

Right to Information Being Curtailed

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Abstract

*The Right to Information (RTI), as an inherent right under Articles 19(1)(a) and 21 of the Indian Constitution, has been instrumental in constructing transparency and accountability within governance systems. Yet, this constitutional right stands in ever-greater danger of restriction as a result of judicial interpretation, institutional fragility, and legislative amendment. Significant court rulings like *CBSE v. Aditya Bandopadhyay* and *Girish Deshpande v. CIC* have weakened the RTI regime by increasing exemptions and prioritizing intangible notions of privacy at the expense of transparency. The amendments proposed under the Digital Personal Data Protection Act threaten the integrity of RTI further by facilitating easy denial of information on a massive scale. Added to the lack of clarity in the appointment processes of Information Commissioners and the misuse of writ jurisdiction to circumvent RTI safeguards, these tendencies indicate a worrisome trajectory. As RTI is on the path to becoming an instrument of denial rather than an instrument of empowerment, it is essential to engender instant civic activism and elicit judicial self-reflection to safeguard this pillar of Indian democracy.*

Keywords: *Right to Information, Fundamental Rights, Article 19(1)(a), Judicial Interpretation, Digital Personal Data Protection Act, Transparency, Privacy, Accountability, Public Information Officers, Democratic Governance*

1. Right to Information

1.1. Evolution In India

When India got Independence in 1947, many people were confident that it would not sustain adult suffrage and democracy. Belying these doubts India has managed these reasonably well. The Constitution guaranteed most inalienable human rights as fundamental rights. The judiciary acted as an effective check on the executive and generally ensured that the scope of the citizen's fundamental rights was not curbed by the executive. During this journey of over seven decades the judiciary discharged its duty as sentinel on the qui vive for citizen's rights and expanded their scope. The nation witnessed many changes in the political parties which came to power at the center and the various States and saw smooth changes of power amongst political parties and leaders. But despite all this actual power did not vest with the individual citizens and power was getting concentrated in the hands of some who held positions of power, their relatives and friends. The improvements and comforts flowed much more to the elite and very little to the poor and disadvantaged.

There were many attempts to give greater power to the under privileged and one such notable effort was the Mazdoor Kisan Shakti Sangathan in Devdungri village in rural Rajasthan. This was initiated by three unique individuals: Aruna Roy who gave up her IAS job, Nikhil Dey a young lawyer trained in USA and Shanker Singh a resident of the area with

phenomenal artistic and communication skills. The trio stayed in a small hut and started working with the villagers from 1987. Through discussions and action, they tried to evolve ways to transform the elective, defective democracy into a participatory democracy empowering citizen. While they struggled to empower the people to use their democratic rights, they faced great corruption and arrogance amongst the officials.

One of the grievances of the villagers was that they felt that they were being cheated out of their fair wages in government works by manipulation in the muster rolls. This led to the demand to see the records. This was refused, and this led to dharnas and negotiations. The villagers began to develop the wisdom that access to government records is essential for them to secure their right to life and to attack the arrogance and insolence of the officials who exploited them. This important understanding of the villagers led them to understand the importance of accessing information from the government and the legitimacy of their right to access it. In simple words they said: *'Hamara Paisa Hamara Hisab'* (The money is ours and hence we must get its accounts). The fact that government belongs to the citizens and public servants are holders of public records on their behalf unlocked the key to the meaning of democracy. This was reiterated in their slogan: *'Yeh Sarkar Hamare Aapki, Nahi kisike Baapki'* (This government belongs to you and me and is not anyone's father's property). They began to realise that access to records was a necessary and useful tool to monitor their government, and curb corruption. There can be no better vigilance monitors who would get accountability from the government than the citizens. The demand for a codified Right to Information spread across the nation and slowly became a national movement.

1.2. Supreme Court's Role

The Supreme Court had sounded the first clarion call for Right to Information in 1975. Justice Mathews in *State of Uttar Pradesh vs. Raj Narain* (1975) 4 SCC 428 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. Their 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". After this in a series of notable judgments the Supreme Court repeatedly held that Right to Information was a fundamental right along with the right to publish flowing from Article 19 (1)(a). In *S.P. Gupta vs. President of India* (1981) the court held: "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 Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands." In *Reliance Petrochemicals vs. Proprietors of Indian Express* (1988) case, the court said the "right to know is a basic right which citizens in a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our constitution". Thus, it was also linked to the right to life. The Supreme Court had accepted Right to Information as emanating from Article 19 (1)(a) and Article 21.

1.3. Right To Information Law

It was recognized that the citizen's Right to Information was a fundamental right of citizens and thus on par with the right to free speech and the right to publish. It is worth contemplating on the fact that right to publish by media arises out of the citizen's right to know and be informed. It is the medium to give information to the citizens. It should be obvious that the right to publish cannot be at a higher pedestal than the Right to Information of the citizens.

