CONSTITUTIONAL AND LEGAL FRAMEWORK OF THE RIGHT TO INFORMATION IN INDIA

On 16th December 2002, the Bill for Freedom of Information was passed after several changers were made for its improvement. The Bill is in accord with both Article 19 of the Constitution as well as Article 19 of the Universal Declaration of Human Rights. The Bill would help bring about a fuller and meaningful participation of people in governance, which is a prerequisite to parliamentary democracy. In case of provisions of the Official Secrets Bill, which are inconsistent with the Right to Information Bill, the provisions of the latter would prevail. Regarding the penalty for those officials who refuse information, as per the Bill's provisions, that the CCS Conduct Rules would be amended for disciplinary action against such officials. However as we would learn as we move along to implement the Bill and make improvements with the passage of time. Out of 200 countries, only 20 have laws for Freedom to Information.

Bill will enable the citizens to have an access to information on a statutory basis. With a view to further this objective, the Bill specifies that subject to the provisions of this Act, every citizen shall have right to freedom of information. Obligation is cast upon every public authority to provide informaiton and to maintain all records consistent with its operational requirements duly catalogued, indexed and published at such intervals, which may be prescribed by the appropriate Government or the competent authority. The Bill provides for appointment of one or more officers as Public Information Officers to deal with requests for information.

The Indian Penal Code 1860

Though the Indian Penal Code 1860 does not deal explicitly with a citizens Right to Information as the Indian Evidence Act 1872 does, it however contains various provisions which have close bearing on the responsibility of a public servant to provide correct information to the public, failing which the public servant concerned is liable to punishment for his acts of omission and commission in this regard.

The Section 21 of IPC defines a public servant to include such categories of persons as every commissioned officer in the military, naval or air force of India, every judge, every officer of a Court of Justice, every juryman, assessor or a member of Panchayat assisting a Court of Justice or public servant, every arbitrator or other person to whom a cause or matter has been referred for decision or report by a Court of Justice or by any other competent public authority, every person who holds any office by virtue of which he is empowered to place or keep any person in confinement, every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring

offenders to justice, or to protect public health, safety or conveniences, every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, every person who is by virtue of his office discharges responsibilities in the conduct of election, and moreover every person who receives pay, remuneration or commission from the Government or from a local authority or corporation established by or under a Central, Provincial or State Act or a Government Company as defined in Section 617 of the Companies Act, 1956.

The Section 167 (Public Servant framing an incorrect statement) mentioned under Chapter IX (Of Ofences by or relating to Public Servants) of IPC 1860 has provided for punishment of imprisonment upto 3 years or fine or both against a Public Servant for framing an incorrect statement or making a wrong translation of a statement with the intention of causing injury to any person.

Under the circumstances, a genuine concern for making the action of State transparent before the people calls for not only a suitable, prior amendment of the outdated Service Rules before the Bill is enacted, but also incorporation of the aforesaid provision of IPC 1860.

Indian Evidence Act, 1872

The Evidence Act 1872 in its Section 74 provides a sweeping definition of public documents, which consist of documents forming the acts or records of the acts of the Sovereign Authority. And as per the said Section, the expression, Sovereign Authority covers within its fold all official bodies and tribunals, public officers of legislative, judicial and executive organs. Further the Evidence Act in its Section 76 (certified copies of public documents) says, every public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such docuemnt or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

The same Evidence Act in its Sections 123 and 124 makes the citizens right to information absolutely discretionary on the part of the Government servants. However, the clear and bold acknowledgement of peoples right to information, copy and inspection of public documents vis-vis all the agencies of sovereign authority, as mentioned under the Sections 74-76 of Evidence Act, is as a matter of fact, unparalleled elsewhere in the legal literature of India.

S.123 - Evidence as to affairs of State : No one shall be permited to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer as the head of the department concerned, who shall give or withhold such permission as he thinks fit.

S. 124 - Official communications : No public officer shall be compelled to disclose communications made before him in official confidence, when he considers that the public interest would suffer by the disclosure.

Keeping these provisions of Evidence Act in tact, the proposed enactment of Right to Information either at State level or at Central level would turn out to be an exercise in futility.

Official Secrets Act, 1923

This notorious, foul smelling piece of colonial legislation, which remains in force to-day

with all its anti-people rigor views the people and Government servants without exception, as the potential agents of the foreign enemies, who are, as if, out to give away the official secrets to the outsiders, and who, on being caught, need be sternly punished under the various provisions of the Act. Not to talk of communication, even mere fact of keeping an official document with himself by an official or non-official person, not authorized to keep it, is considered an unpardonable offence inviting the prescribed punishment of 3 years of imprisonment or fine or both .A token excerpt from Section 5 of the Official Secrets Act, as mentioned below, shall suffice to indicate the tenor of the remaining substance of the Act:

"If any person, retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or willfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof, he shall be guilty of offence under this section."

