

# Right to Information as a Means of Mass Persuasion in a Globalising India

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One cannot perhaps be blamed if one's attention is drawn to Germany of the early 1960s in the context of certain democratic deficits in contemporary India. In 1962, Jurgen Habermas, a relatively less known scholar made a significant contribution to democratic theory and generated quite a sensation in the still rather dull intellectual milieu of the post-war Germany. He focussed on those features of contemporary democracy in his *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* [translated by Thomas Burger with the assistance of Frederick Lawrence, MIT Press, Mass., 1989] that the young scholar's more conservative colleagues tended to downplay at that point.<sup>1</sup>

Influenced significantly by the neo-Marxian Frankfurt School of thought, Habermas argued that, contemporary democracy exhibited a number of troublesome tendencies. To him, a catastrophic fusion of state and society, unforeseen by classical liberal theory, had resulted in the disintegration of the very core of liberal democratic politics, a public sphere based on the ideal of free and uncoerced discussion. According to Habermas, mounting evidence suggested that, liberal democracy was evolving towards a new and unprecedented form of authoritarianism, a mass-based plebiscitarianism in which privileged organized interests (what he described as "non-feudal" institutions fusing public and private sector) in order to perpetuate their social and political domination.<sup>2</sup> This German scholar argued that, an ossified and inflexible political system, in which decisions increasingly were "legimitated" by means of subtle forms of mass persuasion, functioned alongside a profit-hungry mass media that trivialized public life in order to thwart democratic aspirations. The autonomous "bourgeois public sphere" of the late 18<sup>th</sup> and early 19<sup>th</sup> centuries had been jettisoned for the "manipulated public sphere" of organized capitalism.<sup>3</sup> Much later, Habermas reasserted many of the core concerns of his original contributions to democratic theory in his *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*.<sup>4</sup> If we follow through these Habermasian concerns in the Indian

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<sup>1</sup> William Scheuerman, *Frankfurt School Perspective on Globalization, Democracy and the Law*, Routledge, New York, 2008, p. 88

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by William Rehg), MIT Press, Mass., 1998

context, it may perhaps help us to assess the significance of the access to information as an important right that strengthens democracy.

India has been a democracy since her de-colonization in 1947 except during the period of Emergency (1975-77). But, the bitter experiences of Emergency started creating awareness among the citizens that the mere form of democracy is not enough and its content is sometimes more important for empowering people. In that context, the enactment of Right to Information (RTI) reflects a substantial shift in the predominant view (among citizens and elites alike) of the state's role from trusted guardian to merely that of an agent of the people that requires careful monitoring of citizens. The governments so far preferred to withhold information on many occasions to cover up malfeasance or to protect themselves from political embarrassment. In this scenario, the citizens had to have the right to access that information in order to hold the government accountable for its actions.<sup>5</sup>

However, access to information is a relatively new norm. It is important so that the public can be effective advocates for its causes. Many would argue that, the civil society needs to know of threats and trends and understand the origins and consequences of these factors.<sup>6</sup> The latest phase of globalization along with the global communication and the processes of informalisation have made it difficult for the governments to control information and its dissemination. The nation-state often owns up short with nothing near complete closure over events within its boundaries with its more traditional geopolitical concerns for policing its territories, populations and markets.<sup>7</sup>

It is argued that, corporate globalization destroys local and national economies and the livelihoods and jobs that domestic economies generate in the pursuit of corporate profits and financial growth.<sup>8</sup> This creates insecurity, and insecurity, in turn, breeds fear and exclusion and provides fertile ground for emergence of politics based on narrow cultural identities and ideologies of exclusion.<sup>9</sup> Representative democracy in this context becomes increasingly shaped and driven by cultural nationalism. Cultural nationalism emerges as the twin of economic globalization.<sup>10</sup>

In a way, the latest phase of globalization has generated new opportunities as it has posed new challenges for democracy. The adoption of the laws may be one of the unintended effects of globalization. In the 1990s, globalization began supporting the formation of trans-national networks of cooperation and information between public officials, professional lobbies, and economic and financial actors for different reasons.<sup>11</sup> In other words, gone is the faith in the state's paternalistic role to determine what citizens should know about government processes and

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<sup>5</sup> Bruce E. Cain, Patrick Egar and Sergio Fabbini, "Towards More Open Democracies: The Expansion of Freedom of Information Laws", in Bruce E. Cain, Russell J. Dalton and Susan E. Scarrow (eds.), *Democracy Transformed?: Expanding Political Opportunities in Advanced Industrial Democracies*, OUP, New York, 2003, p. 137.

<sup>6</sup> Vandana Shiva, *Earth Democracy: Justice, Sustainability and Peace*, Zed Books, London, 2006, pp. 73-74.

<sup>7</sup> Roland Axtmann, *Liberal Democracy into the Twenty-First Century: Globalization, Integration and the Nation-State*, Manchester University Press, Manchester, 1996, p. 132

<sup>8</sup> Op. cit., fn 6

<sup>9</sup> Op. cit., fn 6

<sup>10</sup> Op. cit., fn 6

<sup>11</sup> Op. cit., fn 5, p. 138

policies. Politicians in many countries run and win electoral campaigns by pledging to reform the public sector, to promote a new public management, to make the government more accountable to its citizens. At the same time, citizens are challenging administrative discretion and secrecy.<sup>12</sup>

A new concept of political right and political action or “trans-border participatory democracy” appears to be emerging in some cases.<sup>13</sup> It asserts a universal “right of the people to intervene in, to modify, to regulate, and ultimately to control any decision that affect them”, no matter where these decisions are made. Trans-border participatory democracy offers an answer to “the particular formation that oppressive power has taken in our time: the state-supported globalization of capital.” This leads to an expanded sense of citizenship.<sup>14</sup>

In this context, some justifiable rights overlap with cultural rights, as in the case of the right to information. Yet how that right is exercised is dependent on cultural context. As Javier Perez de Cuellar, President of the World Commission on Culture and Development, observes in his introduction to the UNESCO report *Our Creative Diversity* (1996), “Economic and political rights cannot be realized separately from social and cultural rights.”<sup>15</sup>

The new opportunities of globalization, like Right to Information Act can contribute a lot in empowering the people and in ensure a more participatory decision-making process. In Italy, it appears to be a formal right only and not a real opportunity. But, in other cases, the US and France especially, citizens and groups make frequent use of the right to obtain documents that would otherwise be denied to them. Some of the informants serve whole purposes, such as reinforcing political accountability and checking corruption, but some of it serves more mundane private or commercial ends. It would be hard, if not impossible, for citizens to hold governments accountable for their action if governments controlled access to critical documents. Governments will naturally seek to suppress information that might be harmful to their electoral prospects. But, suppressing that information prevents voters from punishing bad decisions: they cannot react to what they do not know.<sup>16</sup>

Here, a primary role of domestic law (particularly domestic administrative law) is to provide the infrastructure necessary for the exercise of participatory rights by citizens.<sup>17</sup> Sometimes, this takes the form of new spaces for administrative hearings and citizen inputs. The rights of citizens go beyond rights against the state. They include the right to help shape the structures that control both the allocation and the application of power, including power exercised by the non-state actors, whether domestically or trans-nationally.<sup>18</sup>

To fulfil this role, law must provide citizens with access to the kind of information necessary for them informed judgments – whether that information is held by a public or a private entity.<sup>19</sup> There is a need to create the forums necessary for the citizens to enter into meaningful

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<sup>12</sup> Ibid., p. 137

<sup>13</sup> Muto Ichiyo, “For an Alliance of Hope”, in Jeremy Brecher, John Brown Childs and Jill Cutler (eds.), *Global Visions: Beyond the New World Order*, South End Press, Boston, Mass, 1993, pp. 147-162

<sup>14</sup> Ibid.

<sup>15</sup> *Our Creative Diversity: Report of the World Commission on Culture and Development*, UNESCO, Paris, 1996, p.11

<sup>16</sup> Op. cit., fn 5., p. 138

<sup>17</sup> Alfred C. Aman Jr., *The Democratic Deficit: Taming Globalization Through Law Reform*, New York University Press, New York, 2004, p. 14

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

political debate. These political spaces and opportunities call for going beyond traditional conceptions of representative democracy and public law principles based on clear-cut distinction between public and private or state and federal actors.<sup>20</sup> There are also devices that ensure the flow of information to the public, such as the duty to provide information, or the duty to offer reasons for decision.<sup>21</sup>

## **Birth of the Right**

The legislative embodiment of the right to information has long been recognized as underpinning all other human rights. Article 19 of the *Universal Declaration of Human Rights* of the United Nations (UN), signed on 10 December 1948, states unequivocally: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.<sup>22</sup> Thus, the right to freedom of opinion and expression – from which flows the right to information – and the right to seek and receive information are unambiguous elements of a historic international law to which India is a signatory. The UN Declaration gives human rights precedence over the power of the State. While the State is permitted to regulate rights, at the same time, it is prohibited from violating them.

But, much before this initiative, Sweden, one of the Scandinavian countries, could have the oldest legislation relating to public access to official documents, dating back to 1776. The right is, in fact, provided in the Constitution itself. The principle that disclosure of information is the norm unless it is withheld by specific legal provision underlies Sweden’s open access regime.

Another Scandinavian country, Finland passed the *Law on the Public Character of Official Documents* in 1951. The provisions of Finland’s law benefited from the country having been a part of Sweden in the 19<sup>th</sup> century. However, the public does not have a constitutional right to access information.

Both Denmark and Norway passed their information access laws in 1970. In all four Scandinavian countries, citizens who have been denied information can appeal to the court. In Finland and Sweden, the appellate bodies include the ombudsman, the Chancellor of Justice and/or the Supreme Administrative Court, and in Denmark and Norway, these include the ombudsman and the ordinary courts.

The United States *Freedom of Information Act*, passed in 1966, provided that access to documents was to be the rule rather than the exception. However, due to inherent difficulties in enforcing compliance, this Act was amended in 1974 and the onus of justifying restriction of access to a document was placed entirely on the Government.

Here too, the citizen does not have to provide reason for requesting information.

Some other good practices with regard to the freedom of information from the experiences of different countries can be summarized as follows:

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<sup>20</sup> Ibid.