While the Right to Information was accepted as a fundamental right there was no mechanism to enforce it in practice. There was a need to codify it and provide a practical mechanism to implement it. Some States did enact such laws but finally Parliament enacted the Right to Information Act in 2005 which harmonized the need to provide information to citizens about the working and reasons for government's actions. The national law became effective from 12 October 2005 which was Vijayadashami.

The law in its preamble asserted that democracy requires transparency in functioning, and it was necessary to contain corruption and hold governments accountable. After recognizing that there may be some practical constraints in achieving this, it set out to harmonise the conflicting interests and gave India one of the best transparency law in the world.

1.4. Main Provisions

The law defined information as what existed in files, computers and even works. It gives access to information to all citizens subject only to the exemptions outlined in the act in Section 8. Apart from this information may be denied if it would infringe someone's copyright. In the RTI act the

citizen has to ask for information from the office where the information is likely to be held. All government bodies and all other institutions which are owned, controlled or substantially financed by government have to provide access to their information to citizens. Each office of those mandated to provide information is required to have an officer designated as Public Information Officer (PIO). The PIO is responsible for providing the information. The law recognizes the citizen as ruler of the nation and hence specifies that she needs to give no reason to seek information. If the information is not with the department from whom she has sought the information the PIO must transfer the application to the appropriate department within five days. The PIO is mandated to provide the information within 30 days and if, - without reasonable cause, - information is delayed or denied, the PIO is liable to be penalized personally at the rate of RS.250 per day of delay, subject to a maximum of Rs.25000.

The law expects that most information would be available to the citizens without having to apply for it, since it should be available *suo moto*. It also envisaged computer networks being in place which could make it simple to access and provide the information. If the PIO does not respond in 30 days or denies information, the citizen can file an appeal with a First Appellate Authority in the same department who should give a ruling within 30 days. If the outcome is not satisfactory the law created a new independent institution of Information Commissions. These are headed by Commissioners who are fairly senior and expected to ensure that the citizens' right was honoured and the fundamental right of the citizens was implemented as per the law. The unique feature of this law was that for the first time a citizen could ask for a penalty to be levied on public

servants for not honouring the right of the citizen! The law categorically stated that it superseded all existing laws so that various existing laws and rules could not be advanced to deny information. To ensure that the implementation of the law would not get stuck in the judicial quicksand it laid down that the final appeal will lie with the Information Commission and no court could hear any appeal against the order of the Commission. Citizens took to this right with great enthusiasm and spread it rapidly.

1.5. Weakness

However, the Law had one major weakness like many other laws setting up high power, independent institutions which are expected to act as the checks and balances of democracy. It specified that the Central (and State) Information Commissioners would be selected by a committee comprising of the Prime Minister (State Chief Minister for State Commissions), Leader of Opposition and one other Minister, it was an irony that the Information Commissioners upholding the transparency law were to be selected with no process or transparency. This is one of the biggest flaws in India since our Higher judiciary, Commissioners of Human Rights, Women's rights, Children's rights and various other institutions like Lokayukta are not selected by any transparent process. The absence of transparency and accountability in the selection process is one of the major factors for a lack of real institutional independence and poor adherence to the rule of law.

2. RTI in Courts

2.1. Writ Jurisdiction

Despite this drawback citizens' enthusiasm was vibrant in enforcing the law. There were some very good Information Commissioners who gave

decisions in favour of transparency. Some of these were challenged in the High Courts and despite the bar on hearing appeals imposed by parliament, courts heard many appeals by the government departments contending that the challenge was under writ jurisdiction. No explanation is given how the challenge falls in writ jurisdiction. The rare exception was in a division bench judgment of Bombay High Court in WP 5237 of 2010 which rightly held that “In the case of *Surya Dev Rai vs. Ram Chander Rai and Ors.* ((2003) 6 SCC 675), the Supreme Court made the following observations regarding the powers of certiorari under Article 226 of the Constitution: -

“Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.”

Having considered the challenge by the petitioners, in our opinion, the impugned order does not suffer from any infirmities on any of the grounds set in the above observations and therefore it does not call for interference in this petition. Hence, this petition must fail at the threshold and the same is hereby rejected summarily.”

Despite the legal requirement that there can be no appeal against decisions of Information Commissioners, most courts entertain these challenges, without justifying how they fall in their writ jurisdiction.

Logically when giving a stay on a Information Commissioner's order in a RTI appeal the court must first give a reasoned finding that the challenge falls under writ jurisdiction.

Such respect to the RTI Act has been rare. This has resulted in many challenges to good decisions by Information Commissions languishing in Courts. It is interesting to note that in Mexico challenges to the Commission's orders are not entertained from government departments by the courts unless the issue involves national security.

2.2. RTI Usage Deprecated

Unfortunately, the courts have not followed the RTI Act in the same spirit that they have shown for right to free speech and right to publish. The first major hit to the RTI Act came in 2011 from the Supreme Court judgment in *CBSE Vs. Aditya Bandopadhyay* (2011) 8 SCC 497 when it stated without any provocation, evidence or reason:

“Para 37. Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public

authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties.”

