penalty and the findings were based on evidence and after affording the petitioner a reasonable opportunity of being heard, the writ court refused to interfere.⁸⁶

The reason for delay in providing the information that entire staff of Municipal Board was engaged in collection of data, preparation of voter identity cards under order of Collector and was busy in rescue work after the natural calamity, was held reasonable. Moreover at the time of appeal, the appellant had already received the information, thus imposition of penalty on the ground that information was not supplied within thirty days was held unjustified and arbitrary.⁸⁷ In another case a file allotting space for a kiosk was not supplied as the file was lost for which FIR had been filed. The Court observed that as the loss caused to applicant was because of removal of kiosk and not because of non-supply of required information, damages and penalty were held not proper.⁸⁸ Where the Commission directed an Institute to designate PIO and First Appellate Authority in respect of the Institute and also provide certain information to the applicant, on non-furnishing of all the information, the Commission issued show cause notice to the Principal of the Institute calling upon her as to why contempt proceedings should not be initiated against her. As the Institute was subsequently brought under the ambit of the Act through an order passed by the State Government, on the concession made by the State that the Commission had no jurisdiction to pass the impugned order, the High Court quashed the order.⁸⁹

Interpreting section 20(2) of the Act, the Supreme Court in *Manohar Manikrao Anchule v. State of Maharashtra and Anr.*,⁹⁰ observed that every

85 Sanjay Hindwan v. State, AIR 2013 HP 30.

86 Johnson B. Fernandes v. Goa State Information Commission, Panaji, Goa and Anr., AIR 2012 Bom 56.

87 Narender Kumar v. The Chief Information Commissioner, Uttarakhand, AIR 2014 Uttarakhand 40.

88 Nagar Nigam, Dehradun v. Chief Information Commissioner and Anr., AIR 2015 Uttarakhand 118.

89 Principal, Nirmala Institute of Education, Goa v. State, AIR 2013 Bom 28.

90 AIR 2013 SC 681.

default on the part of the concerned officer may not result in issuance of a recommendation for disciplinary action. The case must fall in any of the specified defaults and reasoned finding has to be recorded by the Commission while making such recommendations. 'Negligence' per se is not a ground on which proceedings under Section 20(2) of the Act can be invoked. The Commission must return a finding that such negligence, delay or default is persistent and without reasonable cause. It is a penal provision as it vests the delinquent with civil consequences of initiation of and/or even punishment in disciplinary proceedings.⁹¹ Information was sought about the basis on which teachers were appointed on the post reserved for handicapped persons. The petitioner neither supplied the required information nor he made any such statement that the said teacher was appointed without any handicap certificate issued by the government. The petitioner concealed the necessary facts and did not comply with the specific repeated directions of the Commission and absented himself on the dates fixed in the case and the Commission was thus held justified in passing the impugned order against the petitioner.⁹²

In *Nagar Nigam, Dehradun v. Chief Information Commissioner and Anr.*,⁹³ the Chief Information Commissioner in the impugned order had held that lodging of an FIR for a missing file was no ground for non- supply of

91 The Supreme Court further observed that all the attributable defaults of a Central or State Public Information Officer have to be without any reasonable cause and persistently. Besides, the finding that any of the stated defaults have been committed by such officer, the Commission has to further record its opinion that such default in relation to receiving of an application or not furnishing the information within the specified time was committed persistently and without a reasonable cause. There could be cases where there is reasonable cause shown and the officer is able to demonstrate that there was no persistent default on his part either in receiving the application or furnishing the requested information. In such circumstances, the law does not require recommendation for disciplinary proceedings to be made. It is not the legislative mandate that irrespective of the facts and circumstances of a given case, whether reasonable cause is shown or not, the Commission must recommend disciplinary action merely because the application was not responded to within 30 days, the Central or the State Commission have no jurisdiction to add to the exhaustive grounds of default mentioned in the provisions of Section 20(2). The case of default must strictly fall within the specified grounds of the provisions of Section 20(2). This provision has to be construed and applied strictly. Its ambit cannot be permitted to be enlarged at the whims of the Commission.

92 Lakshmi Narayan Singh v. State, AIR 2011 Pat 32.

93 AIR 2015 Uttarakhand 118.

information or non-supplying of file for perusal of the applicant and thus applicant should be paid compensation as well as penalty should be paid by the guilty officer. But the High Court held that penalty could be imposed under section 20 (2) only when information was supplied with undue delay without there being any sufficient reason or information was declined to be supplied without any sufficient reason. As the file was not made available for inspection as the same was missing and FIR had already been lodged, therefore, non- furnishing of file for perusal was justified and consequently penalty ought not to have been imposed.