<sup>21</sup> Eyal Benvenisti, “Welfare and Democracy on a Global Level: the WTO as a Case Study”, in Eyal Benvenisti, Georg Nolte and Daphne Barak-Erez (eds.), *The Welfare State, Globalization and International Law*, Springer-Verlag, Berlin, 2004, p. 350

<sup>22</sup> [www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/)

The UK Freedom of Information Act, 2000, makes it mandatory for public authorities to create and adapt publication schemes, which are approved by the Information Commissioner. The publication scheme is a document that lays down the categories of information that a public authority is to disclose proactively.<sup>23</sup>

The Freedom of Information (Scotland) Act, 2002 makes it mandatory for a public authority to adopt and maintain a publication scheme approved by the Information Commissioner, which the public authority would need to review from time to time. The nature of the publication schemes is very similar to that of the UK and includes the illustration of classes of information that the authority publishes the manner or form in which the public can expect to find each class of information, and whether the information would be available free of charge or on payment of a fee.<sup>24</sup>

The US Department of Veteran Affairs, which processed the most number of information requests in 2005, has gone beyond the affirmative disclosure provisions of the US Freedom of Information Act (amended in 2002) and posts on its website even information that does not fall under this section of the Act, but which can be published since it is not exempt, in order to help clear the backlog.<sup>25</sup>

In the United States of America, access to information is generally governed by the Freedom of Information Act,<sup>26</sup> but the US Supreme Court has also interpreted the constitutional freedoms of speech and press to include a constitutional right of access to information because these protections all “share a common core purpose of asserting freedom of communication on matters relating to the functioning government.”<sup>27</sup>

While this right has generally focussed on public access to criminal proceedings, some justices have argued for a broader right to information.<sup>28</sup> The court also held that, the access may only be denied if such a denial is “necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”<sup>29</sup> The US Supreme Court also noted two more things about the right of access to information: “First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information... Second, the value of access must be measured in specifics.”<sup>30</sup>

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<sup>23</sup> <http://www.nationalarchives.gov.uk/recordsmanagement/> accessed on 2 February 2010

<sup>24</sup> <http://www.nas.gov.uk/recordKeeping/recordsManagement.asp> accessed on 4 February 2010

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[http://www.va.gov/oit/cio/foia/documents/Plan\\_Clean\\_6\\_13\\_06.pdf#search=%22US%20department%20of%20veteran%20affairs%20proactive%20disclosure%22](http://www.va.gov/oit/cio/foia/documents/Plan_Clean_6_13_06.pdf#search=%22US%20department%20of%20veteran%20affairs%20proactive%20disclosure%22) accessed on 6 February 2010

<sup>26</sup> USC 552 (1994)

<sup>27</sup> *Richmond Newspapers Inc. V. Virginia*, 448 US 555. 575 (1980)

<sup>28</sup> In *Globe Newspaper Co. V. Superior Court*, supra note 42, 457 US at 604. 607 (in voiding a state law that required the exclusion of the press and public from the courtroom during the testimony of a minor who was allegedly the victim of a sexual offence, the court noted that the First Amendment rights seek to “protect the free discussion of government affairs” and thereby “ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government”

<sup>29</sup> Quoting *Mills v. Alabama*, 384 US 214. 218 (1966); *Press Enterprise Co. V. Superior Court*, 478 US 1 (1986) (holding that press has the right of access to the transcripts of a preliminary hearing of a criminal case)

<sup>30</sup> For details, please see Carl Bruch and Sarah King, “Constitutional Procedural Rights: Enhancing Civil Society’s Role in Good Governance”, in Carl Bruch (eds.), *The New “Public”: The Globalization of Public Participation*, Environmental Law Institute, Washington, D.C., 2002, pp. 21-38

The Canadian Government has made it mandatory under the Canadian Access to Information Act, 1983 for its Government agencies to disclose financial and human resource-related information by making this information available *suo motu* on their websites. The three areas that are disclosed proactively (subject to exemptions under the information Act and the Privacy Act) are the travel and hospitality expenses for selected Government officials, contracts entered into by the Government for amounts over \$10,000 and reclassification of occupied positions. In addition, information regarding grants and contributions of over \$25,000 is also to be proactively disclosed.<sup>31</sup>

The Mexican Freedom of Information Act, 2003 mandates public authorities to upload proactively disclosed information on the internet, so that an overall picture of the authority is available. This reduces the need of individuals to file information requests regarding the general functioning of a public authority. Information that is requested by one applicant is uploaded on the website and thus available to the general public.<sup>32</sup>

The South African Promotion of Access to Information Act, 2000, which extends to private bodies as well, mandates the Human Rights Commission to compile a guide on how to use the Act, in each official language. The guide has to be updated every two years. Contact details of all information officers of all public authorities, including electronic mail addresses, are made available in the telephone directory used by the public. Every private body also needs to publish most of the above information.<sup>33</sup>

In India, the access to information by the citizens has been given a legal recognition following a strong grassroots movement. Apart from certain domestic political and legal developments, the trans-national networks also encouraged the civil rights activists and the NGOs to fight for the right to information and make it a legitimate right of the people in order to check corrupt practices in the decision-making process and in order to ensure political accountability at large. To be precise, in India, the movement for the right to information occurred mainly in three areas: legal pronouncements, civil society/people's movement, and government action. In India, The Supreme Court has, in various judgments, held that the right to information is a part of the fundamental right to freedom of speech and expression under Article 19 (1) of the Constitution, since the right cannot be properly exercised if the people did not have the right to information. Perhaps one of the clearest enunciations of the fundamental right to information was seen in the Supreme Court ruling in the State of U.P vs. Raj Narain [(1975) 4 SCC 428, in which Justice K.K. Mathew said:

“In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security... They (the public) are entitled to know the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor, which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover

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<sup>31</sup> <http://www.justice.gc.ca/en/dept/disclosure.html> accessed on 10 February 2010

<sup>32</sup> <http://www.irmt.org/> accessed on 15 February 2010

<sup>33</sup> <http://www.irmt.org/> accessed on 20 February 2010

with veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption”.<sup>34</sup>

Similarly, in *S.P. Gupta vs. Union of India*, Justice P. N. Bhagwati observed: “The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure of information in regard to the functioning of the Government must be the rule and secrecy an exception.”<sup>35</sup> The Supreme Court asserted: “This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of the Government must be the rule, and secrecy an exception justified only when the strictest requirement of public interest demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interests, bearing in mind all the time that disclosure also serves an important aspect of public interest.”<sup>36</sup>

Subsequently, in 1988, the Supreme Court held that, access to information, or the right to know, was a basic public right and essential to developing public participation and democracy.<sup>37</sup> The same year, the High Court of Rajasthan held that, the privilege of secrecy only exists in matters of national integrity and defence.<sup>38</sup>

Again, at the grassroots level, a series of demonstrations and public hearings were held to show how local Governments had manipulated the records that affect wages and livelihoods of villagers. The most important feature that distinguishes the movement for the people’s right to information in India from that in most other countries, whether of the North or the South, is that it is deeply rooted in the struggles and concerns for survival and justice of most disadvantaged rural people. The reason for this special character to the entire movement is that it was inspired by a highly courageous, resolute, and ethically consistent grassroots struggle related to the most fundamental livelihood and justice concerns of the rural poor. This inspiring struggle in the large desert state of Rajasthan was led by the Mazdoor Kisan Shakti Sangathan (MKSS), as part of a people’s movement for justice in wages, livelihoods and land.<sup>39</sup>

In 1996, a nation-wide network of senior journalists, lawyers, distinguished bureaucrats, academics and non-government organization (NGO) activists was formed that vigorously advocated the removal of the Official Secrets Act, 1923 and the legislation of a strong right to

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<sup>34</sup> AIR 1975 SC 865

<sup>35</sup> (1981) Supp SCC 87

<sup>36</sup> *S.P. Gupta vs. President of India*, AIR, 1982, SC 149, 234 (India). Please also see, *Bombay Environmental Action Group v. Pune Cantonment Board*, WP 2733 of 1986 and Supreme Court Order re Special Leave Petition No. 1191 of 1986 (Bombay High Court, October 7, 1986) emphasizing access to information for bona fide activists.

<sup>37</sup> *Reliance Petrochemicals v. Indian Express*, (1988) SCC 592

<sup>38</sup> *L.K. Koolwal v. Rajasthan*, 1988 AIR (Rajasthan), 2, 4

<sup>39</sup> Harsh Mander and Abha Joshi, *The Movement for Right to Information in India: People’s Power for the Control of Corruption*: Commonwealth Human Rights Initiative, New Delhi, 1999

information Act at the Centre.<sup>40</sup> Similarly, The National Campaign for Peoples' Right to Information (NCPRI) advocated the drafting of model information access legislation for consideration by the Government. The Press Council of India (PCI), under the chairmanship of Justice P.B. Sawant, presented a draft model law to the Government in 1996, which was later revised and came out in the form of the PCI-National Institute of Rural Development (NIRD) draft in 1997. This draft included a broad definition of what constitutes information (any act and/or record concerning the affairs of a public body; information that cannot be denied to the Parliament or State Assembly cannot be denied to the citizen) and what constitutes the right to access that information (inspection, taking notes and extracts and receiving certified copies of the documents).<sup>41</sup>

With the model right to information bill having been submitted to it by the NCPRI and the PCI in 1997, the then Government formed a Working Group on Right to Information and Promotion of Open and Transparent Government chaired by consumer activist late H.D. Shourie. Though the Shourie Committee draft law published in 1997 extended the scope of the Act by bringing within its purview the judiciary and legislatures, there were more points going against it than for it. It narrowed the definition of public authorities, excluding the private sector and those NGOs that are not substantially funded or controlled by the Government, widened the scope of exemptions and had no penalty provisions for erring officials. However, given the rapid change in governments at that time, this Bill too did not materialize as legislation.

In 2000, the Centre brought out a draft *Freedom of Information (FOI) Bill*, which was a reworked version of the Shourie Committee Draft Bill. This Bill was referred to the Parliamentary Standing Committee on Home Affairs, which sought suggestions from the Government, civil society groups and individuals and then made its recommendations. Though the FOI Act was passed by Parliament in 2002 and received Presidential assent in January 2003, it was not notified and, as a result, was never enforced.

When the United Progressive Alliance (UPA) came into power in May 2004, the struggle for the right to information received some encouragement in the form of the National Common Minimum Programme (NCMP), which promised to make India's information access legislation "more progressive, participatory and meaningful". The RTI Bill was tabled in the winter session of Parliament in 2004. It was then referred to the Standing Committee on Personnel, Public Grievances, Law and Justice. The final report of the Standing Committee, which contained further amendments to the RTI Bill, was tabled in the Lok Sabha in March 2005. The RTI Amendment Bill 2005 was passed by both Houses of Parliament in May 2005, and received Presidential assent in June 2005. The Act came into force within 120 days of its enactment, on 12 October 2005.

Meanwhile, several states had already begun enacting their own access to information laws. Activists did not consider these Acts very strong tools for enforcing accountability. Neither were these laws citizen friendly. Most of them neither had proactive disclosure provisions nor strict penalty clauses nor even a wide definition of what constitutes information. In some cases there was a long list of documents and information exempted from the laws. Tamil Nadu Right to Information Act, 1997, Goa Right to Information Act, 1997, Rajasthan Right to Information Act,

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<sup>40</sup> Ibid.

<sup>41</sup> For details, please see Dipnakar Sinha, "For the Right Kind of Communication," in Bhabesh Das and Rajiv K. Bhattacharyya (eds.), *The Rights and Wrongs of It*, Gangchal, Kolkata, 2007, pp. 335-358



2000, Delhi Right to Information Act, 2001, Maharashtra Right to Information Act, 2002, Assam Right to Information Act, 2002, Madhya Pradesh Right to Information Act, 2003, Jammu & Kashmir Right to Information Act, 2004 (this is the only state law that has remained in use even after the enactment of the national RTI Act since Jammu & Kashmir does not fall within the purview of the Central legislation).

