

Message for Smt. Aruna Roy and Sri Jean Dreze

Thanks for the circular email dated 18th August 2004 that informed us inter alia about the developments at the level of NAC on the right to information and also about the NCPRI's alternative draft of the Right to Information Act. It is a welcome decision on your part that you have invited suggestions from everybody on the NCPRI's draft-amendments. After going through the draft-amendments, I noted down the following suggestions thinking that they might improve your draft further. The views/suggestions placed below, as a matter of fact, had emerged in course of the Orissa Campaign for Right to Information. The CHRI activists who were part of this Statelevel campaign might testify this fact. Now I would request you to give your views by the return email on the worth of the suggestions given below, for our own benefit.

With regards,

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Suggestions for further amendment to NCPRI-proposed Amendment of the Freedom of Information Act 2002

1) Section 2 (f) Public Authority:

The NCPRI's draft has limited its definition of public authority only to two kinds of bodies, first, those established or constituted under the Constitution, second, those established or constituted under any law made by the appropriate Government and includes any other body owned and controlled by the appropriate Government. Firstly, given this definition, can an individual Contractor who is not a body but a person that operates with public funds be made liable to disclose information to the members of public regarding the works executed with the said funds? Secondly, the case of MPs and MLAs. While discussing their case I am aware about the definition of Competent Authority that covers among others the Speakers of the Houses of Parliament and State Legislatures (Section 2 b), but consider it too deficient.. The MPs and MLAs nowadays operate huge amount of public funds under the label 'LAD' but are not legally accountable to disclose to a citizen as to the manner of utilisation of the said funds. Should they not come under the purview of the definition of public authority, being liable to disclose the information about the LAD and other matters? Thirdly, the case of political parties. 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, parties are formally required to submit annual returns to Income Tax Department, but the common people have no chance to know about the returns so submitted. 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 out of legal compulsions. Even if a party doesn't submit such returns, there is no provision

of punishment against it either. 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. 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. Again, 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 or punish 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.

Our 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 modelled on transparent lines, as observed by the National Commission to Review the Working of the Constitution.

Under the circumstances, 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 above (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? **In my view, leaving the political parties out from the purview of definition of public authorities shall render the whole legislation (immaterial you call it Freedom of information or Right to Information) a toothless and innocuous one.**

2) Section 6: Request for Information:

The NCPRI's alternative draft does not contain any provision for 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 vis-à-vis the recalcitrant bureaucracy. We strongly feel, **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 citizens.**

3) Section 12 C (5) : Penalties:

Here the NCPRI's draft provides, "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, in my State 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 Freedom of Information Act. While I say this I am aware of the Section 14 of the Act that provides for its overriding effect, which the NCPRI's draft retains. As per this provision, the FOI Act shall arguably override the abovesaid 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 FOI Act. 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 a self-contradictory position.

Under the circumstances, our plea is, you should either omit the expression "under the service rules applicable to him" from Section 12 C (5) of the NCPRI's draft, or make an explicit mention of the overriding effect of the Act to cover inter alia the relevant provisions under all the existing Service Rules in the country.

4. Oath of Secrecy: Rewording of the Act's Preamble to assure its abolition from the Constitution:

This all-important point has found mention neither in the original FOI Act 2002 nor NCPRI's alternative draft. The 3rd Schedule of the Constitution contains the format for both Oath of Office and Oath of Secrecy to be administered to a Minister at Centre or in a State before he/she assumes her office. In the type of parliamentary democracy as we have, the Minister is supposed to be simultaneously both a responsible member of the popular house 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 an effective bridgeman 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. A Minister by virtue of the high and responsible office that he assumes is supposed to know the Laxman Rekha i.e. which sensitive and critical 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 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 public public at the top 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, an overarching and overriding testament for the whole nation, should it continue further, shall nullify both the letter and spirit of the Freedom of Information Act, 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 FOI Act, how do we expect their subordinate executives from Cabinet Secretary down to a BDO or an RI to abide by the FOI's imperative of transparency ? In my view, 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 FOI 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 the prime law of the land sounds utterly paradoxical in the context of India being the largest democracy of the world. Can any body name a single other democracy of the world, where the leaders of people are compelled by its Constitution to swear to maintain secrecy of information before the very people who have elected them?

Under the circumstances, our humble suggestion is that the NCPRI should incorporate the vision for abolishing the Oath of Secrecy and its replacement by an Oath of Transparency in the Preamble of its alternative Draft, 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 even after 58 years of independence