Overriding Effect of the Act

Section 22 has been interpreted by different courts under various circumstances. When information is accessible to a public authority and is held or under its control, then the information must be furnished to the information seeker under the RTI Act, even if there are conditions or prohibitions under another statute already in force or under the Official Secrets Act that restricts or prohibits access to information to public. Prohibition or conditions which prevent a citizen from having access to information in view of the non obstante clause in Section 22 of the RTI Act do not apply. Regarding the issue whether the examinee is entitled to inspect his evaluated answer-books or take certified copies thereof, the Supreme Court observed that the right is claimed by the students, not with reference to the rules or bye-laws of examining bodies, but under the RTI Act which enables them and entitles them to have access to the answer books as 'information' and inspect them and take certified copies thereof. Because of section 22, the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. Unless, the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of section 8(1), the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations.⁹⁴

When access to information by a public authority itself is prohibited or is accessible subject to conditions, then the prohibition is not obliterated and the pre-conditions are not erased. Section 22 of the RTI Act is a key which

94 Central Board of Secondary Education and Anr. v. Aditya Bandopadhyay and Ors., 2011 AIR SCW 4888.

unlocks prohibitions/limitations in any prior enactment on the right of a citizen to access information accessible to a public authority. It is not a key with the public authority that can be used to undo and erase prohibitions/limitations on the right of public authority to access information.⁹⁵ But the Punjab and Haryana High Court has recently held that marked copy of voters list which was sealed under Election Rules at time of declaration of result cannot be supplied to the applicant under the Act as Section 22 has no overriding effect on Haryana Panchayati Raj Act, 1994 and the corresponding Haryana Panchayati Raj Election Rules. Thus the State Public Information officer has no right to access documents under the relevant Election Rules.⁹⁶

Miscellaneous

Section 24 of the Act exempts certain intelligence and security organizations from the application of the Act. Where information pertaining to the applicant's service record was sought from Defence Research and Development Organisation (DRDO), a Central Government Organisation which was exempted from providing information as per section 24(1), DRDO was held not compelled to supply required information.⁹⁷ The State Government is empowered under section 24(4) to notify in the Official Gazette that nothing contained in the Right to Information Act shall apply to such intelligence and security organization being organizations established by the State Government. But the power to exempt from the provisions of the Act is not available to the State Government even in case of intelligence and security organizations in

95 Election Commission of India v. Central Information Commission and Others, 2009 (164) DLT 205.

96 Block Development and Panchayat Officer v. State Information Commissioner and Anr., AIR 2015 P&H 191, agreeing with the Delhi High Court's observation in Election Commission of India v. Central Information Commission and Others, 2009 (164) DLT 205 that as per the Election Rules, once the ballot papers or control unit or EVMs is sealed, no one can have any access to the same except on an order passed by a competent court. Even the Election Commission does not have right to access the control unit of the EVMs, to encode or download and re-examine the data without permission of the competent court. There is a prohibition and/or restriction on the right of the public authority to have access to the information. Satisfaction of the conditions for encoding and downloading of data stored in the control unit is mandatory before the said information is said to be held by or under the control of the Election Commission of India.

97 Dr. Neelam Bhalla v. Union of India and ors., AIR 2014 Del 102.

respect of the information pertaining to the allegations of corruption and human rights violations. The information sought was the particulars relating to the number of investigations completed and the number and name of persons convicted, the post held by them when the act of corruption was done, the charges framed and the recommendations given to the Vigilance Commissioner after investigation. The Madras High Court observed that all these particulars related to corruption and hence the Government Order prohibiting the application of the Act had no application in the present case.⁹⁸

The Act does not prohibit providing of fees for filing first or second appeal and hence relevant Rules of Chhattisgarh Right to Information (Appeal) Rules (2006) providing for charging fees for first and/or second appeal neither contravenes any provision of Act nor is it beyond rule making power.⁹⁹ Also Rule 3 of Chhattisgarh Right to Information (Submission of Application) Rules (2009) merely envisages filing of separate applications for seeking information in more than one subject. The rule does not bar seeking information in more than 150 words, it merely provides that normally it should be done in less than 150 words, so that information is sought in concise words does not prohibit seeking of information in more than one subject. The rule was thus held valid.¹⁰⁰ The Karnataka High Court has observed that information relating to assets and liabilities statements of MLAs and MLCs cannot be construed as relating to one subject-matter and hence cannot be disclosed in single application.¹⁰¹

The Central Information Commission in its various orders has clearly held that the Information Commission has no power to examine the legality of any Rule. Also it is not within the purview of the Commission to examine the manner in which a competent authority in exercise of its powers to frame Rules under Section 28 of the RTI Act has drawn such Rules. Thus the State Information Commission had no power to examine the legality and validity of the Meghalaya High Court (RTI) Rules, framed by the

98 Superintendent of Police, Central Range Office of the Directorate of Vigilance and Anti-Corruption, Chennai v. R. Karthikeyan and Anr., AIR 2012 Mad 84.

99 Sanjay Singh Thakur v. State of Chhattisgarh and ors., AIR 2014 Chhattisgarh 65.

100 Ibid.

101 Registrar, Office of the Karnataka Lokayukta, Bengaluru v. Karnataka Information Commission, Bengaluru and anr., AIR 2014 Kar 68, case on Karnataka Right to Information Rules (2005).

competent authority and the High Court can quash the appeal pending before the State Chief Information Commissioner who has no jurisdiction to decide the issue.¹⁰²

Conclusion

As more and more orders of the Commissions come before the writ courts for scrutiny, the courts are analyzing the provisions of the Act and expounding the law. The Supreme Court has also in the last few years delivered few important judgments in this field. Scope of 'Public Authority' is now quite wide unlike few years back when the scope was limited. The courts do not disturb the orders of the Commissions lightly. As has been aptly held by the Supreme Court, the Act seeks to bring about a balance between two conflicting interests. One is to bring about transparency and accountability by providing access to information under the control of public authorities. The other is to ensure that the revelation of information, in actual practice, does not conflict with other public interests which include efficient operation of the Governments, optimum use of limited fiscal resources and preservation of confidentiality of sensitive information. The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability.

