

Some critical commissions and omissions in the NAC-approved Draft RTI Act 2004

Chitta Behera, Orissa

It is heartening to learn that the NCPRI-proposed amendment to the Freedom of Information Act 2002, now renamed Right to Information Act 2004 could receive the approval of National Advisory Council of the UPA Government. It is just expected that Smt. Aruna Roy and Sri Jean Dreze thanks to whose ceaseless advocacy the said amendment could get through, would continue to exert themselves in the coming days until its final enactment in the Parliament. The various civil society groups spread across the country, who wish the new legislation entered the country's statute book at the earliest, have also to continue their movement in an ever-reinvigorated manner until it reaches the logical culmination.

Being inspired by the aforesaid development at NAC level and reposing full faith in the sagacity of NCPRI think-tank to steer clear of the impasse that might lie ahead, the present author-activist feels that the latest version of draft RTI Act howsoever foolproof it might appear, should continue to be scanned by all those who want the concerned Act to be really a result-oriented one, not just another show-piece put up by India's populist legislature.

With this perspective in view, the present endeavour is to list out certain omissions and commissions noticed in the draft RTI Act 2004, which if addressed to before it is tabled in Parliament, can render the proposed legislation a far more effective tool in the hands of the citizens to realize their much warranted right to information in the face of an overwhelming State machinery long attuned to the cult of secrecy.

1) Statement of Objects and Reasons to be added to the Draft Act:

It is a common knowledge that to every Act is appended a Statement of Objects and Reasons, which puts forth precisely but quintessentially the justification for its very enactment, and which assumes critical significance before the Courts and other crucial forums in the matter of clearing ambiguity if there arise any, in interpreting the words and expressions used in the provisions of the Act. As a matter of fact, the FOI Act 2002 contained such a Statement, which gives not only a brief history of the multilevel consultative process that ushered in since 1997 around the need for legislating citizens' right to information, but also the overriding compulsions of a democratic State like India to reform its old, outdated legal-administrative framework including the rules governing civil service and office procedure so as to ensure an open, transparent, accountable and responsive system of governance at every level.

Keeping the spirit of the aforesaid Statement of Objects and Reasons in tact, it need be updated and appended thereon to the Draft-RTI Act 2004.

2) Section 2 (g): Definition of Public Authority to be widened to include MPs/MLAs and political parties in its purview

The NCPRI's draft compared to the FOI Act 2002 has no doubt given a wider definition of public authority by adding an explicit mention of Panchayati raj institutions and community bodies like district councils as notified under 5th and 6th Schedules of the Constitution for their accountability to disclose information. But the said draft conspicuously omits a very important category of public authorities from its purview i.e. MLAs and MPs and political parties.

As for the MLAs/MPs, they are not only the law-makers of the country, but also nowadays the trustees of a huge sums of public money called LAD Funds. But there is no legal-administrative

mechanism as such in the existing system for a common citizen to exercise his right to information from these people's representatives either regarding how they conduct themselves in the matter of public policy or regarding how they plan to use or already used the LAD Funds allotted to them. The MLAs/MPs are also ex-officio members of various big and small public committees functioning from central down to Block level. Without holding them accountable for disclosure of information, we can't possibly compel the grass root level bodies like PRIs or District/Village Councils to go by the obligations for disclosure as envisioned under the proposed draft-RTI Act 2004.

Then look at the case of political parties. Besides playing a very crucial role in the making of country's destiny, they transact huge amount of money during the course of a year, apart from the colossal sums of expenditure during the elections. As per the existing laws, there exists no mechanism for the common people to ask the political parties about the various manners of income and expenditure they make. Moreover, since there is no legal provision for auditing of the accounts of a party, the filing of returns by it is presumably an arbitrary and subjective formality that a party fulfils only out of legal compulsions. Again as regards the filing of electoral expenditure before the Election Commission, it is an individual candidate that files it. As per the R.P. Act 1951, each candidate is to file the particulars of expenditure incurred only by him and his agent. The expenditure made by the party is not included in his returns. Thus as the matters stand now, the political parties on a legal plane remain unaccountable before any authority, let alone citizenry in respect of the huge incomes and expenditures they make centring round the election and otherwise. But among the public there is the widely prevalent perception that the political parties are the safest, legalised conduits of black money. Way back in 1993 Vohra Report had confirmed this truth too. Moreover, every party at the time of its registration with Election Commission under RP Act swears to abide by the ideals like democracy, secularism and socialism etc. The Election Commission has no power to investigate, let alone penalise a party in regard to adherence or non-adherence to these ideals. There is no other forum or provision to enquire with a party on day-to-day basis as regards whether they adhere to the sworn-in ideals or not.

The sole contention that lies behind the above illustrations about the political parties is that they being the leading actors and factors of country's governance should first and foremost be modeled on transparent lines, as observed by the National Commission to Review the Working of the Constitution.

The question is pertinently raised, while a Society, a Cooperative or a Company or a Trust and the like shall be brought under the purview of the definition of public authority as defined in the Draft Act (since they are constituted under some law or the other), should there be not an explicit mention that political parties like the aforementioned groups should be considered public authorities and therefore liable to disclose information to the public as per the proposed law?

