

ISSUES AND CONSTRAINTS IN IMPLEMENTATION OF THE RIGHT TO INFORMATION ACT, 2005

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"Knowledge will forever govern ignorance and a people who meant to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means for obtaining, it is but a prologue to force or tragedy or perhaps both."

- James Madison

INTRODUCTION

India being a welfare state, it is the duty of the government to protect and enhance the welfare of the people. It is obvious from the Constitution of India, 1950 (hereinafter the Constitution) that we have adopted a democratic form of government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to 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 can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.²

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. And that is why the demand for openness in the government is increasingly growing in different parts of the world.³

NEED FOR RIGHT TO INFORMATION ACT

In recent years, there has been an almost unstoppable global trend towards recognition of the right to information by countries, intergovernmental organizations, civil society and the people. The right to information has been recognized as a fundamental human right, which upholds the inherent dignity of all human beings. The right to information forms the crucial underpinning of participatory

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² J.N. BAROOWALA, THE RIGHT TO INFORMATION ACT 2005 5 (2010).

³ S.P Gupta v. Union of India, A.I.R. 1982 S.C. 149.

democracy-it is essential to ensure accountability and good governance. Greater the access of the citizen to information, greater the responsiveness of government to community needs. Alternatively, the more restrictions that are placed on access, the greater will be the feelings of 'powerlessness' and 'alienation'. Without information, people cannot adequately exercise their rights as citizens or make informed choices.⁴

The free flow of information in India remains severely restricted by three factors:

- a) The legislative framework includes several pieces of restrictive legislation, such as the Official Secrets Act, 1923;
- b) The pervasive culture of secrecy and arrogance within the bureaucracy; and
- c) The low levels of literacy and rights awareness amongst India's people.

The primary power of the right to information is the fact that it empowers individual Citizens to requisition information. Hence without necessarily forming pressure groups or associations, it puts power directly into the hands of the foundation of democracy-the citizen. In the Constitution, Article 19 has been interpreted to mean that right to information is one of the essential ingredients of Article 19(1).⁵ After going through Article 19 of the Constitution, it is pertinent to note that the interpretation of the provisions of the Constitution is the duty of the Supreme Court of India and the law declared by the Supreme Court is binding under Article 141 of the Constitution which reads as under: "The law declared by the supreme court shall be binding on all courts within the territory of India." When we come to the interpretation of Article 19 of the Constitution *vis-a-vis* right to information, the Supreme Court of India has laid down that right to information is a fundamental right under Article 19(1)(a) of the Constitution. The state under clause (2) of Article 19 of the Constitution, however, is entitled to impose reasonable restrictions, *inter alia* in the interest of the state.⁶

⁴ http://www.legalserviceindia/articles/rti_dh.htm (last visited Jan. 21, 2013).

⁵ INDIA CONST. art. 19: Protection of certain rights regarding freedom of speech etc.- (1) All citizens shall have the right-(a) to freedom of speech and expressions;..... Reasonable restrictions in clause(2) are 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.

⁶ People's Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C.1442.

Right of information is a facet of the freedom of "speech and expressions" as contained in Article 19(1)(a) of the Constitution. Right of information, thus, indisputably is a right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose.⁷

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 should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.⁸

Right to information and the recommendation by NCRWC

The right to information is such basic right today that this right to information was considered by the National Commission to Review the Working of the Constitution (NCRWC) and as per its report under Chairmanship of Justice M.N. Venkatachaliah, dated March 31, 2002, and it was held that right to information should be guaranteed and needs to be given real substance.

Accordingly NCRWC suggested that Article 19(1)(a) of the Constitution may be amended as:

"(1) All citizens shall have the right-(a) to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinions and to seek, receive and impart information and ideas.

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, or preventing the disclosure of information received in confidence except when required in public interest."

⁷ Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal, A.I.R. 1995 S.C. 1236.

⁸ State of Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865.

Reason for being right to information as a basic human right

The freedom of speech and expression includes right to acquire information and disseminate it. Freedom of speech and expression is necessary for self-fulfillment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts.⁹ The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.¹⁰ In one of the leading English case, Lord Simon of Glaisdale¹¹ has said that the public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.