Once the necessary enactment has been done to institutionalise the right to information, the question remains whether these laws benefit only a small section of the society given the digital divide emerging from widespread poverty, illiteracy (the question of computer illiteracy coming much later) and inequality. If so, then the very purpose of the enactment of the right to information may be defeated. Therefore, we need to examine whether these new opportunities of communication have been able to contribute significantly to the sustainability of rights in India facing a globalising world or not. If the answer is yes, how far has this been possible? In a country with high indices of poverty, illiteracy and inequality, have the RTI and similar other initiatives, in fact, given rise to a new knowledge-enriched mediating class of people representing the most down-trodden, or have they genuinely been able to empower the people and ensure the sustainability of their economic, political and cultural rights in a fast globalising, yet somewhat fragmenting world? Have the different agencies of the Union and State Governments in India been reasonably cooperative to extend due respect to the RTI? Or has there been some constitutive exclusion?

### **Empowering Common People?**

For our purpose, we can examine the study conducted by the RTI Assessment & Analysis Group (RaaG) and National Campaign for People's Right to Information (NCPRI). In their report entitled *Safeguarding the Right to Information: Report of the People's RTI Assessment 2008*, published in July 2009, indicated that, 45% of their randomly selected urban respondents (from state capitals and the national capital) claimed that they knew about the RTI Act. In nearly 40% of the over 140 FGDs in district headquarters, at least one or more person knew about the RTI Act. However, in only 20% of the over 400 FGDs organized in villages was there even a single person who knew about the RTI Act. In the rural areas, most people got to know about the RTI Act through news papers (35%), followed by television and radio, and friends and relatives (10% each), and NGOs (5%). Among urban applicants, nearly 30% learnt about the Act from newspapers, 20% from NGOs and a similar number from the TV, and almost 10% learnt about the RTI Act from friends and relatives. Unfortunately the government was not a major force in raising public awareness about the RTI Act. Disturbingly, over 90% of the rural applicants and 85% of the urban applicants were males. Among the rural participants, about 30% of the sample applicants belonged to the economically weaker section of the society, having a below-poverty-line (BPL) or *Antyodaya* ration card. Nearly 65% had above-poverty-line (APL) cards.

The sample for this study comprised 10 states and Delhi, with 3 districts in each state and 8 villages in each district selected randomly. These were Assam (Dibrugarh, Karbi Anglong, Nalbari), Andhra Pradesh (Ananthapur, Nalgonda, Visakhapatnam), Gujarat (Kutch, Narmada, Mahesaha), Karnataka (Bijapur, Dakshin Kannada, Haveri), Maharashtra (Aurangabad, Yavatmal, Raigad), Meghalaya (South Garo Hills, West Khasi Hills, Ri Bhoi), Orissa (Kalahandi, Deogarh, Kendrapara), Rajasthan (Dungarpur, Jhunjhunu, Karauli), Uttar Pradesh (Azamgarh, Bijnor, Jhansi), West Bengal (Burdwan, Cooch Behar, Uttar Dinajpur). According to this study,

an estimated 400,000 applicants from the villages of India filed RTI applications in the first two and a half years of the RTI Act. Over 40% of the rural respondents of that study stated that, the most important constraint they faced in exercising their right to information was harassment and threats from officials. Similarly, nearly 15% of urban respondents cited harassment from officials and uncooperative officials as the most important constraint.

Similarly, the profile of appellants published by in Annual Report of the Central Information Commission clearly indicated that, “during the period of 1st April 2006 to 31st March 2007, the total number of appellants was 2306.” The majority of appellants “were males (2062) followed by females (228) and group (16)”.<sup>42</sup> The same is shown through the pie chart (See Figure 1).

**Figure 1: Overall Profile of Appellants during 2006-2007**



According to the same report, The period under report witnessed exponential increase in the number of requests (1,71,404) received by the public authorities. If all the ministries are taken together the number of requests received in year 2006-07 were seven times over previous year.<sup>43</sup> The following table shows a trend regarding the RTI petitions during 2006-07

**Table 1: RTI Petitions Received during 2006-2007**

Month	Opening Balance	Closing Balance	Receipt	Disposal	Percentage of Monthly Disposal / Receipt
April 2006	486	638	249	97	38.9%
May 2006	638	847	413	204	49.3%
Jun 2006	847	1087	494	254	51.4%

<sup>42</sup> Annual Report 2006-07, Central Information Commission, New Delhi

<sup>43</sup> Ibid.

Jul 2006	1087	1310	507	284	56.4%
Aug 2006	1310	1427	491	374	76.1%
Sep 2006	1427	1587	485	325	67.0%
Oct 2006	1587	1650	350	287	82.0%
Nov 2006	1650	1863	509	296	58.1%
Dec 2006	1863	2017	724	570	78.7%
Jan 2007	2017	2379	721	359	49.7%
Feb 2007	2379	2683	859	555	64.6%
Mar 2007	2683	3251	1037	469	45.2%
Total			6839	4074	55.6%

**Source:** *Annual Report 2006-07*, Central Information Commission, New Delhi

Some of the findings of this report indicated that, the more positive aspects of RTI included: citizen empowerment, faster decision-making, a boon for more honest officers, some improvement in record management; and the more negative aspects of RTI included: misuse, used mainly by the elite, little impact on the decision-making process, and undermined the authority of the executive. There is a perception that, the RTI Act is being used mainly by the educated and the privileged. The findings of this report, however, do not support this conclusion. There is another perception that, a major use of the RTI is by the aggrieved government employees who used the RTI Act to redress their grievances, particularly with regard to promotions, postings and disciplinary action. But, the findings of the report do not support this belief either.

Before 2004, it was largely the Members of Parliament and Members of State Legislatures who could question the performance and functioning of Government authorities through proceedings in their respective Legislatures. “The Act has, in a manner of speaking, now created a virtual “Parliament of the People”, where every citizen, through a simple method, can seek information from public authorities; and expect a response in 30 days. This has been the biggest fundamental difference that has been brought about by the RTI enactment – providing relatively easy access to information. There is no doubt that the flow of information to the citizens will help them make enlightened judgments.”<sup>44</sup> The President of India also said in her speech that, “Citizens exercising the right to information have substantially grown in numbers, complexion, and stature. There are many illustrative cases – physically handicapped persons getting their entitlement, women getting old age pension, students getting correct evaluation of exams and damaged roads being repaired. This speaks of the success of the RTI Act in creating conditions for free flow of information and thereby empowering the citizen.”<sup>45</sup>

But, in the same convention, the next day, the Vice President of India started his speech with a somewhat contrarian viewpoint. He said, “When passed in 2005, it was hailed as a revolutionary step aimed at fundamentally altering the balance of power between the government and citizens. Four years hence, some dissatisfaction is evident and pertains to five major

<sup>44</sup> Speech of The Hon’ble President of India, Smt.Pratibha Devisingh Patil at the inauguration of the Annual Convention of the Central Information Commission on 12 October, 2009 at New Delhi

<sup>45</sup> Ibid.

themes.”<sup>46</sup> According to him, a vast number of organizations that should have been covered under the definition of “public authority” for being owned, controlled or substantially financed, directly or indirectly, by funds provided by the appropriate government, have not come forward proactively to be covered by the Act. They await a case-by-case ruling by the Central or State Information Commissions to be so considered and hence covered by the Act. He further stated that, “currently, neither the Information Commissions nor the governments have ensured that all bodies that are covered by the definition of ‘public authority’ undertake action as listed in Chapter II of the Act.”<sup>47</sup>

Second, he mentioned, “very few public authorities of the Central and State governments have followed the provisions of Section 4 of the Act in letter and spirit. It would be useful to review if cataloguing and indexing of records and data-sets has changed during the last four years in a manner that could facilitate the Right to Information under the Act.”<sup>48</sup> He noted with concern that, “The actual disclosure of information by the public authorities is marked by inconsistency and unevenness. There has been little innovation and adaptation to capture information in government agencies and thereafter bring about suo-moto disclosure. The websites of the central and state governments also lack technical and content standardization. There is clearly a case for putting in place detailed ‘RTI Act friendly’ record management practices.”<sup>49</sup>

According to him, “an important lacuna has been the lack of a mandatory monitoring mechanism to look at the implementation of the RTI Act and to ensure that the Act is implemented in letter and spirit. Currently, the media and civil society groups are undertaking this task on an ad hoc basis.”<sup>50</sup> He also pointed out that, “I have noticed that information on the RTI Act, including the translation of the Act itself, is not available in all the 22 languages mentioned in the Eighth Schedule of our Constitution. The website of the Ministry of Personnel, Public Grievances and Pensions has the RTI Act in only 11 languages. The web sites of most Information Commissions are not multilingual covering the official languages adopted by the appropriate governments. For example, the Central Information Commission does not have a Hindi website for dissemination of information.”<sup>51</sup> He rightly said that, “Empowerment would be meaningless if it is sought to be achieved through a language that the citizen does not understand. Section 4 (4) of the RTI Act mandates that all materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area. Article 350 of the Constitution also entitles every person to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.”<sup>52</sup> But, he hastened to add in his speech that, “The basic tenets have been implemented and the institutional structure is being utilized by citizens. The Right to Information has become an important

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<sup>46</sup> Valedictory Address by the Honourable Vice-President M. Hamid Ansari at the 4th Annual Convention of the Central Information Commission on 13 October 2009 in New Delhi

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

instrumentality to our media and civil society. What we see is the beginning of decentralization and participatory governance and a citizen-friendly orientation to government.”<sup>53</sup>

The Report of National Coordination Committee on Right to Information Act made an Appraisal of key issues pertaining to each item mentioned in the Terms of Reference. The key issues and constraints identified pertain to the following:

1. The free flow of information has been hampered by several factors. These include Institutional issues, Organisational issues, non-standardization and non-compliance with basic processes & mechanisms, lack of awareness and usage of the RTI Act, deficiencies in the role and functioning of State Information Commissions, limited use of information technology
2. Lack of effective coordination & cooperation among State Information Commissions as there is no worthwhile system in place for various State Information Commissions to share and disseminate information, case laws and best practices in the promotion of open government.
3. The limited use of technology has hindered the effective implementation of RTI. Except in a few states no effective IT systems have been established to monitor and report on the disposal of applications by public authorities. Likewise, internal systems for management of complaints and appeals by SICs are non-existent in many states. Each SIC has a different website and there is no uniformity across them on structure, content or templates.
4. While most state governments have subscribed to similar rules framed by the Government of India, there are a few states which have made different rules, especially those pertaining to fees and costs.
5. The quality of records management in public authorities is very poor. In most Government organisations, records are not organized systematically. The use of IT to strengthen records management systems have been implemented in very few government offices.
6. Although different states have initiated training of key officials on the RTI Act, there is great variance across states in their efforts to sensitise and train various supply side stakeholders on the RTI Act. On the demand side, the fundamental issue in this regard is awareness on RTI among the general public on which limited progress has been made.
7. The problem of delivery at the field/district level is a critical one. There is a lack of infrastructure with the public authorities at the district level which makes dissemination of information practically impossible. At the same time, the organisational and individual capacities at the cutting edge level for dealing with the RTI mandate are considerably weaker.