Under the circumstances, leaving the political parties out from the purview of definition of public authorities shall render the whole legislation (immaterial we call it Freedom of Information or Right to Information) a toothless and innocuous one. So there is an irrefutable case for including MLAs/MPs and political parties under the definition of public authorities in the NAC approved Draft RTI Act 2004.

3) Section 6: The PIO's obligation for issuing an acknowledgment receipt to be included: The draft RTI Act 2004 does not contain any provision for obligatory issue of a receipt by the Public Information Officer acknowledging the citizen's letter of request for information. An acknowledgement receipt is like the copy of an FIR, the first and foremost instrument in the hands of the citizen requester to pursue, build up and defend his case before the public authorities and

information commissioners as and when necessary. In fact the Delhi RTI Act 2002 contains a provision for issuing an acknowledgment receipt to the applicant in a prescribed format. Without incorporating the provision of acknowledgement of letter of request into the Act, the right to information would remain a non-starter for most of the poor and innocent citizens seeking information from public offices, which, as you know, are adept in the act of removing, disfiguring and even tearing away the letters from the citizens.

4) Section 7(1) and (3): No two fees to be demanded from the citizens:

From a reading of the above two sub-sections of the Section 7, it appears as if the Act wants two kinds of fees to be collected from a citizen applicant. The Subsection (1) speaks of ‘to provide the information requested on payment of such fee as may be prescribed’ and the Subsection (3) speaks of ‘to provide the information on payment of a further fee representing the cost of providing the information’. What is this ‘further fee’ is not at all clear. And moreover the Section 7 containing 8 subsections and some sub-sections having their further split subsections have been so clumsily worded as to give rise to several ambiguities, not only about the fees to be paid, but also about the fixing of actual time-period within which the requested information is to be delivered to the requestor-applicant.

In a similar vein the FOI Act 2002 also had spoken ambiguously about two kinds of fee, namely fee and a further fee representing the cost of production. Question arose, if the second category of fee represented the cost of production, then what did the first category of fee represent? As a result of such ambiguity, the Draft Rules for the FOI Act 2002 which were announced on the website of the Ministry of Personnel, GOI inviting public opinion thereon by 31st August 2004, provided for two kinds of fees, namely Application Fee and Production Fee. Such a proposal for a dual fee regime as mooted in the Draft Rules was vehemently opposed by the advocates of RTI from all over the country in their response submitted to the Ministry.

So it is advisable that the Section 7 of the draft RTI Act should be cleared of all ambiguity regarding the fee to be paid. The said Section should be so reworded as to ensure:

- a) One-time fee to be paid to cover all components of expenditure for collection and delivery of requested information,
- b) The said one-time fee to be paid only against the delivery of requested information.
- c) No application fee to be submitted.
- d) If at all an Application Fee is to be charged, it should be refunded forthwith at the time of rejection by the PIO of the application for information.
- e) If at all an Application Fee is fixed, it should be adjusted against the amount of Fee to be charged for cost of production for the requested information.

5) Section-12(4)(5): Penalties: Gross Incongruities to be removed:

The above quoted provision of the draft RTI Act says, “The Public Information Officer or any other officer on whom the penalty ... is imposed shall also be liable to appropriate disciplinary action under the service rules applicable to him.” Apparently this is fine. But look at the Service Rules as they stand today. For instance, the Section 9 of All India Services [Conduct] Rules 1968, Section 110 of the Manual of Office Procedure, Section 11 of the Central Civil Service (Conduct Rules) 1964 are severely biased against the disclosure of information by public servants to the citizens. In States too, the corresponding Rules are invariably prohibitive of disclosure of official information to the public. For instance, the Section 11 of the Orissa Government Servants’ Conduct Rules 1959 provides for penalisation of an official on the ground of unauthorised disclosure to the public. As you might further know, today everywhere in the Government establishment, disciplinary action is being taken against the public servants on the grounds of ‘unauthorised communication of information’. Thus on

the basis of the existing Service Rules with their thrust on maintenance of secrecy, there can be no disciplinary proceedings initiated at all against the Officers found guilty under a Right to Information Act. While saying this the author is pretty aware of the Section 14 of the draft Act 2004 that provides for its overriding effect vis-à-vis the provisions of OSA 1923 or any other law or instrument in force. As per this provision, the RTI Act 2004 shall arguably override the prohibitive conditions of the aforesaid Service Rules. But this is not enough, since we need an altogether different sort of service rules based upon a diametrically opposite premise, where the disclosure is the rule and withholding the exception. The old Service Rules should therefore first be amended to provide for nature and manner of disciplinary proceedings to be pursued against the very public servants who fail to provide the official information, either of obligatory or requested nature, to the public as per the contemplated RTI Act 2004. Then only, the Service Rules in their modified form can be of any avail to the concerned authorities to conduct disciplinary proceedings against the defaulting public servants. Otherwise we shall be placed in an absurd position of putting the cart before the horse.