Freedom of expression has four broad social purposes to serve:

- i. It helps an individual to attain self-fulfillment;
 - a) It assists in the discovery of truth;
 - b) It strengthens the capacity of an individual in participating in decision-making; and
 - c) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

In our democratic set up the enlightenment of the electorate is very important for the fair functioning of the democracy i.e., for the fair election of the representatives of the power of the people of India. It is we, the people of our country, who will decide the future of our country. So, it is possible only if we are well informed about the choices we have to make. It is only the knowledge, the information that can show us the right path. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know.

⁹ Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal, A.I.R. 1995 S.C. 1236.

¹⁰ Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, A.I.R. 1986 S.C. 515.

¹¹ Attorney General v. Times Newspapers Ltd., (1973) 3 All. E.R. 54.

Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.¹²

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. To conclude, right to information is a basic human right and even Article 19 of the International Covenant on Civil and Political Rights (ratified in 1978) declares that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and to seek, and receive and impart information and ideas through any media and regardless of frontiers". The Supreme Court of India while interpreting Article 19(1)(a) of Constitution. Right of expression, thus, indisputably is a fundamental right,¹³ a basic human right.

Access to information is at the foundation of a democracy. The right to know has been seen to be at the base of the democratic process and in *Romesh Thapar v. State of Madras*¹⁴, the Supreme Court of India found the freedom of discussion to be included in Article 19(1)(a) of the Constitution and the freedom of press to be an aspect of the freedom of discussion so that members of a democratic society should be sufficiently informed to 'be able to form their own beliefs and communicate them freely. The fundamental principle is the people's right to know'. Later in many cases this view has been amplified by the Supreme Court.¹⁵

In *Maneka Gandhi v. Union of India*¹⁶, in *S.P Gupta v. Union of India*¹⁷, it has been held for a clean and healthy administration and effective participatory democracy the information or the means of obtaining it, is very important.

Legislative background of the Right to Information Act, 2005

The Preamble of the Constitution embodies the essence of democracy and declares the "people" as the source of power in our country. So the citizen's have fundamental right to know what the government is doing in its name. Freedom of

¹² Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, A.I.R. 1986 S.C. 515.

¹³ People's Union for Civil Liberties v. Union of India, A.I.R. 2004 S.C. 1442.

¹⁴ A.I.R. 1950 S.C. 124.

¹⁵ Sakal Papers (P) Ltd., v. B.N. Sarpotdar, A.I.R. 1962 S.C. 305; Bennett Coleman & Co. v. Union of India, A.I.R. 1973 S.C. 106; Indian Express Newspapers (Bombay) P. Ltd., A.I.R. 1986 S.C. 515; Dinesh Trivedi v. Union of India, (1997) 4 S.C.C. 306; Vineet Narain v. Union of India, (1998) 1 S.C.C. 226.

¹⁶ A.I.R. 1978 S.C. 597.

¹⁷ A.I.R. 1982 S.C. 149.

speech is life and blood of democracy. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a break on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration in the country.¹⁸

From time to time various provisions were made in various acts passed by the legislature for imparting information to the citizens. E.g.: Sections 74 to 78 of the Indian Evidence Act 1872 give right to the person to know about the contents of the public documents, and in this connection Section 76 of the Indian Evidence Act lays down that the public officials shall provide copies of public documents to any person who has the right to inspect them. Under the Factories Act, compulsory disclosure of information has to be provided to factory workers regarding dangers including health hazards arising from their exposure to dangerous materials and the measures to overcome such hazards. Under Section 25(6) of the Water (Prevention and Control of Pollution) Act, every state is required to maintain a register of information on water pollution and it is further provided that so much of the register as relating to any outlet or any effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises. Under Section 33A of the Representation of the People Act, a candidate contesting elections is required to furnish in his nomination paper the information in the form of an affidavit concerning: (i) accusation of any offence punishable with two or more years of imprisonment in any case including the framing of charges in pending cases; and (ii) conviction of an offence and sentence of one or more than one year imprisonment.