Citizens' right to get information is statutorily recognized by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble of the Act. The provisions of RTI Act should be enforced strictly and all efforts should be made to disclose as much information as possible. But importance and emphasis will have to be given to other public interests like confidentiality of sensitive information, fiduciary relationships, efficient operation of governments and right to privacy too.

* * * * *

102 B. Bhattacharjee v. The Appellate Authority, High Court of Meghalaya, Shillong and Ors., AIR 2016 Meghalaya 1.

AMBIT OF RIGHT TO INFORMATION ACT, 2005 - WIDE ENOUGH TO COVER PRIVATE AIDED COLLEGES ?

Anjana Girish*

Abstract

This paper is a critical analysis of the judgment rendered by the Hon'ble High Court of Kerala in the case of V.S. Lee, Principal v. State of Kerala, represented by chief, the State Information Commission and The Registrar, University of Kerala¹ Connected cases, wherein the Court was called upon to examine whether an aided private college in the State of Kerala would be a 'public authority' as defined in Section 2 (b)(d) of the Right to Information Act, 2005 so as to attract the applicability of the provisions of the said Act to these institutions. The Right to Information Act, 2005 is based on the right to information recognized by judicial decisions as part of the fundamental right to free speech and expression under Article 19 (1)(a) of the Constitution. A perusal of the scheme of the Act and the statement of objects and reasons leave no doubt that the legislature by this Act intended to hold Government and Government instrumentalities alone accountable to the governed. Accordingly, the instrumentality as falling within the definition of 'public authority' has to be understood as only an instrumentality of the Government and has to be one over which the appropriate Government has deep and pervasive control. Therefore, if an institution is not an instrumentality in terms of Article 12 of the Constitution of India, it cannot be brought within the definition of 'public authority' under the Act.

Introduction

Private aided colleges in the State are not owned or controlled by the Government. The administration is in the hands of a manager elected by the educational agency. The governing body is free from governmental control in the discharge of its functions. All the employees including the principal and teachers are employees of the colleges and all of them are appointed by and on behalf of the Colleges and the Government has no say or control over it. These Colleges are not 'substantially financed' by funds provided by the appropriate Government. The inclusiveness provided by Section 2 (h) of the Act does not enlarge the scope of the earlier limb of the definition in as much as what is added in as inclusions should be read by applying the rule of construction: *noscitur a sociis*, which means that the meaning of a word is to be judged by the company it keeps as well as the rule of *eiusdem generis*. The elements brought into the definition of public

*Assistant Professor, Inter University Center for IPR Studies, Cochin University of Science and Technology.

authority by using the legislative device 'includes' should be read to be compatible with what is provided for in the earlier limb. Therefore a body owned, controlled or substantially financed or a non governmental organization substantially financed directly or indirectly by funds provided by the appropriate Government can fall within the definition of 'public authority' under the RTI Act, only if it is one established or constituted by notification issued or order made by the appropriate government. These Colleges would not be 'public authority' under the Act as they are neither established or constituted by or under the Constitution of India or by any law made by Parliament or State Legislature, nor by Notification issued or order made by appropriate Government. It is neither a body owned, controlled or substantially financed by the Government, nor is a Government organization. The critical analysis of the judgment rendered by the Hon'ble High Court of Kerala in the case of *V.S. Lee, Principal v. State of Kerala*¹, which upheld the aforesaid position of law follows.

Brief facts of the case

The Kerala State Information Commission vide letter No. 1084/SIC-Gen/06 intimated all the Universities in Kerala to furnish details of Government colleges and aided colleges under the Universities along with the details of name and designation of the Assistant public information officers and public information officers appointed by the Colleges under the provisions of the Right to Information Act, 2005. Pursuant thereto, the universities issued letters to the principals of the colleges affiliated to the universities calling upon them to furnish the name and designation of the Public Information Officer and Assistant Public Information Officer of the Colleges, directly to the Kerala State Information Commission with intimation to the university on or before 15.05.2006. The explanations submitted by the colleges that they do not fall within the ambit of the Act of 2005 came to be rejected by the Kerala State Information Commission stating that these private aided Colleges are controlled and substantially financed by the Government of Kerala and they are public authorities as defined in Section 2 (h) (d) (i) of Act 22 of 2005. Accordingly, the colleges were once again directed to designate officers for the posts of Assistant Public Information Officer, Public Information Officer and Appellate Authority as per the RTI Act within 10 days, notify the same and intimate the particulars for consideration of the Commission. The Colleges preferred various Writ Petitions before the Hon'ble High Court of Kerala

challenging the directions of the Kerala State Information Commission and also praying for a declaration that the Colleges are not public authorities as defined in Section 2 (h) of the Act and also to restrain the authorities from enforcing the provisions of the Act against the Colleges.

