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Draft RTI law needs sharpening

Chitta Behera points out that the otherwise progressive draft Right to Information Act 2004 (prepared by the National Advisory Council) could do with some additional fine-tuning while still under review within the offices of our government.

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October 2004 - It has been heartening to note that the NAC-proposed amendment to the Freedom of Information Act 2002, now renamed Right to Information Act 2004 is under consideration with the UPA Government. Aruna Roy and Jean Dreze thanks to whose ceaseless advocacy the said amendment could get through, would expectedly continue to exert themselves in the coming days until its final enactment in the Parliament. Civil society groups spread across the country who wish that the new legislation would enter 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.

Both inspired by the developments and despite them, this writer 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 RTI Act to be really a result-oriented one, not just another show-piece put up by India's populist legislature.

With this perspective, I will 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 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.

Statement of Objects and Reasons must be added

The draft Act contains a statement of Objective (*section 1(5)*), but this is at odds with the legislative tradition. The usual practice is to append to every Act 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 in interpreting the words and expressions used in the provisions of the Act. While initiating a discussion on the Act on the floors of Parliament, the concerned Minister first reads out the Statement of Objects and Reasons appended to the Act as a matter of course. Such a Statement by virtue of its overall nature, cannot be placed within the body of the Act.

It is true the contents of the Statement are not justiceable in the sense that the particular articles of the Act are. But when a dispute arises in interpreting a particular article of the Act inside or outside a courtroom, then the Statement which by nature is a mere appendix to the Act emerges from its invisibility to serve as the most potent and reliable instrument to settle the dispute.

In 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 this spirit intact, this writer recommends that the NAC use the original Act's Statement of Objects and Reasons, update it to explain why it became necessary to amend the FOI Act 2002, and have the government append this to the Draft-RTI Act 2004 under consideration.

Widen the definition of Public Authority to include MPs/MLAs (Section 2(g) of the draft Act)

Compared to the FOI Act 2002, the NAC's draft 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 draft conspicuously omits a very significant category of public authorities from its purview i.e. MLAs and MPs and political parties.



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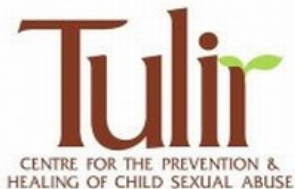
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- Untying the states from the Centre's

The MLAs and MPs are not only the law-makers of the country, but also nowadays trustees of 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. 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.

Widen the definition of Public Authority to include political parties (Section 2(g))

Then look at the case of political parties. Political parties, being the leading actors and factors of country's governance should be modeled on transparent lines, as observed by the National Commission to Review the Working of the Constitution, 2002. 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. An individual candidate (or agent) files electoral expenditure before the Election Commission and the party is not accountable in any way. As per the Representation of People Act 1951 (RP Act), 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.

Also, 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 income tax returns remains a somewhat arbitrary and subjective formality that a party fulfills only out of legal compulsions.

Thus as the matters stand now, the political parties on a legal plane remain unaccountable before any authority, let alone citizenry in respect of their huge incomes and expenditures centred around elections and otherwise. Precisely for this reason, 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.

Civil Service Rules and Right to Information (Section 12(4)(5))

The draft RTI Act goes "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." On the face of it, this is fine. But look at the Service Rules as they stand today. For instance, Section 9 of the 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 the 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. It is well known that disciplinary action against the public servants on the grounds of 'unauthorised communication of information' is not uncommon at all in government. 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.

We need an altogether different set of service rules based upon a diametrically opposite premise, where the disclosure is the rule and withholding the exception.

- "The current law is unacceptable"

In saying so this writer is 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 still need an altogether different set of service rules based upon a diametrically opposite premise, where the disclosure is the rule and withholding the exception.

Current 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. The Service Rules in their modified form will only then be of any avail to the concerned authorities to conduct disciplinary proceedings against the defaulting public servants. Otherwise we may be placed in an absurd position of putting the cart before the horse.

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

Ambiguity over 'Coming into force of the Act' (Section 1(3) vis-à-vis Sections 17 to 20)

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

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room for ambiguity in the concerned provisions.

Sections 17 to 19 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. The sections do not have any guarantee that the proposed Act can come into force within 120 days of its enactment because they don't stipulate the deadline within which the Rules shall be made to give effect to the provisions of the Act. Furthermore, Section 20 does not specify the deadline for its tabling before the Parliament. There is also the use of vague phrases such as 'as soon as' which are usually a euphemism for avoidance of definite commitment on the part of the State for the timely implementation of a law (in what has typically become an 'Indian' style).

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 and the task of tabling and passing of the Rules in Parliament and State legislatures should be completed, all within a time-period of 120 days, so that the Act is really enforced on or before the 121st day of its enactment as promised.

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The PIO's obligation for issuing an acknowledgment receipt to be included (Section 6)

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 rules of the Delhi RTI Act 2002 contain 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.

No two fees to be demanded from the citizens (Section 7)

It appears as if the draft Act wants two kinds of fees to be collected from a citizen applicant. The FOI Act 2002 had also spoken ambiguously about two kinds of fee, namely fee and a further fee representing the cost of production. As a result of such ambiguity, when the Ministry of Personnel recently announced the draft rules (on the older FOI Act) and invited public comment, it provided for two kinds of fees, an Application Fee and a Production Fee. This proposal for a dual fee regime as mooted in the Draft Rules was opposed by the advocates of RTI from all over the country in their response submitted to the Ministry.

Section 7 of the draft RTI Act which in the manner of its bete noire mentions 'a fee' and 'any further fee' gives rise to the suspicion of a double fee regime. This section should be cleared of all ambiguity regarding the fee to be paid and should be reworded 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) Or alternatively, 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 to be charged, it should be adjusted against the amount of fee to be charged for cost of production for the requested information.

Ministers' Oath of Secrecy and RTI

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 must remain open and transparent before the people in respect of all matters of public interest. Only exceptional categories of information in clearly defined matters should be exempted from disclosure.

But in the existing scheme of things, there is no codified norm (a *Lakshman Rekha*) to guide a Minister to distinguish between which information s/he should disclose in course of due discharge of his duties and which information s/he should not. It has come to depend on the pleasure of our Ministers, the result being the withholding of all crucial information of public interest from the members of public themselves at the topmost level. If a Block Development Officer 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. Charity should begin at home.

The Oath of Secrecy however is an essential part of the Constitution which is supposedly an overarching and overriding testament for the whole nation. Also, in view of this, 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. Should it remain, it contradicts in both letter and spirit, the proposed Right to Information Act 2004, which is a particular piece of legislation made under the authority of the Constitution and so to say, a dispensable creature of the Constitution.

Under the circumstances, my recommendation is that the NAC 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. The 3rd Schedule of the Constitution must be amended to say a final good-bye to this anti-people colonial hangover, which provides prime sanction for the regime of secrecy that we have in tact even after 58 years of independence.

□

Chitta Behera
October 2004

The author is a lawyer at the Orissa High Court.

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