When there was an appeal for disclosing the assets of a judge, the Supreme Court of India took a different position. The judgment pronounced by Chief Justice, Mr. Justice Vikramajit Sen and Dr. Justice S. Muralidhar on 12 January 2010 contained a paragraph saying: “It was Edmund Burke who observed that “All persons possessing a portion of power ought to be strongly and awfully impressed with an idea that they act in trust and that they are to account for their conduct

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<sup>53</sup> Ibid.

in that trust.” Accountability of the Judiciary cannot be seen in isolation. It must be viewed in the context of a general trend to render governors answerable to the people in ways that are transparent, accessible and effective. Behind this notion is a concept that the wielders of power – legislative, executive and judicial – are entrusted to perform their functions on condition that they account for their stewardship to the people who authorize them to exercise such power. Well defined and publicly known standards and procedures complement, rather than diminish, the notion of judicial independence. Democracy expects openness and openness is concomitant of free society. Sunlight is the best disinfectant.”

However, in the USA, the practice has been quite different recently, The Ethics in Government Act, 1978 was enacted by the US Congress; it applies to all levels of federal judges (known as “Article III judges” since they are usually appointed for life, and cannot be removed except through a process analogous to impeachment). The enactment obliges federal judges to disclose personal and financial information each year; the sources of income, other than what is earned as an “employee of the United State” (since judges in the US are free to receive remuneration through writing, teaching, and lecturing, provided such activity does not hinder their duties) received during a preceding calendar year, the source, description and value of gifts beyond a defined value too are to be declared. The US Congress passed what are known as “redaction” provisions to the Ethics in Government Act, for the first time in 1998, allowing members of the judiciary to withdraw, or withhold certain information “to the extent necessary to protect the individual who filed the report”. Redaction is permitted after the individual judge demonstrates the existence of objective factors which justify withholding of part of the information, mandated to be revealed. The US Judicial Conference (which is a statutorily created body, by virtue of Congressional law, and comprises of 13 representatives among District Judges, equal representation from Circuit (Appeal Court) judges, and two judges of the US Supreme Court, with the Chief Justice of the US Supreme Court as the Chairman) submits reports; it also examines redaction applications, by judges, through a committee known as “Subcommittee on Public Access and Security”. The procedure followed has been described in an article by Sarah Goldstein as follows:

“The Committee has developed a multi-phase process for reviewing judges' redaction requests and public requests for copies of judges' reports. When a member of the public requests a copy of a judge's financial disclosure report, the Committee sends a notification of the request to the judge in question and concurrently contacts the United States Marshals Service ("USMS") for a security consultation. The public request must be made on "an original, signed form listing the judges whose reports [the requester is] seeking and any individuals on whose behalf the requests are being made." When the Committee notifies the judge of the public request for the report, it asks the judge to respond in writing within fourteen days as to whether the judge would like to request new or additional redactions of information; however, the Committee can extend this response period if the judge so requests. If the judge does not request a redaction from his or her report at this time, the Committee staff sends a cost letter to the requester, the requester pays for the report, and the Committee then releases a copy of the report to the requester. However, if the judge requests a redaction upon receiving notification of the request for a copy of the report, the Committee staff sends the results of USMS security consultations, original requests for the judge's report, and the judge's redaction requests to members of the Subcommittee. The Subcommittee then votes on the redaction requests, with a majority needed to approve or deny the request, and the Subcommittee vote is forwarded to the Committee staff. As with reports where the judge has not requested a redaction, the staff then sends a cost letter to the requester, and the requester pays

for the report. Finally, the Committee releases a copy of the report, with approved redactions, to the requester.”<sup>54</sup>

## Concluding Observations

In this scenario, the following brief observations may be worth considering.

First, it seems to be clear that, at this stage, the groups and individuals have to be willing to fight for their right to information, often taking their requests through several stages of appeal. If the political culture does not support and encourage that sort of behaviour, citizen participation will give only the appearance of having expanded.<sup>55</sup> Transparency is an openness with respect to knowledge and information that builds and binds trust between the institutions of governance and the citizenry at various levels of social interaction. In effect, it implies establishing the right to information as an aspect of constitutionalism, including a strong bias against public sector secrecy and covert operations.

Second, has the codification of the Right to Information in India simply been able to get more information out of the governmental closet or has it also made the *babus* learn new tricks to hide the information more effectively than reveal them? Much vital information with regard to the welfare of the people is out of bounds on the pretext of official secrecy, national security and terrorist threats.

Third, there may not always be any standardised form of disclosing information. But, it is necessary to note that, unlike many other countries, India still has not been able to develop a culture of proactive disclosure of information. Perhaps the colonial hangover acts as a major hindrance to such disclosures. Therefore, a vocal minority has so far been able to get access to huge amount of information, but the silent majority of Indians are far away from that access. After all, when the state had to recognise this right under pressure from the civil society, probably the agencies of the state did not have any idea what would really happen when the information genie would be let out of the bottle.

Fourth, on another front, as this capitalist globalisation entails more privatisation, the question remains how far this law would be effective in having access to information so far as a huge sector of the non-state actors and private enterprises are concerned. This is a crucial issue in view of the large-scale asymmetries of globalisation.

Fifth, the growing access to information has made the state more accessible in many cases. But, access to information may not necessarily lead to empowerment of the people. Empowerment is not automatically linked to free flow of information.

Finally, it is important to note that, even for having crucial information relating to governance, a right-enabling public sphere is absolutely important. A Habermasian public sphere of free and uncoerced discussion is still far-fetched. Moreover, if there is any tendency of a civil society subjecting itself to the mentalities and regimen of the state to a large extent, then even the enactment of the right enabling the access to information may not take us far. In the absence of a rational debate, simple access to information is not enough.

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<sup>54</sup> Sarah Goldstein, “Re-examining Financial Disclosure Procedures for the Federal Judiciary”, *The Georgetown Journal of Legal Ethics*, Summer 2005, Vol. 18, Issue 3, pp. 759-770

<sup>55</sup> *Op. cit.*, fn 5, p. 138

But, there are silver linings too. In view of the recent success of the *panchayat* system in different parts of the country, the people in the rural areas have started saying: “We rule in our village and we will negotiate with government about what powers we want to delegate to them”.<sup>56</sup> Perhaps, that way, direct democracy can do a better job of rooting out corruption, as the Right to Information movement has also indicated.<sup>57</sup>

In *The Order of Things: An Archaeology of Human Sciences* (1973), Foucault sketched out three different and discontinuous modalities of relation between thought and world, or epistemes, that enable the various fields of knowledge in each given era. In each era, knowledge is organized, according to Foucault, by a series of fundamental operative rules. The Renaissance or 17<sup>th</sup> century episteme is based on resemblance, the mode by which language relates words and signatures that mark things. Knowledge consisted of relating, through interpretations, the different form of knowledge so as to “restor(e) the great, unbroken plain words and things.” The classical episteme of 17<sup>th</sup> and 18<sup>th</sup> centuries consisted of representation and classification of all entities according to the principles of order and measurement. It is this episteme that Borges caricatures in his image of the Chinese encyclopaedia, cited by Foucault as his inspiration for thinking its obverse, the heteroclitite. With the rise of the modern episteme, which Foucault locates at the turn of the 18<sup>th</sup> and 19<sup>th</sup> centuries, representation is no longer adequate for the examination of concerns with life, the organic and history.<sup>58</sup>

Now, if this kind of direct democracy is to be fostered, public spheres in which deliberation on questions of the public good is held, must also be permeable to different cultures. In this context, the notion of performativity could be treated as the suitable mode, beyond instrumentality, in which the social is increasingly practised. The expediency of culture underpins performativity as the fundamental logic of social life today.<sup>59</sup> Three issues may be underlined in this context. First, globalization has accelerated the transformation of everything into resource. Second, the specific transformation of culture into resource epitomizes the emergence of a new episteme, in the Foucaudian sense. Third, this transformation should not be understood as a manifestation of “mere politics”.<sup>60</sup> Therefore, this fourth episteme of performativity may be applied, in future, for a better assessment of the RTI in India.

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<sup>56</sup> For details, please see Vandana Shiva, “The Myths of Globalization Exposed: Advancing Toward Living Democracy”, in James Gustave Speth (ed.), *Worlds Apart: Globalization and the Environment*, Island Press, Washington, D.C., 2003, pp. 141-154

<sup>57</sup> Ibid.

<sup>58</sup> Please see George Yudice, “The Expediency of Culture”, in Tim Oakes and Patricia Lynn Price (eds.), *The Cultural Geography Reader*, Routledge, Oxford, 2008, pp. 422-430

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.



# Globalisation and Right to Information: The Indian Scenario

Sibaji Pratim Basu

## I

Information-as-knowledge, christened as ‘statistics’ – the science of the state – makes the modern government possible. The things that a modern government is concerned about are ‘men in their relations, their links, their imbrication with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility etc.; men in their relation to other kinds of things which are customs, habits, ways of doing and thinking etc.; lastly, men in relation to that other kind of things which are accidents and misfortunes such as famine, epidemics, death etc.’<sup>1</sup> Information of the above nature hugely enhances power in the hands of the modern state/government – making it a very efficient machine to control and serve the citizens in various ways. And the *ways* of its actions- decision- making and implementation – are often guarded from the citizens. You may have the theoretical or constitutional knowledge of the complex patterns of the structures and functions of modern governments – about their administrative wings, or bureaucracies and their legal/ethical dos and don’ts, but seldom you are likely to get access to a government/semi-government document, even though that might jeopardise your life, even your existence.

Not only the colonial and postcolonial regimes preserve and protect their official documents under a cloak called ‘secrecy’, the so-called ‘First World’ is no exception. In USA, a congressional committee (1956) reported that a million people in government—military and civilian—were authorized to wield secrecy stamps. In March 1957, *The Washington Post* reported that the Pentagon had recently stamped more documents secret than they had during World War II. Much of the ‘secret’ information consists of speeches and other public records. A cartoon by the legendary cartoon-artist Herbert Block (published on March 13, 1957, in *Washington Post*) tells it all. Here we find two worried-looking officials in conversation. Holding up a file, one official says to the other: ‘Well, we certainly botched this job. What’ll we stamp it – secret or top secret?’<sup>2</sup>

Thus, the modern state stands on a juxtaposed ground. On one hand, it prefers to keep *exclusive* right on government documents in the name of maintaining the security, integrity, friendly foreign relations, or simply, the sovereignty of the state. On the other hand, it cannot ignore (not officially, at least) its ‘democratic’ compulsions of *inclusion* of citizens in the affairs of the state through representation and other mechanisms, and posing it to be ‘accountable’ to people, which again requires *publicity*. This desire of being accountable to citizens finds echo in

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1. See, ‘Introduction’ in Paul Rabinow (ed) (1984): *The Foucault Reader*. London: Penguin.