Issues

- 1) Whether an aided private college in the State of Kerala would be a 'public authority' as defined in Section 2 (h) (d) of the Right to Information Act, 2005 so as to attract the applicability of the provisions of the said Act to these institutions?
- 2) In the case of an aided college established by a minority, whether the interpretation given by the Hon'ble High Court that colleges without substantial state control are not government entities, would be violative of the fundamental right guaranteed under Articles 19 (1) (g), 26 (a) and 29 of the Constitution of India?

Judgement

All the writ Petitions were heard together and the learned Single Judge vide common judgment and order dated 04.07.2007 dismissed all the writ petitions holding that these colleges are public authorities as defined in Section 2 (h)(d) of the Right to Information Act, 2005. Appeals preferred by the Colleges came to be dismissed by the Division Bench of the Hon'ble Court.

Ratio of the case

Only where there is ample and unimpeachable evidence to conclude that the private aided colleges are 'in fact' substantially financed by the Government, would they fall within the definition of 'public authority' as contained in Section 2 (h) of Act of 2005. To delve upon this it has to be further examined if apart from the day to day and managerial expenses, other expenses including the infrastructure facilities such as providing class room with modern facilities, electronic equipment, play grounds, sports infrastructure, computerized laboratory and libraries, computer facilities and various other facilities in tune with the modern day requirements are all provided with aid or funding from the Government or is left to the college Management itself without any support from the government.

Analysis by the author

The Right to Information Act is based on the right to information recognized by judicial decisions as part of the fundamental right to free speech and expression under Article 19 (1)(a) of the Constitution. The said Act was enacted in 2005 to provide for information to citizens under the control of Public Authority. A perusal of the scheme of the Act and the statement of objects and reasons leave no doubt that the legislature by this Act intended to hold Governments and Government instrumentalities alone accountable to the governed.

The judgment raises a very substantial question of law as to whether a private aided college established in the State of Kerala is not a 'public authority' as defined under Section 2 (h) of the Right to Information Act, 2005? Section 2 (h) of the Act of 2005 defines public authority as :

- (h) *"public authority" means any authority or body or institution of self-government established or constituted—*
 - (a) *by or under the Constitution;*
 - (b) *by any other law made by Parliament;*
 - (c) *by any other law made by State Legislature;*
 - (d) *by notification issued or order made by the appropriate Government, and includes any—*
 - (i) *body owned, controlled or substantially financed;*
 - (ii) *non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.*

It appears that private aided Colleges in the State of Kerala are neither established nor constituted by or under the Constitution of India or by any law made by Parliament or State Legislature, nor by Notification issued or order made by appropriate Government. They are neither bodies owned, controlled or substantially financed by the Government, nor are they Government organizations. Moreover the expression 'non Government organizations substantially financed' has to be read in consonance with the earlier part of the definition which means an organization established or constituted under the Constitution, law made by Parliament or State Legislature. This is not the scenario in the case of these Colleges. While the

section makes it sufficient that the authority/body is established 'by' or 'under' the Constitution, it mandates that it has to be established 'by' any law made by the Parliament or State Legislature. It is not sufficient that it is established 'under' the law. This assumes importance because it is only the university alone which is established 'by' the University Act and these colleges are not authorities/bodies established or constituted 'by' the University Act. Nor are they establishments issued on order made by the appropriate Government. The intent and importance is to the establishment and the constitution and not its running. It further appears that most of the Colleges have been established by Societies/Trust and therefore would be beyond the ambit of the above definition. The definition of 'Public Authority' can have no wider meaning than 'the State' under Article 12 of the Constitution of India, especially when the right to information stems from Article 19 of the Constitution which can be enforced only against a 'State' as contained in Article 12. It has been held by the Hon'ble Supreme Court in a plethora of cases² that the Right to Information Act is based on the 'right to information' recognized by judicial precedents as part of the fundamental right to speech and expression guaranteed by Article 19 (1)(a) of the Constitution. Fundamental rights can be enforced only against the Government, government agency or government instrumentality. Thus what is to be primarily seen is whether the establishment/ institution satisfies all the requirements so as to become any of the above so as to attract the said Article. One needs to understand the difference between the phrases 'substantially financed' and 'financially controlled'. The phrase 'substantially financed' is an expression used for the provision of finances at the time of Constitution and establishment of the Institution. Attention is invited to the judgment of the Hon'ble Supreme Court in *Mysore Paper Mills Ltd v. Mysore Paper Mills Officers Assn*³ wherein the Court held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removed at the instance of the Government and carrying on important functions of Public Interest under the control of the Government alone will become 'an authority' within the meaning of Article 12. The same criteria has to be necessarily applied to determine if a body is a public authority for the purpose of the Act of 2005.

2 See *Namit Sharma v. Union of India* (2013) 1 SCC 745. Paras 24 to 41.

3 (2002) 2 SCC 167. Para 12.