During the last decade, the right to information has got such a momentum as never before and on the civil societies side also some organizations, social activists and individuals did excellent work in this field. The Mazdoor Kissan Shakti Sangathan (MKSS in 1990) has done a great job in the field of right to information in rural India and its struggle for minimum wages and to get the information regarding muster rolls being maintained ultimately led the Government of Rajasthan to enact Right to information Act and then various other state governments enacted the Right to Information Acts, viz.: the Tamil Nadu Right to Information Act, 1997;

¹⁸ R. v. Secretary of State for the Home Department Ex. P. Simms, (2000) 2 L.R. 115 (AC).

the Goa Right to Information Act 1997; the Karnataka Right to Information Act 2000; the Assam Right to Information Act 2001; the Madhya Pradesh Right to Information Act 2001; the Delhi Right to Information Act 2001; the Orissa Right to Information Act 2002; the Maharashtra Right to Information Act 2003; the Jammu and Kashmir Right to Information Act 2004.

Then Government of India enacted Freedom of Information Act, 2002, which received the assent of the President of India on January 6, 2003 with an aim to make the government more transparent, and accountable to the public. But with the passage of time, it was felt that this Act has not fulfilled the aspirations of the citizens of India in the field of right to know and to get information and therefore this Act need to be more progressive, participatory and meaningful. To achieve this object, the Right to Information Bill was introduced in the Parliament in December 2004 and was passed by both the Houses of Parliament with major amendments in May, 2005. It received the assent of the President of India on June 15, 2005.

Empowerment of Public Interest Litigation due to right to information

The rule of law is the common way of life in a civilized society and it is also used to protect the interests of the society and the public at large to fulfill the ideals of the modern welfare state. The interpretation of the law is the function of judiciary in a democracy like ours and the main concern of administration of justice is protection of the rights of the people for the well-being of its subjects. The right to freedom of speech and expression guaranteed under Article 19(1) of the Constitution includes the right to receive and inspect information. Freedom of speech is the lifeblood of democracy. The Supreme Court in *Union of India v. Association of Democratic Reforms*¹⁹ has passed various directions for the disclosure of information by the candidates who are seeking election to Parliament or a State Legislature like information about any offence committed by them, details of property and assets, any liabilities, educational qualification etc. So, the right to get information in democracy is recognized all throughout and it is a natural right flowing from the concept of democracy.

¹⁹ A.I.R. 2002 S.C. 2112.

Structural and Functional Framework

The Right to Information Act, 2005 (hereinafter the RTI Act) mandates a legal-institutional framework to establish a practical arrangement for the right to access public information. It prescribes both the mandatory disclosure of certain kinds of information by public authorities and the designation of public information officers (PIOs) or assistant public information (APIOs) in all public authorities to attend to requests from citizens for information. It also provides citizens the right to appeal. Further, the RTI Act mandates the constitution of State Information Commissions (SICs) and a Central Information Commission (CIC) to enquire into complaints, hear appeals, and oversee and guide its implementation. The RTI Act imposes certain obligations on public authorities and the Information Commissions. The RTI Act includes the provisions for imposition of penalties in case of non-compliance of the provisions of the RTI Act.²⁰

Political parties as "Public Authorities"

In the case of *Subhash Chandra Aggarwal and Anil Bairwal v. 6 Political Parties*,²¹ it is held that 30% of their income which these political parties would have otherwise paid by way of income tax has been given up in their favour by the Central Government. No one can dispute that this is substantial financing, though indirectly. Added to this are the concessional allotment of land and buildings in prime locations in the national capital and in several state headquarters. 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 organizations. Political parties affect the lives of citizens, directly or indirectly, in every conceivable way and are continuously engaged in performing public duty. It is, therefore, important that they become accountable to the public.

Right to privacy and right to information

The scheme of the RTI 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

²⁰ Shreyaskar & K.P. Pankaj, *Investigating Compliance of the RTI Act*, ECONOMIC AND POLITICAL WEEKLY, Vol. XLVIII. No. 9, Mar. 2, 2013 at 19.

²¹ File No. CIC/SM/C/2011/001386, decision dated June 3, 2012.

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.

