

ISSN 0019-5561

# *The Indian Journal of Public Administration*

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*Quarterly Journal of  
The Indian Institute of Public Administration*

Special Number

on

Right to Information:  
Present Status and Issues



EDITOR  
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JULY - SEPTEMBER 2009  
Vol. LV                      No. 3



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## RIGHT TO INFORMATION AS A HUMAN RIGHT: THE ROLE OF SUPREME COURT

**T.S.N.SASTRY**

*The philosophy of law not only helps the individuals in realising their rights but fixes responsibility on the states too to be transparent in rendering its governance. In consonance with the above, for the first time in the history of mankind, the Government of Sweden ensuring the philosophical dimension of individual liberty to take part in the governance in a more cohesive manner enacted the Freedom of Information Act in 1766. It took 182 years to crystallise this right, as part and parcel of the human rights paradigm in the international arena. From then onwards, it became a self determinant right of the people and forced the nation-states to open their doors to supply information about the various aspects of governance. In that direction, to adhere to the realm of good governance of the contemporary era, the Government of India too opened its cudgels bowing to the pressure of its judiciary which constantly reminded the state, to respect the right to information of its sovereigns and adhere to the dictum of the Constitution, that the active participation of people at all levels of governance is a must for a democratic Republic. Considering the significant role played by the judiciary, the article subtly analyses the role of the judiciary in transforming the right to information as a human right and address the remedial shortcomings of the Act.*

THE EFFORTS of Andres Chydenius, led his Majesty Adolphus Frederick, the King of Sweden to promulgate the world's first Freedom of Writing and of the Press Ordinance in 1776. Though it had lived only for a short span of time, it had a significant influence across the frontiers in developing ideology of Right to Freedom of Information<sup>1</sup>. Among the

<sup>1</sup>[http://www.Chydenius.net/pdf/worlds\\_first\\_foia.pdf](http://www.Chydenius.net/pdf/worlds_first_foia.pdf); visited on 7.7.2009.



various constitutions, the US Constitution is considered as the first one to incorporate the Swedish idea of freedom of information, through the first amendment to the Constitution in 1789. Though these efforts were more towards the freedom of the press than to supply of information to citizens, certainly, laid the foundations for the evolution of the modern concept of right to information as a fundamental natural human right of the mankind. And, at the same time, making the nation-states duty bound to engage the free participation of citizens in the governance in a more transparent manner than in yesteryears. In the contemporary era, this is what is otherwise, referred to as adherence of states to the tenets of good governance in an era of globalisation.

Though few countries around the world enacted freedom of information laws long ago before its recognition as a human right, only in 1998 for the first time in the history of human rights, the Inter-American Court of human rights in *Marcel Claude Reyes et.al., v. Chile*,<sup>2</sup> expressly recognised it as a human right. The court, upholding the information sought petition of Claude Reyes and other environmentalists on a secret deal between the Government of Chile and few industrialists seeking information about the exclusive deal of the project Rio Condor Logging Project, wherein the Government of Chile gave exclusive rights to a multilateral timber company that had gained government subsidies in the sub-artic region of Tierra del Fuego with respect to access to timber and other natural resources. The court in no uncertain terms held that the government has no veil to deny the supply of information wherein a larger interest of public is involved, and held that the Government of Chile had violated the implied right of freedom of information which forms part of freedom of thought and expression of Article13 of the American Convention on Human Rights.

The decision of the Inter American Court had strengthened the movement for right to information of various forums all around the world and resulted in the enactment of Right to Information Acts by various countries. Today more than 75 countries enacted the right to information legislation ending the age old bureaucratic realm of secrecy of the governments.

The ending of the colonial bureaucratic concept of supremacy of secrecy by governments and the opening up of the Pandora's Box of supply of information to public across the world, the advocates of the movement of transparency have developed few fundamental principles, to guide the states for the effective implementation of the statues on right to information. Today

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<sup>2</sup>Case No.12.108, Report No. 60/03, Inter-Am.C.H.R. OEA/Ser.L/V/IL.118, Doc.70, Rev.2 2003 at 222

these principles became the corner stone of every Act of Right to Information in ensuring maximum supply of information to the public<sup>3</sup>. These principles are:

- *Firstly*, every statute needs to ensure that the information mainly belongs to the public and not to that of the state.
- *Secondly*, the exception clauses of the legislation, at no point of time should be subject to administrative supremacy or for change of governments and must be too narrow and should not defeat the purpose for which the Act has been enacted.
- *Thirdly*, The exception clauses to release the information must be based on identifiable harm to specific state interests, not general categories like "national security," or "foreign relations."
- *Fourth*, even where there is identifiable harm, the harm must outweigh the public interest served by releasing the information, such as the general public interest in open and accountable government, and, the specific public interest in exposing waste, fraud, abuse, criminal activity, and so forth and so on.
- *Fifth*, time limits need to be fixed to supply information to information seekers, without allowing the bureaucrats to take long time in order to defeat the purpose of seeking information.
- *Finally*, the judiciary and or an independent commission like that of an ombudsman alone be empowered to resolve the disputes relating to access to information.