The Hon'ble Supreme Court in the case of *Chander Mohan Khanna v. National Council of Educational Research and Training and Ors.*⁴ after considering the memorandum of association and rules came to the conclusion that NCERT was largely an autonomous body and its activities were not wholly related to Governmental functions and the governmental control was confined only to the proper utilization of the grants and since its funding was not entirely from government sources, the case did not satisfy the requirements of State under Article 12. If one was to adopt the same parameters, the real and prime question to be answered is whether private aided colleges which receive meager grant-in-aid from the Government, and where there is no other financial aid or funding from the Government and almost all the expenses are met by the college from its own funds, is it appropriate in law to proceed on the basis that the College is substantially financed by the Government. A reading of the judgment does not reflect that there is any aid from the government to these aided colleges under any of these heads and therefore the decision to categorise them as substantially financed by the Government may need a revisit.

The Hon'ble Supreme Court in the case of *Thalappalam Co-operative Society v. State of Kerala & Ors*⁵ held:

Merely providing subsidiaries, grants, exemptions, privileges etc., as such, cannot be said to be providing funding to a substantial extent, unless the record shows that the funding was so substantial to the body which practically runs by such funding and but for such funding, it would struggle to exist. The State may also float many schemes generally for the betterment and welfare of the cooperative sector like deposit guarantee scheme, scheme of assistance from NABARD etc., but those facilities or assistance cannot be termed as "substantially financed" by the State Government to bring the body within the fold of "public authority" under Section 2(h)(d)(i) of the Act".⁶

This leads to another question of vital importance as to whether in order to attract Section 2 (h) of the Act, there has to be deep and pervasive state Control over the institution. It is without any doubt that these private aided Colleges are not owned or controlled by the Government. The

4 AIR 1992 SC 76. Paras 4, 5 & 10.

5 (2013) 16 SCC 82. Paras 46 to 48.

6 Ibid., Para 38.

administration is in the hands of a manager elected by the educational agency. The governing body is free from governmental control in the discharge of its functions. Also, all the employees including the principal and teachers are employees of the college and all of them are appointed by and on behalf of the College and the Government has no say or control over it. It is also a fact that these colleges maintains complete records of the staff, their personal files, account of PFs, gratuity, leave encashment, etc. Further, these colleges have a set of well defined rules and regulations for the management and administration, especially financial and accounting. These rules have consistently stood the test of scrutiny by Courts in various cases. The financial support from the Government is without any unusual control. The entire fee collected by the College is remitted to the Government. The presence of a government representative in the select committee of the teaching staff or the conditions of affiliation in the University rules cannot be determinative of whether the College is Government controlled. But it appears that the Hon'ble High Court has considered only one limb of the definition namely the financial aid from the Government. i.e. the salary of the teachers. This, in law, alone is not sufficient to attract Section 2 (h). In the absence of any deep and pervasive state control, to categorise these colleges as 'public authorities' wouldnot be contrary to law.

It is also necessary that the words "controlled or substantially financed" has to be read along with the principal part in Section 2 (h) (d) and in the light of the long title and preamble as well as the statement of objects and reasons of the Act.

The statement of objects and reasons of the Act reads thus:

An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

WHEREAS the Constitution of India has established democratic Republic;

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold

Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS; it is necessary to harmonise these conflicting interests while preserving the paramourcy of the democratic ideal;

NOW, THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

A reading of the above reflects that the predominant intention of the legislature in enacting the Act is to hold Governments and its instrumentalities accountable to the governed. Therefore, to make a private body amenable to the provisions of the Act and thereby restrict its autonomy would be contrary to the intention of the legislature and any such interpretation would be traveling beyond the scope and ambit of the legislation.

The Hon'ble Supreme Court in the case of *TMA Pai*⁷ held that the right to establish and administer the colleges/ schools is a fundamental right guaranteed under Article 19 (1) (g) of the Constitution of India and this right cannot be taken away or infringed by the State except in accordance with Article 19 (6). The Court further held that maximum/ complete autonomy in the matter of administration is required to be given to these institutions. Most importantly the Hon'ble Supreme Court held that the State should restrict its interference in the working of educational institutions only to the matter concerning the standards of education. The effect of the impugned judgment is that it wrongly classifies the private aided colleges as 'public authority' and thereby denude them of their autonomy and independency. Such an interpretation would be contrary to the judgments of the Hon'ble Supreme Court recognizing the autonomy and self governance of these institutions. However, if one were to assume that the condition to disclose information is attached to the conditions of receiving financial aid, still the same would be a case of excessive restriction on the rights of these aided institutions which cannot stand the test of reasonableness. Mere performing of public functions does not make an

7 TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 para 25.

entity/body a public authority. Any such interpretation would be widening the scope and width of the definition of 'public authority' as is defined in Section 2 (h) of the Act of 2005.

The judgment also raises another question of vital importance as to where an aided college established by a minority, whether the interpretation given by the Hon'ble High Court would be violative of the fundamental right guaranteed under Articles 19 (1) (g), 26 (a) and 29 of the Constitution of India. In the present case, some of the colleges are seen established by the religious wing of the Sree Narayana Dharma Paripalanam which is a religious denomination and therefore has the fundamental rights under Article 26 (a) of the Constitution to establish and maintain institutions for charitable purposes. The matters in respect of which the state authorities can regulate this fundamental right is provided by the said Article itself, and no such limitation not provided therein can be imposed. If the interpretation given by the Hon'ble High Court as to the meaning of public authorities is accepted, the provisions of RTI Act of 2005 and orders of state authorities would impose such restrictions which are alien to Article 26 and hence would be violative of the fundamental right guaranteed under Article 26 (a) of the Constitution of India. The Constitution of India guarantees a fundamental right under Article 29 (1) to all sections of citizens having distinct culture, language and script to establish educational institutions to conserve their distinct language, script or culture. There is no restriction on this right except as provided in Article 29 (2). Any interpretation which seeks to classify the minority run aided institution as 'public authority' would be restricting, limiting and interfering with the rights and autonomy guaranteed by Article 29 (1) and hence unconstitutional.