Needless to say, the Official Secrets Act 1923, which was largely instrumental in institutionalizing the mechanism of secrecy in the system of governance of the country over the years and continues to feed to this day, the all-pervasive culture of secrecy in the day-to-day transaction between State and citizens, deserve to be abrogated lock, stock and barrel, so that a genuine effort can be initiated towards making the business of governance open, accountable and transparent in true sense. Otherwise, every case of enacting Right to Information in the State or at Centre is bound to meet its doom as soon as it is given effect to under the overwhelming influence of the Official Secrets Act 1923.

Central Civil Service Conduct Rules, 1964

The Officers of All India Services, working under the State Governments, are required to abide by the Central Civil Service Conduct Rules 1964, which in its Section 11 forbid the unauthorized communication by a public servant to the citizens and considers it a punishable offence. In view of this, how can the enactment of a Right to Information law in the States or at the Centre improve the state of transparency in governance before the citizens ?

Manual of Office Procedure for the Central Government

As per this Manual, only Ministers, Secretaries and other officials specially authorized by the Minister are permitted to meet the representatives of the Press and to give them information. In case of any dispute concerning the unauthorized communication, the Principal Information Officer of Government of India is the final arbiter.

Keeping the Minister at the head of the information regime and living the matters relating to information to the discretion of the Minister means dividing the system of governance of an inbuilt and inherent mechanism to freely and timely respond to and interact with the citizenry day to day, which is the hall mark of a democratic polity. Unless and until the existing top down system of information administration as ordained by the manual of office procedure is replaced by a system in which every layer of governance is equally transparent, responsive and accountable to the citizens in their respective spheres, no enactment of Right to Information law would be able to effect a modicum of change in the present situation of secrecy and suspicion.

Constitution of India

The most formidable obstacle to the implementation of a Right to information law in the States and country comes from the Constitution itself it defies human reason as to how

a visibly anachronistic arid anti-people article i.e. oath of secrecy found place in the third Schedule of the Constitution and is still being tolerated to this day without any compunction, the like of which is noticed nowhere in the democratic world. The Article 75 (4) of the Constitution makes it binding on every Minister before entering into his office to swear by an oath of Secrecy, which reads as follows:

I, Swear in the name of God that I will not reveal to any person or persons any matter, which shall be brought under my consideration or shall be known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister.

As is well known, in the typical Indian system of Parliamentary Democracy, a Minister is both a member of legislature and a head of the executive in respect of the portfolios he holds. When a Minister, the head himself vows in the name of God to maintain secrecy of official information from the people, how can the rest of the executive i.e. the Government servants whom he heads and leads for all practical purposes, be expected to disclose official information to the people just for the sake of a piece of legislation, called Right to Information or Freedom of Information Act ? Over and above, there are Conduct Rules, Codes and Manuals for the Government Servants, as already examined by us, which bind them to the observance of strict secrecy of official information from the public.

The National Commission to Review the Working of the Constitution (2000- 2002), which submitted their 1800 and odd page Report to the Prime Minister on 3lst March 2002 have therefore observed inter alia.

Much of the common man's distress and helplessness could be traced to his lack of access to information and lack of knowledge of decision-making processes, which vitally affect his interest. Government procedures and regulations shrouded in a veil of secrecy do not allow the clients to know how their cases are being handled. They shy away from questioning officers handling their cases because of the latter's snobbish attitude and bow-wow style. Right to information should be guaranteed and needs to be given real substance. The traditional insistence on secrecy should be, in fact, we should have an oath of transparency in place of an oath of secrecy. Administration should become transparent and participatory.

The Oath of Secrecy apart, the Indian Constitution is replete with provisions, which are just uncritically borrowed from its colonial predecessor Government of India Act 1935, and legitimize and reinforce by the full backing of the supreme law of the land, an obsolete and nefarious regime of administrative secrecy, that is squarely incompatible with a democratic polity of modern times. Such immunitarian provisions of the Constitution as guaranteeing a special manner of Protection to the Permanent Civil Service of the colonial style (Article 311), Privileges of the Legislators (Article 105 for MPs and Article 194 for MLAs), Securty of tenure to the Judges (Article 124 for Supreme Court Judges and Article 217 for High Court Judges), and above all Legal Protection to the President and Governors (Article 361), which together make the citizens stare at the key functionaries of the State with awe and wonder, and which give a free hand to these functionaries to deal with them as they like without being directly accountable to them, do also contribute indirectly but substantially to the maintenance of a regime built upon secrecy, red-tape, corruption and alienation from the people.