Under the circumstances, the draft RTI Act 2004 should omit the expression “under the service rules applicable to him” from its Section 12 (4) (5).

6) Section 1 (3) vis-à-vis Sections 17 to 20: ambiguity over ‘Coming into force of the Act’ to be removed.

The Section 1 (3) rightfully stipulates that the Act ‘shall come into force within 120 days of it being enacted’. But needless to say that an Act of the present type can’t be enforced, without and until the operational Rules are made and notified there-under. It is now well known that the FOI Act 2002 despite its notification in the official gazette remained only on paper till date for want of Rules. The same fate may befall the contemplated RTI Act 2004, if there remains room for ambiguity in the concerned provisions. If one reads Sections 17 to 19 which deal with Rule making powers of the Centre, State and Competent Authority respectively and Section 20 that deals with tabling of central Rule so made before the Parliament, s/he can’t find any guarantee that the proposed Act can come into force within 120 days of its enactment. Because the Sections 17 to 20 don’t stipulate the deadline within which the Rules shall be made to give effect to the provisions of the Act and the Section 20 does not specify the deadline for its tabling before the Parliament except mentioning the typically Indian style of vague words ‘as soon as’ usually applied to avoid a definite commitment on the part of the State for the timely implementation of a law.

It is therefore urged that the Sections 17 to 20 of the draft RTI Act should mention clearly that the entire Rule making business by all the concerned authorities along with the task of tabling and passing of the Rules so made in the Parliament and State legislatures should be completed, all within a time-period of 120 days, so that the Act is really enforced on the 121st day of its enactment as promised.

7) Oath of Secrecy by Ministers: the Objects and Reasons of the Act to assure its abolition from the 3rd Schedule of the Constitution:

The 3rd Schedule of the Constitution contains the format for both Oath of Office and Oath of Secrecy to be administered to a Minister of Centre or of a State before he/she assumes office. In the type of parliamentary democracy as we have, the Minister is supposed to be simultaneously both a responsible member of the house of legislature s/he belongs to and head of the executive of a Ministry/Department of the concerned Government. A minister being first and foremost an elected representative is supposed to act as a bridge-man between the Government on one hand and the people on the other and therefore remain open and transparent before the people in respect of all matters of public interest. Moreover, a Minister by virtue of the high and responsible office that he holds is supposed to be aware of the Laxman Rekha i.e. which sensitive information he should not

disclose before the public in the public interest itself. Otherwise he shouldn't be a Minister at all. For those exceptional categories of information, should a Minister in a democracy have to swear in the name of God 'not to communicate or reveal directly or indirectly to any person or persons any matter, which shall be brought under my consideration or shall be known to me as a Minister ... except as may be required for the due discharge of my duties as such Minister'. And in the existing scheme of things, there is no codified norm to guide a Minister to distinguish between which information he should disclose in course of due discharge of his duties on one hand, and which information he should not reveal to any person. It all depends upon which way he pleases to disclose, the result being the withholding of all crucial information of public interest from the members of public themselves at the topmost level. If a BDO sitting at the lowest echelon of bureaucracy refuses to disclose the Muster Roll on the spacious plea of official secrecy, he is in fact legally and morally buttressed by the conduct of the Minister sitting at its top over him, who refuses to disclose the real goings-on of his office under the constitutional mandate of oath of secrecy. Moreover the Oath of Secrecy being an essential part of the Constitution which is supposedly an overarching and overriding testament for the whole nation, shall, should it continue further, nullify both the letter and spirit of the proposed Right to Information Act 2004, which is but a particular piece of legislation made under the authority of the Constitution and so to say, a dispensable creature of the Constitution. Again, if the Ministers who for all practical purposes are the bosses of the respective departmental executives do continue to behave under the avowed cult of secrecy irrespective of an RTI Act, how do we expect their subordinate executives from Cabinet Secretary down to a BDO or an RI to abide by the RTI's imperative of transparency ? Charity should begin at home. The Minister, the boss should open up first, then only the administrative executives who are his subordinates would automatically open up to the people, irrespective of whether there be an RTI legislation or not. It is with this conviction that the National Commission to Review the Working of the Constitution-2002 called for abolition of Oath of Secrecy and its replacement by an Oath of Transparency. Otherwise also, the oath of secrecy, an obnoxious and stinking colonial relic, placed, as it is in the prime law –book of the land sounds utterly paradoxical in the context of India being the largest democracy of the world.

Under the circumstances, it is humbly suggested that the NCPRI should incorporate the vision for abolishing the Oath of Secrecy and its replacement by an Oath of Transparency in the Objects and Reasons of the draft RTI Act 2004, and simultaneously conduct a nation-wide campaign for necessary amendment of the 3rd Schedule of the Constitution to say a final good-bye to this anti-people colonial hangover, which provides the prime sanction for the regime of secrecy that we have in tact even after 58 years of independence.

CHITTA BEHERA, dated 8th Oct. 2004
4A Jubilee Tower, Choudhury Bazar, Cuttack-9, Orissa
PH: 0671-2623518, Email: chittabehera@rediffmail.com