Impact of the case

The judgment has upheld the independence and autonomy of private educational institutions guaranteed by the Constitution of India. Limited supervisory control by the State cannot denude these institutions of their autonomous character so as to subject them to the rigor of the Act of 2005. Hence, the exclusion of such private educational institutions which are not substantially financed or controlled by the government from the

ambit of the Right to Information Act, 2005, is a welcome move as far as the independence of such educational institutions is concerned. At the same time it needs to be remembered that there are other governmental regulators which regulate the activities of such private education institutions, hence we cannot say that excluding an entity from the ambit of RTI would completely exclude the regulatory scrutiny of such institutions by the government.

* * * * *

DISCLOSURE OF INFORMATION IN CUSTODY OF FINANCIAL INSTITUTIONS: RESERVE BANK OF INDIA V. JAYANTILAL N MISTRY

*Sindhu Venkata Reddy**

Abstract

The regulatory regime in India is a complex system with multiple regulators set up for promoting “healthy and orderly development” and to “prevent malpractices” of private organizations such as companies, banks, stock markets etc. This healthy development is very closely related to the principle of transparency enshrined under the Right to Information Act, 2005 (“RTI Act”). It is however the case that even after the enactment of the RTI Act, government authorities and regulatory bodies have held back the information sought for, claiming the grounds of exemption under Section 8(1) of the RTI Act or on the grounds of holding the information in a fiduciary capacity. However, the ground of “fiduciary relationship” cannot be used anymore as in a recent judgement, Reserve Bank of India v. Jayantilal N Mistry (decided on December 16, 2015), the Supreme Court made it mandatory for the Reserve Bank of India (“RBI”) to disclose information about banks under the RTI Act. The aforesaid revolutionary judgement has been critiqued below.

Introduction

The Supreme Court in the case of *Reserve Bank of India v. Jayantilal N. Mistry*¹ came down heavily on the Reserve Bank of India (RBI for short) for depriving information under the RTI Act, 2005 in the name of fiduciary relationship between itself and the banks, the Supreme Court has in the aforesaid landmark decision declared that RBI does not place itself in a fiduciary relationship with the financial institutions because, the reports of the inspections, statements of the bank, information related to the business obtained by the RBI are not under the pretext of confidence or trust. In the aforesaid case, the Apex Court was considering a batch of transferred cases from various High Courts wherein the order passed by the Central Information Commission (CIC) directing the RBI to furnish the Information sought to the applicants under the RTI Act. Following, is the analysis of the aforesaid landmark judgment.

*Former Associate of Majmudar & Partners, Bengaluru.

1 2015 SCC Online SC 1326, Judgment rendered by the Hon’ble Supreme Court of India at New Delhi.

Facts

The respondent sought information regarding various financial institutions separately from RBI by filing multiple applications under the Right to Information Act, 2005. The respondent sought the aforesaid information on account of the suspension of operation of his trading account. RBI replied back saying that the aforesaid information cannot be released *interalia* because the disclosure of the information in the scrutiny report is held in fiduciary capacity and the disclosure of the same can affect the economic interest of the country and also affect the commercial confidence of the bank. It also gave the reason that such information is also exempt from disclosure under Section 8(1) (a) & (e) of the RTI Act, 2005. It was also reasoned that apart from the fact that information sought by the appellant is sensitive and cannot be disclosed, it could also harm the competitive position of the co-operative bank.

The respondent approached the Chief Information Commission which ordered RBI to disclose the aforesaid information as a result of Section 8(2) of the RTI Act, which mandated the disclosure of the relevant information.

Being aggrieved by the order of the appellate authority, RBI, moved second appeal before the CIC, who by the impugned order directed the CPIO of RBI to furnish information pertaining to Advisory Notes as requested by the respondent within a few days. RBI approached the respective high courts of Delhi and Bombay by way of writ petition being aggrieved by the decision of the Central Information Commission (CIC). The High Court, while issuing notice, stayed the operation of the aforesaid orders. Various transfer petitions were, therefore, filed seeking transfer of the writ petitions pending before different High Courts. The Supreme Court allowed the transfer petitions filed by Reserve Bank of India, which sought the various writ petitions filed by it in the High Courts of Delhi and Bombay. Aggrieved by the order issued by the High Court, RBI moved the Supreme Court.