The movement for right to information around the world and the clarion call of the United Nations and many regional organisations to member states, to enact specific legislation to recognise the right to information as a co-existent right of the human right of freedom of expression and free speech, gained momentum in India. The efforts of various organisations, the Press Council of India's draft bill under the Chairmanship of Justice P.B. Sawant in 1996<sup>4</sup> and the constant pronouncements of the judiciary finally transformed the governmental attitude to enact the legislation on the much awaited right to freedom of information in the year 2005.

#### *Right to Information as a human right*

In consonance with the provisions of the Charter, the UN has begun its efforts in making the states to realise the various rights that are part and parcel of the provisions of the Charter and the number of declarations,

<sup>3</sup>[http://www.humanrightsinitiative.org/programs/ai/rti/national/intl\\_standards.htm](http://www.humanrightsinitiative.org/programs/ai/rti/national/intl_standards.htm)  
3.8.2009

<sup>4</sup> For the historical perspective of RTI in India see Niraj Kumar: Treatise on Right to Information Act, (2<sup>nd</sup> edn.) 2009 pp.46-81



covenants and conventions on human rights. Accordingly, in 1946 the UN General Assembly in its first session adopted a resolution signifying the importance attached to right to information, the General Assembly emphatically resolved: "*Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.*"<sup>5</sup> Further in order to make the member states obligatory to extend protection to right to information, in no uncertain terms in the Universal Declaration on Human Rights, 1948<sup>6</sup>, Covenant on Civil and Political Rights, 1961<sup>7</sup>, incorporated the provisions for right to information as a human right.

Apart from the above, through its Commission on Human Rights (which is now upgraded as Human Rights Council) appointed a Special Rapporteur<sup>8</sup> in 1993 to monitor and submit period reports on the international implementation of the right to freedom of opinion and expression including that of right to information. Considering the various reports submitted by the Rapporteur and the opinions expressed therein<sup>9</sup>, in 2000<sup>10</sup>, the Commission accepted the principles of freedom of information framed by the Special Rapporteur. The Principles of the UN on Freedom of Information are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;

<sup>5</sup> UNGA.Doc, Res.59(1),5<sup>th</sup> Plenary Meeting; December 14, 1946.

<sup>6</sup> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to see, receive and impart information and ideas through any media and regardless of frontiers.

<sup>7</sup> Article 19 (2) states that: Every one shall have the 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, in writing or in print, in the form of art, or through any other media of his choice.

<sup>8</sup> Abid Hussain of India was appointed as the Special Rapporteur pursuant to resolution UN Doc. E/CN.4/1993/45.

<sup>9</sup> UN.Doc.E.CN.4/1998/40; January 28, 1998

<sup>10</sup> Un.Doc.E.CN.4/2000/63, April 5, 2000.

- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within government;
- A refusal to disclose information may not be based on the aim to protect governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify nondisclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicant and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment related sanctions for releasing information on wrongdoing, viz., the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failure in the administration of a public body.

These principles become the guiding principles for the states to enact legislations, or to enact their existing legislations in the entire world on the Freedom of Right to Information.

In 2004, the free expression rapporteurs of the UN, Organisation of American States, and Organisation for Security and Cooperation in Europe issued another joint declaration on International Mechanisms for Promoting Freedom of Expression, also endorsed the right to access information as a



fundamental human right<sup>11</sup>.

For the first time in the legal history of Europe, the European Court of Human Rights in *Társaság a Szabadságjogokért v. Hungary*<sup>12</sup>, in a landmark decision recognised the right to freedom of expression as mandated by Article 10 of the European Convention of Human Rights, also includes the right to information from public bodies. According to the court, "the law cannot allow arbitrary restrictions which may become a form of indirect censorship."