Areas of major concern in implementation of right to information

It is evident now that India's right to information laws have in a short period of time made the people aware of their rights in a whole new way. In developing countries, which face the twin challenges of corruption and inefficiency in governmental institutions and the need for rapid economic and social progress, the operation of right to information laws have shown they hold vast potential for transformation. The RTI Act has given the citizens an instrument to directly challenge the system. So, during the course of its implementation over the period of time since its enforcement, many issues regarding its effective working have cropped up. These issues require concern and immediate remedial measures need to be adopted.

The Department of Personnel and Training (DoPT) in 2009 had engaged PricewaterhouseCoopers (PwC) for assessing and evaluating the level of implementation of the RTI Act with specific reference to the key issues and constraints faced by the "Information Providers" and "Information Seekers".

This report has been prepared by PricewaterhouseCoopers (PwC) in association with IMRB (market research partner). This study takes into account the feedback of over 2000 information seekers and over 200 information providers across public authority (PA) at Centre, State, and local levels in 5 States. It also includes feedback of 5000 citizens with respect to their awareness of the RTI Act. As part of the study, the team also conducted four national workshops, in which Central Information Commissioners, State Information Commissioners, Civil Society Organizations, and the media participated. Apart from this, the team has also (i) participated in several seminars conducted by Civil Society Organizations, (ii) conducted various focused group discussions/one to one meeting with several stakeholders, including PIOs and first appellate authorities. The issues and constraints which were found are discussed below:

1. Issues faced by information seekers

- a) **Faced in filing applications:** Sections 27(1), 28(1) and Section 6 of the RTI Act requires the PIOs to provide assistance to the applicant in drafting and submission of the application. But, practically there is non-availability of user guides for the applicants. The survey shows 52% of citizen surveyed requested availability of a user guide/ manual at all the Public Authorities.
- b) **Low public awareness and quality of awareness:** Section 26 provides provision regarding public awareness about how to exercise the rights under the RTI Act. Survey shows only 15% of the respondents were aware of the RTI Act.
- c) **Poor quality of information provided:** The survey shows that more than 75% of the citizens are dissatisfied with the quality of information being provided.
- d) **Constraints faced in inspection of records:** The discussion with the PIOs during the survey shows that 89% of the PIOs did not use the provision for inspection of records.

2. Issues faced by information suppliers

- a) **Failure to provide information within 30 days:** During the study, more than 50% of the information seekers mentioned that it took more than 30 days to receive the information from the PIO. The experience of citizens from disadvantaged communities was similar to the overall experience levels.
- b) **Inadequate trained PIOs and First Appellate Authorities:** Findings of the report show that only 55% of surveyed PIOs had received RTI training. During discussions with the PIOs and the ATIs, it was highlighted that the frequent transfers/ changes in the PIOs adds to the challenge. This place additional work-load on the training institutes entrusted with providing RTI training.
- c) **Poor record management practices and obsolete guidelines:** Ineffective record management systems and procedures to collect information from field offices lead to delays in processing RTI applications. As per Section 4(1)(a) of the RTI Act, a public authority

needs "to maintain all its records duly catalogued and indexed in a manner and 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".

- d) **Non-availability of basic infrastructure:** The implementation of RTI requires the PIOs to provide information to the applicant through photocopies, soft copies etc. While these facilities are considered to be easily available at a district level, it is a challenge to get information from Block/ Panchayat level. PIOs highlight that the lack of infrastructure hampers the RTI implementation at the PA level.
- e) **Lack of motivation among PIOs:** During the RTI workshops organized in the surveyed States, PIOs cited that there were no incentives for taking on the responsibility of a PIO; however penalties were imposed in cases of non-compliance. There is also a wide variance in the seniority levels of PIOs.
- f) **Ineffective implementation of Section 4(1)(b):** The internal processes within the public authorities are not defined, so as to take care of the requirement of the relevant suo-motu clauses. Various departments and ministries of government of India have in the last one year posted the requirements specified under Section 4(1)(b) on the website. However the status of the same in the state government departments and websites is significantly poor.

3. Issues faced at Information Commissions

- a. **SIC Annual Reports:** During the survey it was also found that there is no centralized data base of RTI (at the State/Centre level) applicants. A centralized database 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.