Issues

- a) Whether all the information sought for under the Right to Information Act, 2005 can be denied by the Reserve Bank of India and other Banks to the public at large on the ground of economic

interest, commercial confidence, fiduciary relationship with other Bank on the one hand and the public interest on the other? If the answer to above question is in negative, then upto what extent the information can be provided under the RTI Act? ²

- b) The basic question of law is whether the Right to Information Act, 2005 overrides various provisions of special statutes which confer confidentiality in the information obtained by the RBI? ³
- c) Whether Section 8 of RTI Act provides that giving information to the general public would be detrimental to the economic interests of the country and to what extent the public should be allowed to get information? ⁴

Appellant's contention

The specific stand of the petitioner, the Reserve Bank of India is that the information sought for is exempted under Section 8(1) (a), (d) and (e) of the Right to Information Act, 2005. As the regulator and supervisor of the banking system, the RBI has discretion in the disclosure of such information in public interest as the disclosure of information would prejudicially affect the economic interest of the State. ⁵

The Right to Information Act, 2005 is a general provision which cannot override specific provisions relating to confidentiality in earlier legislations such as Section 44 of State Bank of India Act, 1955, Section 52, State Bank of India (Subsidiary Banks) Act, 1959, Section 13 of the Banking Companies (Acquisition & Transfer of Undertakings) Act, 1970⁶ in accordance with the principle that where there are general words in a later statute it cannot be held that the earlier statutes are repealed altered or discarded.⁷ It was argued that Section 22 of the Right to Information Act, 2005 cannot have the effect of nullifying and repealing earlier statutes in relation to confidentiality as well settled by earlier case laws of the Supreme Court. ⁸

2 RBI v. Jayantilal Mistry, 2015 SCC Online SC 1326, at para 1.

3 Ibid., at para 27.

4 Ibid., at para 63.

5 Ibid., at para 23.

6 Ibid., at para 32.

7 Ibid., at para 33.

8 Ibid., at para 34.

It was further argued that the Preamble of the RTI Act, 2005 itself recognizes the fact that since the revealing of certain information is likely to conflict with other public interests like “the preservation of confidentiality of sensitive information” and Section 8(1)(a) of the Right to Information Act, 2005 states that there is no obligation to give any information which pre-judiciously affects the economic interests of the States.⁹

In sum, it was argued that the RBI cannot be directed to disclose information relating to banking under the Right to Information Act, 2005 on the ground that such information is exempted from disclosure under Section 8(1)(a)(d) and (e) of the RTI Act.

Respondent’s Contentions

It was argued that, it was held in the case of the *Union of India v. Association for Democratic Reforms*,¹⁰ that it is part of the fundamental right of citizens under Article 19(1)(a) to know the assets and liabilities of candidates contesting election to the Parliament or the state legislatures.¹¹

It was further argued that RTI Act, 2005 contains a clear provision in the form of Section 22, by virtue of which it overrides all other Acts including Official Secrets Act. Thus, notwithstanding anything to the contrary contained in any other law like RBI Act or Banking Regulation Act, the RTI Act, 2005 shall prevail insofar as transparency and access to information is concerned.¹²

Moreover, the RTI Act 2005, being a later law, specifically brought in to usher transparency and to transform the way official business is conducted, would have to override all earlier practices and laws in order to achieve its objective. The only exceptions to access to information are contained in RTI Act itself in Section 8.¹³

Decision

The court decided that Central Information Commissioner has passed the impugned orders giving valid reasons and therefore, there was no need of

9 Ibid., at para 35.

10 AIR 2002 SC 2112.

11 Supra note 9, at para 41.

12 Ibid., at para 43.

13 Ibid.

interference by the court with respect to the orders and that there was no merit in all these cases and hence the writ petitions were dismissed.

Ratio

RBI is clearly not in any fiduciary relationship with any bank. RBI has no legal duty to maximize the benefit of any public sector or private sector bank, and thus there is no relationship of ‘trust’ between them.¹⁴

RBI has a statutory duty to uphold the interest of the public at large, the depositors, the country’s economy and the banking sector. It is duty bound to comply with the provisions of the RTI Act and disclose the information sought by the respondents.¹⁵

The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same.¹⁶

Observations by the court

The contention that if people, who are sovereign, are made aware of the irregularities being committed by the banks then the country’s economic security would be endangered, is not only absurd but is equally misconceived and baseless.

The exemption contained in Section 8(1)(e) applies to exceptional cases and only with regard to certain pieces of information, for which disclosure is unwarranted or undesirable. If information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. However, where information is required by mandate of law to be provided to an authority, it cannot be said that such information is being provided in a fiduciary relationship.¹⁷

The RBI and the banks have sidestepped the general public’s demand to give the requisite information on the pretext of “Fiduciary relationship”

14 Ibid., at para 60.

15 Ibid.

16 Ibid., at para 62.

17 Ibid.

and “Economic Interest”. This attitude of the RBI will only attract more suspicion and disbelief in them. RBI as a regulatory authority should work to make the banks accountable for their actions.¹⁸

Surmising that many financial institutions have resorted to such acts which are neither clean nor transparent, the court slammed the RBI in association with them of trying to cover up their acts from public scrutiny. The court reminded the RBI of its responsibility to take rigid action against those banks which have been practicing disreputable business practices.¹⁹