Apart from the steps taken by the UN, the regional standards adopted in various regions and their organisations and the judicial pronouncements of various municipal courts and by the judicial organs of the regional organisations, finally crafted the right to seek information from public bodies as a human right. Apart from the political perspective of this right, today it almost encompasses all the areas of human rights especially the second and third generation rights, namely economic, social and cultural rights, and the group rights, which cannot be realised without the right to freedom of information<sup>13</sup>.

#### *The Supreme Court and Right to Information*

A glimpse into the ancient past of India amply specifies that right to information was recognised as an essential right of the individuals. A close examination of the literature of ancient texts such as the *Vedas*, *Vedangas*, *Smritis*, *Sritis*, the epics of *Ramayana* and *Mahabharata*, and other texts like the *Arthashastra et.al.*, makes it clear, the law imposed a duty on the King to disclose the information about the administration to the public to the extent that is necessary to lead a peaceful life. In a strict legal parlance, the right to information in ancient and medieval India became a part and parcel of the concept of 'Dharma.'

However, from the second half of the medieval century, till recent times, the frequent foreign invasions of the kingdoms and later the entry of the colonial masters of Britain brought in radical changes not only in the socio-economic and cultural life of the individuals but hampered the human rights concept that was painstakingly crafted by the legal concept of *dharma* of ancient India. The British in order to continue their colonial supremacy and to suppress the freedom movement, enacted the draconian law of Official Secrets Act, 1923, which empowered the public bodies as *persona non grata* to seek information on their activities.

<sup>11</sup> See <http://www/cidh.org/Relatoria/showarticle.asp?artID=319&IID=1> .visited 14.8.2009

<sup>12</sup> <http://www/freedominfo.org/news/20090414.htm> visited 14.8.2009

<sup>13</sup> [http://www/humanrightsinitiative.org/programs/arti/internationalintl\\_standards.htm](http://www/humanrightsinitiative.org/programs/arti/internationalintl_standards.htm), visited on 16.8.2009



After Independence, though the Constitution of India has not explicitly recognised the right to freedom of information unlike some of its counterpart constitutions, like South Africa, the New Nepal Constitution, the right has been inherently recognised as part of right to freedom of the individual through the prism of fundamental rights. A close examination of the Constitution further makes it amply clear that the right to freedom of information is a basic right among all the fundamental rights, since the enjoyment of these rights are mainly dependent upon this right.

Though it took more than half a century for the Executive to enact a specific legislation on the Right to Information in 2005, taking into consideration of the opinions expressed by the judiciary from time-to-time a good number of legislations conferred the right to information.<sup>14</sup> However, the judiciary especially, the apex court in no uncertain terms recognised the right to information as a fundamental right of the citizens and its significance in exercise of various other fundamental rights that are guaranteed to the citizens under the Constitution. From then onwards, in a number of cases, the court enlisted the various legal percepts that are centred round the concept of right to information as a fundamental right, especially to lead a life with decency and dignity as guaranteed by Article 21 of the Constitution.

In *Bennett Coleman and Co & Union of India*,<sup>15</sup> in answering the question on government's right to newsprint, the court held that "freedom of speech and expression includes within its compass the right of all citizens to read and be informed." In *Indian Express Newspapers (Bombay) Pvt. Ltd vs. Union of India*,<sup>16</sup> it was clearly enunciated that "the basic purpose of freedom of speech and expression is that all members should be able to form their belief and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know."

In *State of UP vs. Raj Narain*,<sup>17</sup> examining the administrative power of the government to decide, whether disclosure of certain privileged documents was in the public interest or not, the court held that, "... while there are overwhelming arguments for giving to the executive the power to determine what matters may be prejudice public security, those arguments give no sanction to giving the executive exclusive power to determine what matter 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 Mathew went on further and

<sup>14</sup> Local Government (Access to Information) Act, 1985, the Environment and Safety Information Act, 1988; Access to Health Records Act 19890, etc.

<sup>15</sup> AIR 1973 SC 783.

<sup>16</sup> SCC (1) 1985 641

<sup>17</sup> AIR 1975 SC 865

more vocally crafted the right to information, that the veil of secrecy is not applicable to the common administrative business of the executive more so in matters of public interest, and has a duty to share the information to safe guard oppression and corruption.

The same was more emphatically advocated in *S. P. Gupta V. Union of India*,<sup>18</sup> (popularly referred to as the judge's transfer case), the court rejecting the privilege of the government not to disclose information on the correspondence between the Chief Justice of India and the Union Law Minister regarding the appointment of certain High Court Judges, "... in a democracy, all public servants exercise power only on behalf of the people and it would be an anathema, if what they did were hidden from the people."