2. Herbert Block (1993): *Herblock, A Cartoonist's Life*. New York: Macmillan.

the following words of Thomas Jefferson: ‘The diffusion of information and the arraignment of all abuses at the bar of public reason, I deem [one of] the essential principles of our government, and consequently [one of] those which ought to shape its administration.’<sup>3</sup> This urge for ‘openness’ and actuality of ‘secrecy’ – the exclusion of citizens in the name of sovereignty and inclusion of them in the name of democracy – reflects one of the principal paradoxes of the modern [‘democratic’] regimes.

## II

The modern Indian state also contains the above ambivalence. Its Constitution (1950) recognizes an array of citizens’ rights, known as Fundamental Rights (Part III) and privileges them over other rights. While there is no specific right to information or even right to freedom of the press in the Constitution of India, the Right to Equal Protection of the Laws and the Right to Equality Before the Law (Article 14), the Right to Freedom of Speech and Expression (Article 19 (1) (a)) and the Right to Life and Personal Liberty (Article 21). The Right to Constitutional Remedies in Article 32, backs these, that is, the Right to approach the Supreme Court in case of infringement of any of these rights. The legal position with regard to the right to information has developed through several Supreme Court decisions. In the context of all above rights, but more specifically in the context of the Right to Freedom of Speech and Expression, which has been said to be the flip side of the Right to Know, and one cannot be exercised without the other. However, in most cases, even these rights, along with favourable Supreme Court decisions could not ensure the disclosure of Government Information, because India is governed by a colonial law known as the Official Secrets Act of 1889(which was amended in 1923). This law secures information related to security of the State, sovereignty of the country and friendly relations with foreign states, and contains provisions which prohibit disclosure of non-classified information. Civil Service conduct rules and the Indian Evidence Act impose further restrictions on the government officials’ powers to disclose information to the public. Although, a Bill called The Freedom of Information Bill was passed by the Indian Parliament as the Freedom of Information Act, 2002, the Official Secrets Act (OSA) of 1923 did not lose its paramount importance in the eyes of the state, especially for the coercive authorities. The following incident, which drew immense public attention, will elaborate our case.

In June 2002, Iftikhar Gilani, Chief of Bureau of *The Kashmir Times*, was arrested under the OSA for possessing a paper published by the Institute of Strategic Studies, Islamabad, detailing among other things, the deployment of Indian troops in Indian-held Kashmir. The document was anything but classified: it was actually a third-hand information, available on the Internet. Moreover, as it had originated in Pakistan, it clearly did not qualify as an ‘official secret’ of the Indian government. Yet, evidence was fabricated. Intelligence Bureau officials altered the words ‘Indian-held Kashmir’ in the document to ‘Jammu and Kashmir’ to suggest it was an Indian document - to make a false case against the journalist. He was detained in Tihar jail till January 2003, when the government withdrew the case against him, owing to rising pressure throughout the country by fellow journalists, civil liberty activists and even politicians.<sup>4</sup> In this

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3. Thomas Jefferson: 1st Inaugural Address, 1801. ME 3:322; from Paul Leicester Ford (ed) (1904-05):*The Works of Thomas Jefferson*, Vol. IX. Federal Edition New York and London: G.P. Putnam’s Sons.

4. Iftikhar Gilani (2005): *My Days in Prison*. New Delhi: Penguin.

background, a new legal instrument Right to Information Act (RTI), 2005 generated curiosity, hopes and doubts simultaneously. People concerned were curious because they wanted to know in what way the new law would be an improvement on the previous rights (including the aborted Freedom of Information Act, 2002); they were hopeful because in the process of enacting the new law some of the eminent activists' views were taken into consideration; they were still doubtful whether it would be really possible to make the full use of the RTI because the scope of the new law was so wider that it could be used, despite a long list of exemptions, against a host of 'public authorities', which, in most of the cases, were not ready to shed their colonial 'know-all-divulge-none' mindset.<sup>5</sup> The mixed response on the part of the citizens and the media would not seem unwarranted if we briefly follow the history of this Act.

### III

The foundations for the right to information in India were laid by a judgment of the Supreme Court in 1974 in the election case of *Raj Narain vs Indira Gandhi*, where the court while rejecting the government's claim of privilege on the disclosure of the security instructions for the prime minister, stated as follows:

'In a government of responsibility like ours where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor, which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussions on public security. To cover with the veil of secrecy the common routine business, is not in the interest of the public'.

Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against operation and corruption'.<sup>6</sup> Despite such a historic verdict the government preferred to ignore it. And to cap it all, a National Emergency (1975-1977) was declared soon, which suspended major civil rights in India for 19 months. After the lifting of the Emergency, a number of civil liberty organisations and NGOs, old and new, began to demand for enactment and effective maintenance of various social, economic and democratic rights for the citizens. According to an author, if the late 1970s had gone through the 'civil liberties phase' (in which the focus was on the 'state-civil society complementarity'), the '1980s were marked by a shift to the second phase—the 'democratic rights phase'—with a new state versus civil society framework... Towards the end of the 1990s, the third phase—the 'human rights phase'—reconstituted itself on a new civil society versus political society framework.'<sup>7</sup> Serious movements for right to information also emerged in this decade of 1990s. The RTI Act, 2005 came into being as a direct result of tremendous pressure by a number of NGOs and civil liberty organisations. Indirectly though, there was an urge on the part of the state as well as central governments to satisfy the international money lending institutions to borrow

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5. See, Shailesh Gandhi, 'Right to Information — path to Swaraj' in *The Hindu*, Chennai, Oct 07, 2005.

6. AIR (1975): Supreme Court 865, *State of UP vs. Rajnarain*, Para 74.

7. Ajay Gudavarthy (2008): 'State, Civil Society & Beyond' in *Contributions to Indian Sociology*, Vol. 42, No. 1, 29-57.

the loans to carry out various humanitarian and developmental projects in the neo-liberal atmosphere of the '90s. It was a time when 'rolling back' of the public undertakings and various welfare activities run by the government became the mantra of the men d'affaires in New Delhi. The void, especially in the field of public welfare, would be filled soon by NGOs and civil liberty groups, mostly run on foreign funds. The government too, in the changed order of neo-liberal globalisation, accepted the co-existence of foreign-funded NGOs in the welfare/developmental fields, mainly because of a) paucity of fund; b) conditions laid down by international agencies, which suspected efficacy and efficiency of government organisation and relied more on NGOs, and c) owing to their own convictions and ideological commitments. The government, at different levels, became heavily dependent on international funding and trade agencies for survival. This privileged the above agencies to demand *transparency* of government policy, activities and accounts.<sup>8</sup> In a way, the demand for right to information by the NGOs coincided with the conditionalities laid down by international agencies.

A number of social and civil liberty organisations led strong grassroots level movements in different parts of India, among which some like the Mazdoor Kisan Shakti Sanghatana (MKSS), Parivartan<sup>9</sup>, National Campaign for People's Right to Information, Common Wealth Human Rights Initiative played the prominent role. And among them one must acknowledge the relentless contribution made by the MKSS in Rajasthan led by a charismatic IAS-turned-social worker, Aruna Roy.

#### IV

The MKSS, a peasant-farmer's collective that inquires into the issues of governance and policy making processes, began its journey in 1987, but from 1990 onwards only one can see somewhat structured initiatives at the grassroots level. Some of the important issues taken up and succeeded to some extent are – minimum wages, right to work, right to food, right to information etc. The genesis of Right to Information Movement in India lies in the Public Hearings or *Jan Sunwais*, a unique instrument applied by the MKSS in some rural parts of Rajasthan<sup>10</sup>. In order to check corruption in governmental activities concerning people's welfare and development, such public hearings were organised, which were largely attended by elected representatives, government officials, local intelligentsia such as lawyers, media persons, NGOs, community based organisations, external observers and above all the common people. The MKSS initiated a series of public hearings over rural developmental activities with the substantial evidence of data and documents by involving cross section of the society. The MKSS initiated the series of public hearings identifying corruption, misuse, and nepotism in the drought relief works and in the rural developmental activities with the substantial evidence of data and documents by involving cross section of the society.

Along with the public hearings, the MKSS also launched the direct actions like *Dharnas* for the Right to Information in various parts of Rajasthan such as Beawar in 1995. The demand

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8. Zdenek Drabek and Warren Payne, 'The Impact of Transparency on Foreign Direct Investment' in Staff Working Paper ERAD-99-02, Revised November 2001, World Trade Organization, Economic Research and Analysis Division, Geneva.

9. [http://www.parivartan.com/stories\\_list.asp](http://www.parivartan.com/stories_list.asp) [http://www.parivartan.com/stories\\_list.asp](http://www.parivartan.com/stories_list.asp)

10. Aruna Roy, *The Journey begins*, <http://www.cnfonline.org/2005/2005v13n483.html>

was to press for the issue of administrative orders to enforce the right to information of ordinary citizens regarding local development expenditure. *Dharna* witnessed an unprecedented upsurge of homespun idealism in the small town of Beawar and the surrounding countryside. The daily assembly of over 500 people took place in the heat of the tent, listening to speeches and joining in for slogans, songs and relics. Active support cut across all class and political barriers. From rich shopkeepers and professionals to daily wage labourers, and the entire political spectrum from the right wing fringe to left trade unions extended vocal and enthusiastic support.

While the *dharna* continued in Beawar, it also spread to state capital of Jaipur, where over 70 people's organisations and several respected citizens came forward to extend support the MKSS demand. The mainstream press was also openly sympathetic. On 14 May 1996 the State Government announced the establishment of a committee which within two months would work out the logistics to give practical shape to the assurance made by Chief Minister to the legislature, regarding making available photo-copies of documents relating to local development works. Another year passed and despite repeated meetings with the Chief Minister and senior cabinet members and state officials, no order was issued and shared with the activists, although again there were repeated assurances. In the end, on a hot summer morning in May 1997 began another epic *dharna*, this time in the state capital of Jaipur close to the State Secretariat. The struggle saw the same outpourings of public support as had been seen in Beawar a year earlier. At the end of 52 days of the *dharna*, the Deputy Chief Minister made an astonishing announcement, that six months earlier, the state government had already notified the right to receive photo-copies of documents related to *panchayat* or village local government institutions. Nevertheless, the order of the state government was welcomed by the supporters as a major milestone, because for the first time, it recognized the legal entitlement of ordinary citizens to obtain copies of government held documents.

Besides MKSS, Parivartan, an NGO, working in the urban slums of Delhi, also had a big contribution towards implementation of the RTI. It worked hard for building awareness on Right to Information Act and using RTI as the potential instrument for transparent delivery of services like Public Distribution System, infrastructure such as public roads and buildings and electoral reforms. It also used the right to information in conducting the social audit in the urban areas on spending of the public investment. As part of the National Campaign for People's Right to Information, Parivartan put consistent effort for the National Right to Information.