- b. **Perception of being lenient towards PIOs:** When the information which is not given within the stipulated time then if PIO as a person is not responsible, then it has to be a systemic failure within the public authority. However as highlighted in the next sub-section, the information commission does not possess adequate monitoring and review mechanism to track the failures of the Public Authorities in complying with the RTI Act.
- c. **Lack of monitoring and review mechanism:** There are inadequate processes and records available with the information commission to take such steps.
- d. **High level of pendency:** This is a grave situation; the pendency at the commission is a huge challenge. It is due to non optimal processes for disposing off appeals and complaints.
- e. **Geographical spread of Information Commissions:** Some of the state governments have set up regional offices of their state commissions at various places in the state which saves lot of time and expenses. The CIC which has jurisdiction over RTI appeals relating to central government Public Authorities spread across the country is located in Delhi which results in wastage of considerable time/ expenses of PIOs and the appellants, who come from far off areas.
- f. **Variation in assumptions of role by SIC and State Governments:** It was found during the survey that there is no clear division of responsibilities between the SICs and Nodal Department in terms of monitoring the implementation of RTI Act.

4. Issues and constraints found in survey

While assessing the entire situation during the survey the following issues emerged:

- a. The Public Authorities have to enhance the level of ownership to ensure the RTI delivery happens as per the spirit of the Act. They have to be ultimately responsible for identifying the gaps in their offices in the delivery of the information, thereafter identify the resources needed and appropriately budget for it.

- b. Maintenance of the information required to be furnished to the State Information Commission as per Section 25(3) the role of the Centre/State Government is to facilitate the Public Authorities in implementation of the Act. This can happen through providing support to Public Authorities for training, development of software applications, e-Training modules, generating awareness amongst citizens etc.
- c. The role of the Information Commission has to go beyond the hearing of the appeals. As per the Act, they are expected to issue orders/directions to the Public Authorities to carry out their duties as per the mandate of the Act. However till the time Information Commission assumes the role of ensuring the compliance of the RTI Act by the various Public Authorities, there would not be any control mechanism. The State Government has to play a facilitative role to the Information Commission through issuance of supporting rules/orders to the Public Authorities.

Conclusion

The effective implementation of the RTI Act will not be possible until or unless the governments and its Public Authorities realize that it is their sincere responsibility to serve their duty. All the agencies involved have to work efficiently and transparently. The infrastructure and resources are conducive for the successful working of the RTI Act. The issues and constraints found in the survey have to be effectively dealt with to empower this right of common citizen.

Further the RTI Act has also been criticized on several grounds. It provides for information on demand, so to speak, but does not sufficiently stress information on matters related to food, water, environment and other survival needs that must be given pro- actively, or *suo moto*, by public authorities. The RTI Act does not emphasize active intervention in educating people about their right to access information-vital in a country with high levels of illiteracy and poverty or the promotion of a culture of openness within official structures. Without widespread education and awareness about the possibilities under the RTI Act, it could just remain on paper. The RTI Act also reinforces the controlling role of the government official, who retains wide discretionary powers to withhold information.

The most scathing indictment of this RTI Act has come from critics who focus

on the sweeping exemptions it permits. Restrictions on information relating to security, foreign policy, defence, law enforcement and public safety are standard. But the RTI Act also excludes cabinet papers, including records of the council of ministers, secretaries and other officials; this effectively shields the whole process of decision-making from mandatory disclosure.

Another stringent criticism of the RTI Act is the recent amendment that was to be made allowing for file noting except those related to social and development projects to be exempted from the purview of the Act. File notings are very important when it comes to the policy making of the government. It is these notes that hold the rationale behind actions or the change in certain policy?; why a certain contract is given or why a sanction was withheld to prosecute a corrupt official. Therefore the government's intention to exempt the file notings from the purview of the RTI Act has come in for stringent criticisms.

In the end we can say that in enacting the Right to Information Act, 2005 India has moved from an opaque and arbitrary system of government to the beginning of an era where there will be greater transparency and to a system where the citizen will be empowered and the true centre of power. Only by empowering the ordinary citizen can any nation progress towards greatness and by enacting the RTI Act India has taken a small but significant step towards that goal. The real *swaraj* will come not by the acquisition of authority by a few but by the acquisition of capacity by all to resist authority when abused. Thus with the enactment of RTI Act India has taken a small step towards achieving real *swaraj*.