Critique

a) A welcome move for greater transparency among regulators

This judgment rendered by the Supreme Court could impact the other regulatory bodies of India as well. Regulatory bodies like the Securities and Exchange Board of India (“SEBI”) and the Insurance Regulatory and Development Authority (“IRDA”) could now be asked to provide information through the RTI Act and they cannot deny information relating to regulated entities on the grounds of “fiduciary relationship”.²⁰

b) Need to publish orders arises with respect to RBI

Unlike SEBI, the RBI does not automatically release penalty orders, licence revocation orders, etc; on its website. It merely issues press releases but not reasoned orders imposing penalties or revoking licenses. This practice is arbitrary and improper. Automatic publication of these orders will render the functioning of the RBI transparent and aid in the development of banking law jurisprudence in India. The banking and financial sector has been habituated to working in an opaque system. This judgment would shake the foundations of the structure and force adoption of new way of working of the regulators.

c) Reputation of the regulators might be affected without a clear mechanism in place

Supreme Court has held that, irrespective of anything to the contrary contained in the RBI Act, 1934 or Banking Regulation Act, 1949, the RTI

18 Ibid., at para 65.

19 Ibid., at para 69.

20 Apoorva Charturvedi, *Fiduciary Capacity of Regulators and the Right to Information*, available at <http://indiacorplaw.blogspot.in/2016/01/fiduciary-capacity-of-regulators-and.html> (last accessed on May 13, 2016).

Act shall prevail in so far as transparency and access to information is concerned. This legal position may be problematic from a regulatory perspective. Disclosure of all kinds of enforcement actions as a blanket principle may not be the best solution in every case. For example, it would be inappropriate to publicly release a show-cause notice issued to a bank, if subsequently RBI did not follow it up with any action against such bank due to lack of sufficient evidence. Automatically releasing such a show-cause notice may unnecessarily cause irreparable damage to the commercial reputation of the bank.

Foreign jurisdictions have clear laws in this regard. For example, Section 395 of the UK Financial Services and Markets Act, 2000 empowers the regulator to issue warning notices, supervisory notices, and decision notices.²¹

The present Indian laws like the RBI Act, 1934, or the Banking Regulation Act, 1949 do not have similar provisions. Hence it should be required that orders passed by the regulator to be published, with the exception of those involving private warnings or if such publication prejudices consumers' interest. Enactment of the above exceptions can adequately balance the Supreme Court's concerns about the need for transparency in RBI as well as RBI's concerns about protecting sensitive information relating to banks. Until the quality of Indian financial laws is substantially improved, courts must not be blamed for judicial activism in the financial sector.²²

Aftermath of the judgment

The RBI's own Master Circular relating to customer service issued from time to time, makes its stance before the Hon'ble Supreme Court like an attempt to mislead. Paragraph 25 of this Master Circular reads as follows:

25. Customer Confidentiality Obligations

The scope of the secrecy law in India has generally followed the common law principles based on implied contract. The bankers' obligation to maintain secrecy arises out of the contractual relationship between the banker and customer, and as such no information should be divulged to third parties except under circumstances which are well defined. The following exceptions to the said rule are normally accepted:

- (i) *Where disclosure is under compulsion of law*

- (ii) *Where there is duty to the public to disclose*
- (iii) *Where interest of bank requires disclosure and*
- (iv) *Where the disclosure is made with the express or implied consent of the customer."* [emphasis supplied]

The RBI has issued this circular every year to all Indian and foreign banks that fall under its regulatory control updating information when necessary. However, the paragraph relating to "customer confidentiality" has remained the same, since at least 2011. The relevant Master Circular makes it clear that the term: "customer", includes both 'depositors' and 'borrowers'. Given its own annual exhortation to other banks, the characterization of a bank's relationship with its borrowers, particularly those who defaulted on repayment of loans as 'contractual' in nature clearly contradicts what it said before the Supreme Court.²³ RBI needs to harmonize the above clash of laws.

Importance of the judgment

The aforesaid case is a landmark judgment as it has laid the law with respect to the issues of whether all the information sought under RTI Act, 2005 with respect to banks can be denied by Reserve Bank of India ("RBI") on the grounds of economic interest, commercial confidence and fiduciary relationship with other banks and on account of public interest and to what extent such a disclosure is tenable. The case is also significant as it has for the first time, settled the law with respect to whether the RTI Act can override various provisions of special statutes, which confer confidentiality of information to the RBI.

Conclusion

The judgment has defined the relationship between RBI and the banks / financial institutions. There would be increased pressure on the RBI to uphold public interest and not the interest of individual banks. Hence, the expectation that the RBI ought to act with transparency and not hide information that might embarrass individual banks would in the near future see a lot of information about private banks coming into the public

23 Venkatesh Nayak, What about people's right to know who the bank defaulters are?available at <http://www.governancenow.com/news/regular-story/what-peoples-right-know-who-the-bank-defaulters-are> (last accessed on May 13, 2016).

domain. The rising NPAs and scams have created doubts about the strength of banking industry as a whole. Hopefully, more disclosure resulting from the impact of the judgment would clear the maze and repose confidence in the system. The sector is likely to face the gaze of increased public scrutiny. Hence, the RBI, as a statutory regulator, must pay attention to the developing case law and act in the larger public interest, namely, that of the citizenry rather than in favour of a narrow band of interests of a few entities.

* * * * *