However, before the introduction of the RTI at the central level, many State Governments started introducing the RTI since the late 1990s. These are: Goa (1997), Tamil Nadu (1997), Rajasthan (2000), Karnataka, (2000), Delhi (2001), Assam (2002), Maharashtra (2003), Madhya Pradesh (2003) and Jammu, Kashmir (2003). Among all these Acts, the Maharashtra Right to Information Act was considered as the model act in promoting transparency, accountability and responsiveness in all the Institutes of the State as well as the private organisations, which are getting financial support from the Government. While the Tamil Nadu Act was considered as the most innovative one in how to refuse the information to the seekers. These State Acts were the models for the preparation of National Right to Information Act.

## V

The efforts for the introduction of the National Right to Information Act should be traced in the days since 1996 onwards, when the National Campaign for People's Right to Information

(NCPRI) was founded. Besides, the international organisations like Common Wealth Human Rights Initiative (CHRI) strongly advocated that the Right to Information to be fundamental to the realization of other rights. In response to the pressure from the grassroots movements, national and international organisations, the press council of India under the guidance of its Chairman Justice P.B. Sawant drafted a model bill that was later updated at a workshop organized by National Institute of Rural Development and sent to Government of India, which was one of the reference paper for the first draft bill prepared by Government of India. For some political and other reasons the bill could not be taken up by the Parliament.

Again, in 1997 the United Front Government appointed the working group under the chairmanship of Mr. H.D. Shourie. The working group drafted a law namely *The Freedom of Information Bill, 1997*. However, this bill was also not enacted. Notably, the draft law was criticised for not adopting a high enough standard of disclosure of information.<sup>11</sup> The Shourie Committee draft law passed through two successive governments, but was never introduced in Parliament. In the interim, in 1999 Mr Ram Jethmalani, then Union Minister for Urban Development of the NDA Government, issued an administrative order enabling citizens to inspect and receive photocopies of files in his Ministry. Disappointingly, the Cabinet Secretary did not permit this order to come into effect.

Eventually, the Shourie Committee draft law was reworked into the Freedom of Information Bill, 2000. But, according to activists, it was an even less satisfactory Bill than the draft law. The 2000 Bill was sent to the Parliamentary Standing Committee on Home Affairs, which consulted with civil society groups before submitting its Report in July 2001. The Committee recommended that the Government address the flaws in the draft Bill pointed out by civil society. However, the Government did not implement that recommendation, to the detriment of the final content of the Bill. At last, the national Freedom of Information Bill 2000 was passed in December 2002 and received Presidential assent on January 2003, as the Freedom of Information Act, 2002. However, it could not enter into force, as the necessary notification was never issued by the then government. (Section 31 of the Right to Information Act 2005 repealed the Freedom of Information Act 2002.)

The failure on the part of the NDA Government to implement the Freedom of Information Act, 2002, and the subsequent change in the government after the Lok Sabha elections of 2004, paved the way for a new and improved law – the Right to Information Act, 2005. The new coalition – led by Congress – formulated an agenda called the ‘Common Minimum Programme’ (CMP). One of such agenda of the CMP was the introduction of *Right to Information Act*. The CMP stated clearly stated: ‘The Right to Information Act will be made more progressive, participatory and meaningful.’ In order to look after the implementation of the Common Minimum Programme the UPA constituted National Advisory Council. In the National Advisory Council some of the activists like Aruna Roy, Jean Drez, who had been deeply associated with the NCPRI, had been included. These activists consistently put the pressure on the UPA Government to pass the bill and to enact a law. In response to these efforts the Parliament passed the bill and the President of India consented the Act on 15<sup>th</sup> June 2005 and implementation process of the Right to Information Act was started since 12<sup>th</sup> October 2005.

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11. See, *India Together*, Bangalore (India), September 2004.

## VI

The RTI Act, 2005<sup>12</sup> covers the whole of India except Jammu & Kashmir (J&K does have its own RTI Act, which came into effect in 2002). It is applicable to all government entities at Union, State and Local levels. It is also defined in the Act that bodies or authorities established or constituted by order or notification of appropriate government including private bodies 'owned, controlled or substantially financed' by government, or non-Government organizations 'substantially financed, directly or indirectly by funds' provided by the government are also covered in it.

Certain legal terms are needed to be clarified in order to understand the 'basics' of this Act.

**Appropriate Government** means the Central and the State Governments that have the power to evolve rules about i) most clauses including that of payment of fees; ii) the procedure for deciding appeals/complaints by the Central/State Information Commissions; c) service conditions of the Central/State Information Commissioners. It has also responsibility for popularising as well as promoting the Act by publishing guidelines and organising training programmes etc.

**Central Information Commission (CIC)** comprises a Chief Information Commissioner and a maximum 10 Central Information Commissioners. The Chief Information Commissioner heads the Commission, which is an independent entity like the Election Commission of India, appointed by the President of India. It reports only to the Parliament and the President. All the abovementioned Government/Semi-Government/Government-financed NGOs and privatised organisations run under the jurisdiction of the Central Government (including Union Territories) come under the purview of the CIC.

A **Central Public Information Officer (CPIO)** works for a Public Authority under the Central Government. S/he is a link between the information seeker/citizen and the Public Authority. In fact, the CPIO is responsible for receiving applications and fees from the information seeker, collecting information from the section concerned of the Public Authority and supply the information to the applicant. The CPIO is assisted by Assistant Public Information Officers.

**State Information Commission (SIC)** is an independent organisation that enjoys same powers as the CIC in respect to entities under the State Government. It is headed by the Chief State Information Commissioner and a maximum 10 State Information Commissioners appointed by the Governor and responsible to the State Legislature and Governor. However, unlike the High Courts and the Supreme Court, there is *no hierarchy between the CIC and SIC*. The CIC is not an appellate authority. They only differ in terms of their separate areas of functioning.

A **State Public Information Officer (SPIO)** acts in the same manner as the CPIO in respect to a Public Authority under the State Government.

**Competent Authority** comprises Speakers of Lok Sabha and State Legislative Assemblies, Chairpersons of Rajya Sabha and State Vidhan Parishads, Chief Justice of India, Chief Justices of High Courts, President of India, Governors of the States and Administrators of the Union Territories.

**Public Authority** is wider than the scope of the term 'State' as defined in Article 12 of the Indian Constitution. It incorporates two distinct sets of organisations: a) constituted by way of

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12. Jaipuria & Satpute (2009): *Leading Cases on Right To Information*. New Delhi: Human Rights Law Network.

any enactment of the legislature or notification of the executive and, b) all authorities that owe their existence to funds received, directly or indirectly, from any government organisation.

**Information**, according to Section 2(f) of the Act, includes any material in any form including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

Besides, the term '**Record**' is also used to elaborate the concept of 'Information' further. It includes: a) any document, manuscripts and files; b) any microfilm, microfiche and facsimile copies of a document; c) any reproductoin of image or images embodied in such microfilm (whether enlarged or not); and d) any other material produced by a computer or any other device.

Section 2 (j) of the Act gurantees the following rights to citizens as **Right to Information**:

- a) Right to ask for any information from a public authority;
- b) Right to inspect documents, files and records in the control of the a public authority;
- c) Right to ask for documents, files and records – both in the physical and in the electronic form;
- d) Right to inspect any work or project or activity of the government;
- e) Right to ask for samples of material used in these works or projects.

Again, Section 2 (N) clarifies that in the operation of the RTI Act, particularly in the context of the 'public authority', all persons and authorities other than the information-seeking-citizen would be considered as a **Third Party**. The right to appeal against the decision of the PIO is also extended to the concerned 'third party'.

Every Public Authority, which comes under the purview of the RTI Act, is obliged to appoint a PIO. Any officer of the same organisation is designated and given the additional responsibility of the PIO. S/he is the link between the information seeker and the Public Authority. Her/his job is to receive application from the citizens, who desire to obtain any information and then provide information to them. If the request pertains to another public authority (in whole or part) it is the PIO's responsibility to transfer/forward the concerned portions of the request to the correct and appropriate PIO in another Public Authority within 5 days. In addition, every public authority is required to designate Assistant Public Information Officers (APIOs) to receive RTI requests and appeals for forwarding to the PIOs of their public authority. The citizen making the request is not obliged to disclose any information except his name and contact particulars.

The Act specifies time limits for replying to the request. If the request has been made to the PIO, the reply is to be given within 30 days of receipt. If the request has been made to an Assistant Public Information Officer, the reply is to be given within 35 days of receipt. If the PIO transfers the request to another public authority (better concerned with the information requested), the time allowed to reply is 30 days but computed from the day after it is received by the PIO of the transferee authority. Information concerning corruption and Human Rights violations by scheduled Security agencies (those listed in the Second Schedule to the Act) is to be provided within 45 days but with the prior approval of the Central Information Commission.

However, if life or liberty of any person is involved, the PIO is expected to reply within 48 hours. Since the information is to be paid for, the reply of the PIO is necessarily limited to either denying the request (in whole or part) and/or providing a computation of 'further fees'. The time between the reply of the PIO and the time taken to deposit the further fees for information is



excluded from the time allowed. If information is not provided within this period, it is treated as deemed refusal. Refusal with or without reasons may be ground for appeal or complaint. Further, information not provided in the times prescribed is to be provided free of charge.

But the State also preserves its privilege to put limits on the Act. Section 8 of the Act makes it clear that the RTI is not an absolute right. Disclosure of information, which might prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence, information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court are kept out of purview of the Act. Notwithstanding any of the above exemptions, a public authority may allow access to information, *if public interest in disclosure outweighs the harm to the protected interests.* [Section 8(2)]

According to Section 24/Schedule 2 of the Act, the following agencies are exempted from the application of the Act: Central Intelligence and Security agencies like IB, RAW, Central Bureau of Investigation (CBI), Directorate of Revenue Intelligence, Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotics Control Bureau, Aviation Research Centre, Special Frontier Force, BSF, CRPF, ITBP, CISF, NSG, Assam Rifles, Special Service Bureau, Special Branch (CID), Andaman and Nicobar, The Crime Branch-CID-CB, Dadra and Nagar Haveli and Special Branch, Lakshadweep Police. Agencies specified by the State Governments through a Notification will also be excluded. The exclusion, however, is *not absolute* and these organizations have an obligation to provide information pertaining to allegations of corruption and human rights violations.

## VII

Apart from these built-in exemptions, the Act, like many other acts, has certain other limitations, which in turn affect the effectiveness of the Act to some extent. Some of them need brief mentioning. Let us consider first the issue of appointment of the Central and State Public Information Commissioners. In case of the CIC, its members are appointed by the President on the recommendation of a Committee comprising the Prime Minister, the Leader of the Opposition in the Lok Sabha and a Union Minister, nominated by the Prime Minister. The PM heads the Committee. And the process of appointment is done in a highly confidential manner – leaving no scope for public involvement or participation. Again, most functionaries of the CIC find placement because of their closeness to the Government or the ruling party. The only person who can oppose the selection process is the leader of the Opposition. However, her/his objections can be easily ignored since the PM and her/his cabinet colleague form the majority in the Committee.