Recognising the right of citizens to know about the antecedents of a candidate contesting in the elections for various positions in the country, the court in agreement with that of the Law of Commission and the Nation Commission to Review on the Working of the Constitution, in *People's Union for Civil Liberties (PUCL) vs. Union of India*,<sup>19</sup> observed that, to save the democracy from evil influence of criminalisation of politics, for saving the election from muscle and money power, for having true democracy and for controlling corruption in politics and to make the country and the constitution to work in an healthy environment, it is implied that the contesting candidates have to disclose their antecedents, their assets and liabilities.

Apart from the few judgments discussed above, on a number of occasions in a catena of cases, the court made it clear that the right to information is part and parcel of the epitome of the Constitution, and constitutes as a fundamental human right of the citizens of the country. The court although has not referred to the provisions of the international law of human rights, but in no uncertain terms it advocated that the right to information guaranteed under the provisions of the Constitution, certainly constitutes as a human right of the citizens. In fact, in such issues, the court would have referred to the provisions of international law of human rights as its incorporation is permitted by Article.51 (c) of the Constitution.

#### CONCLUSION

The innumerable number of judgments of the judiciary, and the movement of various organisations finally opened the cudgels of secrecy of the public bodies of the state and the Right to Information Act 2005 came into existence. Though the Act endorsed the unfettered spirit of right

<sup>18</sup> AIR 1982 SC 149

<sup>19</sup> AIR 2004, SC2363 also see AIR 2004 SC 1442



to information, like all other rights this right must also to be used cautiously. Though the right represents the true spirit of the Constitution as a part of the preamble of the Constitution, it is not absolute and the exceptions applicable to all other rights are applicable to it through the exceptions stated in the Act.

According to the Act, although certain information is exempted under Section 8 of the Act, under the principle of public interest override<sup>20</sup>, some of the exemption clauses in the Act will vapor. For example, under the Intellectual Property Rights, if a person receives a patent over an invention, in case if such invention constitutes a danger to the public at large, it casts an obligation to share the information about the invention.

The availability of information commissions at the national and state level though a welcome feature to reduce the burden of judiciary, it would have been more appropriate if the mechanism has been constituted from the grassroots level onwards. It is prudent on the part of the state to amend the provisions of the Act and a separate chapter may be included to cover the district and Mandal level commissions. Such a constitution of commissions will easily address and redress the problems of millions of citizens at their door steps, save the time and money of the people where in millions of the citizenry are living in abject poverty. This will certainly enhance the efficacy of the administration and also the concept of *gram swaraj*.

The Act nowhere imposed an obligation on the State to supply information *suo moto*, at least on matters of major public interest. It is nothing but imperative that on issues of major public significance or any major issues of public importance the government must disclose information. This is nothing but the state would be discharging the obligations imposed by the Constitution in furtherance of the rights that are guaranteed to citizens.

Though Section 8 of the Act gives a privilege to the state to refuse information due to the exception clauses made therein, in the furtherance of good governance and to protect the spirit of the Constitution, the judiciary and the information commissions have to be careful in interpreting the clauses without defeating the purpose of public interest for which the Act was enacted.

The Act has nowhere made provisions that private entities need to supply information. It is time that in view of globalisation, wherein a number of multinational corporations and other entities are mushrooming, appropriate

<sup>20</sup> Deepika Mongilishetty-Farias, "The Freedom of Information Bill 2002—a comparative perspective", <http://www/humanrightsinitiative.org/programs/arti/national/.htm>, visited 16.8.2009.

provisions be incorporated to cover the private agencies including the NGOs.

Further, the Act unlike the Human Rights Act, 1993 has not provided any mechanism for its dissemination. Dissemination being one of the important components of right to information, it is nothing but an obligation of the state to provide mechanism for the widespread dissemination of the provisions of the Act, for its effective implementation. In a country like ours, where millions of citizens are illiterate and a number of languages are in existence, the state should take steps to incorporate provisions in the Act, to make it compulsory that the Act be translated into the local languages of each state to achieve the objective with which it has been enacted and be made part of the curriculum.

It took five and half decades for the people of India, for an effective crystallisation of their human right to access which has been guaranteed by the Constitution long ago, at the same time, duty has been cast on every one to use it judiciously without any malice to harm the life and liberty of every individual that is again guaranteed by the Constitution.