Unless and until the Constitution is rid of its colonial self and remade in such a manner as to place the citizen at its center-stage, with all the organs of power being directly accountable to him and his every day life, no piecemeal enactment of Right to Information can bring about the much desired elements of transparency, responsiveness and accountability to the governance of the day, over which the whole nation cries hoarse.

Judicial Accountability : Human Rights

The judgments and orders of the Indian Supreme Court are available publicly. Yet India's sharp legal minds are never asked about Supreme Court orders, which have rejected *habeas corpus* petitions and directed that alternative remedy be availed of in the district court.

When people disappear after being taken by the police and their relatives invoke constitutional rights to life and liberty and also approach the apex court, they are simply told to go back and approach the lowest court of their district. That nullifies not only the entire chapter of fundamental rights, which is supposed to be the jewel of the constitutional crown, but also the entire legal evolution; of the writ of *habeas corpus*. There are also situations when the apex court simply folds its hands because the high court in the Capital itself will not comply with the Supreme Court's direction that a *habeas corpus* petition ought to be heard expeditiously.

What usually happens is that the lawyer concerned files an affidavit stating the manner of the high court's refusal to comply. But the subsequent silence from the apex court makes mockery of the *habeas corpus* remedy.

When the apex court is on vacation, lawyers with *habeas corpus* petitions are simply told that this is not among the list of priority categories drawn up by the apex court. A Sheela Barse protesting against the casual speed with which, the apex court judges deal with vital issues affecting the life and liberty of children, simply gets thrown out as a petitioner and supplanted by the judge-controlled Supreme Court Legal Aid Committee.

The question is what have the successive attorney-generals of India, who defend India's record before UN Committees, done about this in the very court. Where they have their offices ? If an attorney general says that he does not know about all this then is he fit to hold that office ? But the special UN committee members never ask such a question.

The cloak of ignorance, deliberate or otherwise, has suited the interests of many attorney-generals and of the political interests that have vaulted them to the position they hold. This is evident in the fact that despite the idea of a human rights center having been constantly mooted, no attorney general has thought it fit to even raise this as an issue with his political masters. An attorney general drumming up public support for human rights or the Indian constitutional concept of social, economic and political justice, is a distant dream. But no international human rights agency raises the question why India's attorney generals have failed the Indian people.

There are important Supreme Court judgments on arrest, under trial prisoners, legal aid, prison rights, handcuffing. All these have come about without probing the failure of the executive magistracy and the judicial magistracy, of the high courts and their publicly funded legal aid committees. Those who have been interacting with the police well know their ignorance of these Supreme Court pronouncements. Despite a NICNET computer satellite system from the Supreme Court to the districts, this ignorance continues.

High courts administer the district courts but are not held accountable for the efficient implementation of apex court judgments by the district and sessions judges. Successive attorney-generals of India have done little about their preemptive right of audience in courts and their special constitutional right to address Parliament. But no UN Human Rights Committee questions an Attorney General about the large-scale non-implementation of the Supreme Court's own judgments.

All this means that the people of India are being deprived of their human rights. There is also no attention paid to the positive human rights mandated by the Constitution as primary in the governance of the country, with corresponding provisions in the International Covenants on Civil, Political and Economic Rights.

As a consequence, the attorney-general's office has been reduced to that of being an extension of the Government of India. The tragedy is that UN international monitors permit this to go on under international covenants to which much lip service is paid. In the process, international human rights are reduced to a charade.

Freedom of the Press & Freedom of Information

These freedoms are the bedrock of democracy. In a majority of national Constitutions freedom of the press is guaranteed in specific terms. It is felt that our Constitution should also expressly include freedom of the press and the right to information as guaranteed fundamental rights in Part III. As pointed out above, the Right to Know and the right to information have been spelled out by the Supreme Court in S.P. Gupta's case. (S.P. Gupta & others. v. President of India & others, AIR 1982 SC 149)

Inclusion of Judicially Deduced Fundamental Rights in Part III of the Constitution

As a result of judicial decisions certain fundamental rights, which are not explicitly mentioned in Part III of the Constitution which guarantees fundamental rights, have been inferred or deduced from the specified guaranteed fundamental rights. These judicially deduced fundamental rights are:

Freedom of the Press; (Ramesh Thappar vs. State of Madras, 1950 SCR 594; Brij Bhushan v State of Delhi, 1950 SCR 605. Bennett Colemann & Co. v Union of India, AIR 1973 SC 106)

Freedom of Information; (S.P. Gupta & Others vs. President of India and Others AIR 1982 SC 149)

Instead, why not we mention in Art. 19 that all citizens shall have the right to freedom of speech and expression which shall include the freedom of the press and other media, the freedom to hold opinion and to seek, receive and impart information and ideas regardless of frontiers.

(Source: Prof. A. Krishna Kuamri, Dr. MCR HRD Institute of A.P. Hyderabad)

Courtesy : *RTI Cell : YASODA*