The same thing applies to the SICs at state-levels. The members of SIC (appointed by the Governor) are selected in the same confidential manner by a Committee comprising the Chief Minister, leader of the Opposition and a cabinet minister. Here too, the members to the SIC are likely to be persons closer to the Government and party in power in the state.

Another weakness, according to many critics<sup>13</sup>, is that there is almost no power of order implementation in the hands of the CIC or SICs. If the PIO or the Public Authority fail to implement the orders of the CIC or SICs, the information-seeker has no alternative than to

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13. *Ibid.*

approach the High Court. However, going by Section 18(3) one can form a different impression. It says while inquiring into complaints on refusal to access to information, or non-response to a request for information, or against demand of an unreasonable fee, or against furnishing of misleading/false information by a PIO or Public Authority, the CICs or SICs 'have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908...'

But then, the RTI Act does not give the Information Commission the similar powers as enjoyed by another regulatory body like the Telecom Regulatory Authority (TRAI) under the TRAI Act, 1997. Section 16(2) of the TRAI Act allows TRAI, like a Civil Court, to review, revisit and even set aside its earlier decisions and orders. The CIC/SICs have no such power to review a decision, even if taken erroneously. As a result an aggrieved person has no choice but to move to the High Court to invoke its writ jurisdiction, if s/he seeks to revise the order of the CIC/SICs.

Besides, every proceeding before the TRAI is considered as a judicial proceeding within the meaning of Sections 193 (punishable for giving false evidence), 228 (punishable for intentional insult or interruption to public servant sitting in judicial proceeding) and 196 (punishable for using evidence known to be false) of the Indian Penal Code, 1860 and Chapter XXVI (provisions as to Offences Affecting the Administration of Justice) of the Code of Criminal Procedure, 1973. No such power is enjoyed by CIC/SICs. The only penalty that Information Commissions can impose on the PIOs is a levy (under Section 20 of the Act) at the rate of Rs. 250/ for each day of default in providing information. The maximum limit of such monetary penalty is Rs. 25,000/. This is an exclusive power of Information Commissions. No other appellate authority enjoys such power. In case of persistent non-compliance, the Commissions can recommend disciplinary action against the CPIOs/SPIOs as per service rules applicable to her/him.

However, during the first three years of the operation (i.e. upto 31 March 2008) of the Act, Information Commissions (Central or State) have disposed 50,955 appeals/complaints and among which only in case of 373 appeals/complaints penalty have been imposed on guilty officials under Section 20. Although in a case between G. Basavaraju vs Arundhati and others<sup>14</sup>, the Karnataka High Court held that the penalty provisions as contained in Section 20 can also be used by the Information Commission (in this case the SIC of Karnataka) to get its orders complied with. It further held: '...Courts or tribunals must be held to possess power to execute its own order... Right to Information Act, which is a self-contained code, even it has not been clearly spelt out, must be deemed to have been conferred upon the Commission the power in order to make its order effective, by having recourse to Section 20.'

The reluctance on the part of Information Commissions in terms of application of Section against erring officials definitely dilute the rigour of the Act. Again, although Section 22 of the RTI Act clearly says that it would override all existing acts including the OSA, 1923, the continued existence of the OSA in its present form does have the potential to confuse the minds of the PIOs.

Another important area that has created enough confusion and criticism in recent times is the issue of judicial accountability and disclosure of assets by the members of the judiciary. Controversy began to rise when in a recent landmark judgment, the Delhi High Court upheld a

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14. C.C.C. No. 525 of 2008, Karnataka High Court.

single bench order that the office of the Chief Justice of India (CJI) comes within the purview of the Right To Information (RTI) Act, observing that openness is the 'best disinfectant'. In a recent article, Prasant Bhushan<sup>15</sup>, a well-known public interest lawyer in the Supreme Court and a member of the Campaign for Judicial Accountability and Reforms, has narrated the development of this very crucial and media-hyped story that helps us understand the strength of the RTI Act and the attitude of one of the most powerful institutions in the country towards it.

The issue arose out of a RTI application filed with the Supreme Court by Subhash Agarwal, an 'untiring' RTI-activist. Agarwal sought the information regarding the compliance of a 'Code of Conduct' adopted at the Chief Justices Conference in 1997, which required judges to disclose their assets in confidence to their chief justices. The PIO of the Supreme Court (endorsed by the chief justice) responded by saying that the information did not exist in the court registry. In course of an appeal before the CIC, it transpired that the Supreme Court was making a distinction between information with the Chief Justice of India's (CJI) office and that with the Supreme Court. The CIC rejected this distinction and directed the information officer of the Court to obtain this information from the CJI's office and provide it to the RTI applicant. This prompted the Supreme Court to file a writ petition in the Delhi High Court challenging the CIC order. The Supreme Court argued that disclosure of Judges' assets to the CJI would pave the way for people seeking actual asset disclosures under the RTI Act. They claimed that asset disclosure was exempted under the RTI Act on the basis that this information was disclosed by judges to the chief justice under a 'fiduciary relationship' and that this was "personal information having no relationship to public interest and would cause an unwarranted invasion of the privacy" of judges. The Court further claimed that the CJI was not a "Public Authority" amenable to RTI requests under the RTI Act.

Justice Ravindra Bhat of the Delhi High Court finally delivered judgment on the Supreme Court's writ on 2 September 2009 after the Court made it clear that it would not withdraw its writ petition despite the judges' decision to put their asset declarations on the Court web site.

Justice Bhat emphatically rejected the chief justice's oft-repeated claim that the CJI was not a public authority and that the CJI's office was not amenable to the RTI Act. He also held that information about whether judges had been declaring assets to the chief justice was decidedly held by the CJI and had to be disclosed to the applicant. He also rejected the Supreme Court's contention that the asset disclosures have been given by judges to the chief justice in a 'fiduciary' relationship (one of trust, like a lawyer-client or patient-doctor relationship), by holding that this information was required to be provided to the chief justice by the Code of Conduct adopted by the judges themselves.

At the same time, he held that the information was personal information of judges entitled for protection under clause 8(1) J of the exemptions in the RTI Act, unless the information officer or the CIC would come to the conclusion that the public interest in disclosure of this information outweighs the interest of privacy of the judge. However, as the applicant in this case did not ask for the actual asset disclosures but only whether judges were making them, Justice Bhat did not decide whether the public interest in disclosure of judges' assets outweighs the public interest in protecting the privacy of judges. Although the case is yet to be settled it

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15. Prasant Bhushan: 'Judicial Accountability: Asset Disclosures and Beyond' in *Economic & Political Weekly*, September 12, 2009 vol xliv no 37

shows the potentiality of the RTI Act and the nervousness its application can create in the minds of the people holding highest offices.

## VIII

Notwithstanding the above difficulties, the RTI Act, 2005 is becoming, day by day, the most effective right that cuts across all the rights, especially the 'new' social rights that have become so important in the post cold war times of globalisation. The rights-discourse in India, as we have noted, has entered its Human Rights phase since 1990s. Along with other rights, many pro-poor rights and movements demanding these rights also began to surface. Article 21 of the Indian Constitution had already gained a new importance after the *Maneka Gandhi Vs Union of India* case (1978). After two decades of the *A. K. Gopalan Vs State of Madras* case (1950), the Supreme Court opened up a new dimension and laid down that the procedure of the state cannot be arbitrary, unfair or unreasonable one. Thus in the new light of interpretation, Article 21 imposes a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty. It assures the right to live with human dignity, free from exploitation. In the 1990s, the scope of this Article has further expanded owing to many Public Interest Litigation cases lodged by individual citizens and human rights activists. A host of demands comprising right to food, employment, health, shelter, education, mid-day meals at school, the maintenance of the public distribution system, land rights, forest rights, prevention of starvation deaths and coercive displacement etc. have given the Human Rights discourse a new dimension.

It is interesting to note that the year 2005 witnessed the enactment of two radical pieces of legislations namely, the Right to Information Act and the National Rural Employment Guarantee Act (NREGA). The enthusiastic activists expected that RTI Act would be considered to be an important tool to monitor the effective implementation of NREGA. The following case study was conducted by Sabar Ekata Manch (A forum of community based organizations working on Dalit Rights in Sabarkantha district, Gujarat) and Janpath (A network of voluntary organization of Gujarat), in February-March, 2006.<sup>15</sup> The study was done on the basis of a report that in Balisana village of the Prantij block in Sabarkantha district, workers were getting the payment as low as Rs.3 to Rs.7 per day for their work on the NREG Scheme. Sabar Ekata Manch and Janpath did the fact-finding survey in different villages in Prantij block, where the similar facts recurred. After this, Mr. Natu Barot of Sabar Ekata Manch contacted, Mahiti Adhikar Gujarat Pahel for guidance on how to acquire the Muster Roll and Payment Sheets of the works. Since this kind of information comes under the 'pro-active disclosure' category, he was advised to file simply an application asking the copy of the muster and payment sheets under the RTI Act. And his request was complied immediately. When the muster rolls were studied thoroughly, it came to light that the amount calculated was based on the quantum of work which was incorrectly written in column 7 of the muster rolls instead of recording it in column 10, which ensured minimum wages to workers. These irregularities and violations were brought to the notice of media through press conference. A small video film was produced with the help of Janpath, which screened it for the media. It built due pressure on the government. The payments made afterwards were all done as per minimum wage provision. Thus the copy of the muster

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15. Mahiti Adhikar Gujarat Pahel, C/o Janpath, B-3, Sahajanand Tower, Jivraj Park, Vejalpur Road, Ahmedabad-51; Email:janpath1ad1@icenet.net

rolls, obtained through the application of the RTI Act, played a key role in effective implementation of NREGA.

In another instance, in Surguja district of Chhattisgarh State, a sit-in-demonstration was launched at the local office of the Irrigation Department on 17 October 2005, five days after the national RTI Act came into force. The local workers were demanding the muster rolls in relation to the construction of a talab (pond) under the National Food for Work Programme. A sum of Rs. 3.5 lakhs was sanctioned to the Irrigation Department for the project, of which Rs. 3.1 lakh was spent on labour, tracked in three weekly muster rolls. On the basis of the RTI Act, the workers got it at last after a prolonged demonstration. The public hearing immediately showed that the muster rolls had been fudged. Although there were 320 names on the rolls, it emerged that only 63 of the 320 names were genuine. That means that the wages of nearly 80% of the labourers was misappropriated by corrupt officials. Additionally, it was found that all the thumbprints in the muster roll were false, even in the case of genuine workers they had put their thumbprint or had signed on a different document – the *kaccha* muster roll, an informal register maintained at the worksite to record attendance and make wage payments. At the end of the public hearing, a delegation was sent to the District Collector of Surguja and the evidence was presented to him. The villagers were promised that action would be taken against the culprits.<sup>16</sup>

## IX

During its first five years of existence, the RTI Act, despite various difficulties and shortcomings, has become a powerful tool in the hands of the citizens as well as human rights activists and NGOs. From Gujarat to Assam and other states of India's northeast, from Punjab (I have not included Jammu & Kashmir in the present study) to Kerala – throughout the length and breadth of India, people have used this Act to know almost everything related to their everyday life. From public examination systems to employment-interviews, from the status and utilisation of development works/funds by central/state/local public agencies to the projects involved in catering the 'new' social rights – the RTI has come a long way in a little span of time. The Act and its activists have disturbed the quarters of vested interests in such a dimension that the beginning of 2010 witnessed two RTI-murders within a month, in two different states: Maharashtra and Bihar. In Pune (Maharashtra) Satish Shetty, who was running a public awareness programme for last 15 years and who had filed scores of RTI applications which exposed irregularities in land acquisition by Sable-Waghire company and IRB Builders and promoters, was murdered on 14 January 2010. One such exposure, through Shetty's RTI application, led to the suspension of the deputy land registrar in the area. Just after a month (14 February 2010), we have the body of another activist, Shashidhar Mishra in Begusarai, Bihar. Like Shetty Mishra too, worked tirelessly to expose corruption at the panchayat and block levels. He was shot dead by unidentified men on motorcycles near his residence in Phulwaria village on the night of February 14.<sup>17</sup>

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16. Sohini Paul (2006): *The Right to Information and Panchyati Raj Institution: Chhattisgarh as a Case Study* (edited by Charmain Rodrigues). New Delhi: CHRI.

17. *The Mid-Day*, Pune, 16 January 2010. *The Mid-Day*, Pune, 16 January 2010 & *The Hindu*, Patna, 21 February 2010

However, all is not the tale of success. Success-wise, Maharashtra can claim the most RTI-effective status. But even in Maharashtra, according to a report, a whopping 11,355 second appeals were still pending with the seven information commissioners across the state till November 2009. An audit of the pending second appeals with various information commissions in the state show that the information commission in Pune has the highest number of pending cases (3,723), followed by the Aurangabad commission with 2,667 cases. Amaravati and Mumbai division (including Nashik) come in the third and fourth rank with 1,762 and 1,126 cases.<sup>18</sup>

In case of Karnataka, another RTI-wise effective state, the following statistics of two months – October and November of 2009 is like this:

1. Number of Cases pending at the end of Oct 09 = 7237
2. Number of Complaints and Appeals received during Nov 09 = 1340
3. Number of Complaints & appeals disposed during Nov 09 = 917
4. Number of cases pending at the end of Nov 09 = 7660
5. Number of cases heard during Nov 09 = 1684
6. Appeals & Complaints pending less than 3 months = 3140
7. Appeals & Complaints pending more than 6 months = 4347
8. Appeals & Complaints pending more than 12 months = 173

[Source: Karnataka Information Commission]

On the other hand, the scenario of an otherwise ‘politically conscious’ state of West Bengal is very dismal. The ‘RTI Assessment Report’ prepared by the RTI Assessment and Analysis Group (RaaG) and National Campaign for People’s Right to Information (NCPRI)<sup>19</sup> reflects the poor position of the state.

**Table 1: RTI Performance of West Bengal vis a vis Other States**

Sl. No.	Status of Appeals, Disposal Till 31/03/08	Total	Highest Performing CIC/SIC	Performance of West Bengal
1.	Appeals / Complaints received up to 31/03/08	87,165	22,215 ( Maharashtra)	516
2.	Appeals/ Complaints disposed up to 31/03/08	50,955	6,227 (CIC) 6,115( Maharashtra)	394
3.	Monthly rate of disposal of cases	-----	587( Maharashtra)	18
4.	Cases pending on 31/03/08	36,480	15,988( Mharashtra)	122
5.	Penalty imposed till 31/03/08	373	74 (CIC) 57 (Haryana)	02
6.	Awarding of Compensation up to 31/03/08	576	318 (Chhattisgarh)	01

*Source: Data Compiled by the author based on the RaaG Report*

Civil liberty organisations and activists<sup>20</sup> in West Bengal are voicing the following demands for a long time for a more effective and transparent functioning of the SIC (WB):

18. *TOI*, Mumbai, 11 January 2010

19. <http://www.downtoearth.org.in>

20. <http://www.ngoadda.org>

- A few more Information Commissioner should be appointed and as per the location of applications the hearing are to be organized in the respective district headquarters.
- More and speedy disposal of cases/appeals are to be done immediately.
- Training and awareness programmes must be organised especially for the lower level government officials and village local self-government (panchayat) level staff.
- A comprehensive list of PIOs comprising all the government/semi-government departments must be immediately published.
- Civil Society organisations must be involved in the process.

## X

Within a little span of five years, as it is evident from our study, the RTI Act has become a *right of rights* in the neo-liberal scenario of a ‘globalised’ India. For the time being, let us accept, like David Held<sup>21</sup>, that ‘globalisation’, is an ill-defined and controversial word that captures a number of different trends, all with implications for state power. Like many third world economies, India too had willy-nilly chosen the path of liberalisation and that led to heavy banking on the FDI, even in the core sector, which was something unimaginable even in the first half of the 1980s. We have already mentioned that many international monetary agencies, on which India had to rely on, for paying off debts and huge deficits on one hand and taking fresh loans on the other, had on their part began to impose various conditionalities, which a radical Marxist might describe as the diktat of the ‘global imperialism’<sup>22</sup>, from another perspective this can be called the rule-setting of a newly emerging ‘Empire’<sup>23</sup>.

In the backdrop of rolling back of the state-run enterprises and welfare projects on one hand and decline in the old rigour of political sovereignty on the other, increasing flow of money, technology, people and goods are taking place across national boundaries. This requires new rules of the game to be set not nationally but by international agencies. Of course, the old rhetoric of state sovereignty will be there but it has to adjust, to a great extent, with the global rules. The new global networks of power thus emphasise certain intertwined global rules – economic (including trade practices, monetary and technological/communicational exchanges), political (which highlight universal democratic rights or human rights), environmental (which especially impose various restrictions on pollution –creating industries and practices) and demographic (which seeks to build a global regime for controlling migration and displacement).

We have argued earlier that the rights discourse in India attained its ‘Human Rights’ phase in this decade of transition (i.e. 1990s), which also marked the end of the ‘cold war’ and emergence of a *new world order*. This decade also witnessed a global rise in enactment of right to information/freedom of information laws. Although Sweden granted a public accession to government information through the Freedom of the Press Act in, as back as, 1776, it became

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21. David Held, et al. (1999): *Global Transformations: Politics, Economics and Culture*. Stanford: Stanford University Press.

22. Robert McChesney, ‘Global media, neoliberalism & imperialism’ in *International Socialist Review*, Aug/Sep 2001, Chicago.

23. Michael Hardt & Antonio Negri (2000): *Empire*, Cambridge, Ma.: Harvard University Press.

almost a craze since the beginning of 1990s. The list<sup>24</sup> below records the trend in many states throughout the world:

Albania (1998), Armenia (2003), Australian states (between 1982-2003), Azerbaijan (2005), Bangladesh (through an Ordinance of 2008), Belgium (2003), Bosnia & Herzegovina (2001), Brazil (1991), PRC (2008) Czech Republic (1999), Chile (2009), Croatia (2003), Ecuador (2004), Estonia (2000), EU (2001), Ireland (1998), Israel (1998), Italy (1990), Jamaica (2002), Japan (1999/2001), Latvia (1998), Macedonia (2006), Mexico (2002), Norway (2006), Pakistan (Ordinance in 2002), Poland (2001) Moldova (2000), Romania (2001), Slovakia (2000), South Africa (2000), Republic of China/Taiwan (2005), Thailand (1997), Turkey (2004), Uganda (2006), Ukraine (1992), UK (2000), USA (1966/96), Zimbabwe (2002).

It is not astonishing that two experts of WTO and Economic Consulting Services, Inc. Washington D. C. in their Staff Working Paper should focus on an issue like ‘The Impact of Transparency on Foreign Direct Investment’ in 1999/2001. In this long study the authors, after noting the negative impact on FDI for non-transparency in government related information, publish a country wise list\*<sup>25</sup> of rankings in terms of ‘transparency’.

The RTI movement and Act in India also coincided with this expectation (demand?) of a crucial international agency like WTO. However, pointing at this coincidence does not have any ulterior motive of undermining or scandalising a path-breaking democratic movement participated by a large number of common masses. But what any serious researcher must understand is that the RTI and many other ‘new’ social rights movement, and above all, the Human Rights movement, needed an ‘*objective/material condition*’ to take their present shape. And, I argue, globalisation has provided us with this condition.

In a time of declining/undermined national sovereignty, when the welfare/protectionist policy of the third world states are shrinking day by day, the common/disadvantaged citizens are taking two courses action: 1) negotiating with the state by resorting to claim makings dynamics of right-based politics, or 2) resorting to armed movements that challenge the very sovereignty of the state. From the experience of last two decades it is now clear, that at least in India, the state has badly failed to combat the second course of movement only through over-armed coercion or by patronising counter-insurgencies. Thus the possibilities of rights-based politics are gradually gaining ground. The RTI movement as well as the Act have indeed become a very powerful instrument in this direction.

**Table 2: Country Rankings According To Their Transparency**

Country	Average Rank	Years Included in Sample
New Zealand	38	1992-1995
Denmark	38	1992-1995
France	38	1992-1995
Netherlands	38	1992-1995
Finland	37.5	1992-1994
Germany	37.5	1992-1995
Norway	37.5	1992-1995
Canada	37	1992-1994

24.<http://commons.globalintegrity.org/2009/03/freedom-of-information-comparative.html>

25. Drabek and Payne: *Op. Cit.*



Japan	37	1992-1995
Austria	37	1992-1995
US	36	1992-1995
UK	36	1992-1995
Korea	34.5	1992-1995
Spain	33.5	1992-1995
Israel	33.5	1992-1995
Jordan	33.5	1992-1995
<b>Country</b>	<b>Average Rank</b>	<b>Years Included in Sample</b>
Czech Republic	32.5	1994-1995
Italy	32	1992-1994
S. Africa	31	1992-1995
Singapore	30.5	1992-1995
Egypt	29	1992-1995
Costa Rica	28.5	1992-1995
Botswana	28	1992-1995
Morocco	28	1992-1995
Chile	28	1992-1995
Indonesia	27.5	1992-1995
Argentina	27.5	1992-1995
Syria	26.5	1992-1994
India	26	1992-1993
Paraguay	26	1992-1995
Venezuela	26	1992-1995
Columbia	25.5	1992-1995
Ecuador	25	1992-1995
Nicaragua	25	1992-1995
Uruguay	25	1992-1995
Dominican Republic	24.5	1992-1995
Philippines	23	1992-1995
Bolivia	23	1992-1995
Pakistan	21	1992-1995
Nigeria	21	1992-1994
Panama	20.5	1992-1995
El Salvador	20	1992-1994
Honduras	20	1992-1995
Zambia	19	1992-1993
Guatemala	19	1992-1995
Bangladesh	17.5	1992, 1994-1995
Sierra Leone	12	1992, 1994-1995
Thailand	10	1992-1994
Malaysia	8.5	1992-1995

Source: *International Country Risk Guide*, published monthly by Political Risk Services, (PRS) in Drabke and Payne op it