These devastating unsubstantiated observations made by the Apex Court in Para 37 hereinabove had no basis and were wholly uncalled for. There was no cause or reason for those observations in the case. It does not befit the Supreme Court to voice disapproval in respect of a fundamental right of citizens in such manner. There is not a shred of evidence that RTI is *‘obstructing the national development and integration, or destroying the peace, tranquility and harmony amongst its citizens.’* To label citizens exercising their fundamental right as oppressors and intimidators without a shred of evidence is unacceptable. These observations from the apex court have been gleefully picked up by public officials and quoted freely to curb the citizen’s fundamental right. RTI has been recognised by the Supreme Court as being integral to Article 19 (1) (a) which states that all citizens shall have the right to freedom of speech and expression subject only to the restrictions laid out in Article 19 (2) of the constitution. Section 8 (1) effectively covers these. These remarks cannot be explained by any facts and runs contrary to all the earlier judgments on Right to Information.

If it is argued that right to information should be related to transparency and accountability and eradication of corruption, it could then be argued that the freedom of speech and expression should also be subjected to this test. With these statements the court dealt a serious blow to the fundamental right of citizens. This has warmed the hearts of many PIOs and Information Commissioners, and they are now often parroting these lines to deny the legitimate exercise of the citizen’s fundamental right.

As for the accusation of RTI taking up 75% of time, I did the following calculation: By all accounts the total number of RTI applications in India is not in excess of 10 million annually. The total number of all government employees is over 20 million. Assuming a 6-hour working day for all employees for 250 working days it would be seen that there are 30000 million working hours. Even if an average of 3 hours is spent per RTI application 10 million applications would require 30 million hours, which is 0.1% of the total working hours. This means it would require 3.2% staff working for 3.2% of their time in furnishing information to citizens. This too could be reduced drastically if computerised working and automatic updating of information was done as specified in Section 4 of the RTI Act.

RTI requests have to be met only from the records. Records are kept in any office for reference. If Section 4 of the Act is properly implemented as envisaged in the law, collecting and giving information should not take much time. The Supreme Court did not comment on the lack of Section 4 compliance by all public authorities but decided to pass unwarranted and unsubstantiated strictures against citizens using their fundamental right. On reading the judgment there is no indication of why this condemnation of RTI was made.

2.3. Scope of Exemption Expanded

Another judgment which has done great harm to the RTI Act is the judgment in *Girish Ramchandra Deshpande Vs. Central Information Commission & Ors.* (2013) 1 SCC 212. This judgment gives the license to refuse most information at will to the PIOs, FAAs and the Information Commissioners. It can even be used to deny information for which the RTI Act mandates suo moto disclosure under Section 4.

A RTI Applicant Girish Ramchandra Deshpande had sought copies of all memos, show cause notices and censure/punishment awarded to a public servant Mr. Lute. He had also sought other details such as his movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he had sought for the details of gifts stated to have accepted at the marriage of his son.

RTI only requires information which should be on record to be provided. The Court held that what was sought was ‘personal information’ and hence it is exempted under Section 8 (1)(j) of the RTI Act. This section exempts “information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.”

A simple reading of the words shows that under this clause information from public records can be denied if:

1. The information requested is personal information and the nature of the information requested is such that it has apparently no relationship to any public activity or interest; or;
2. Where the information requested is personal information, and the disclosure of the said information, would cause unwarranted invasion of the privacy of the individual.

The Court did not rule on whether the information was an outcome of a public activity or if its disclosure would amount to an unwarranted invasion on the privacy of the individual. When denying information on the grounds of privacy it is necessary to consider the areas in which reasonable restrictions can be placed on right to information. These are listed in Article 19(2) and there are only two words which can relate to privacy: ‘decency or morality’. If disclosure of information violates decency or morality it should not be given. Realizing that it may be difficult for PIOs and other appellate authorities to decide on what constitutes privacy, Parliament gave a simple test in the proviso that information which would not be denied to parliament or legislature would not be denied to any person. This can only have one meaning: that anyone claiming that information would be denied to the citizen would make a subjective statement that he would deny the information to Parliament. The Supreme Court gave no reasoning but merely stated that the information sought was personal information and need not be given unless a larger public interest could be demonstrated. It did not conclude whether the information was with respect to a public activity, or whether it was invasion on the privacy. Further it did not even quote the all-important proviso about denying the information to parliament. It was as if the court did not read the complete clause.

It also missed taking the ratio of the apex Court in the *R. Rajagopal vs. State of Tamil Nadu* (1994) case in which the clear ratio decidendi had been established stating:

“28. We may now summarize the broad principles flowing from the above discussion:

1. *A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical.*
2. *Once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.*
3. *In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their duty”*

The Deshpande decision was given in a SLP without giving any reasons, or considering the law laid down by Parliament or the precedent of R.Rajagopal. Some people argue that a judgment given in a SLP does not become a precedent, but this has been treated as precedent in six subsequent apex court judgments. Thus, a decision which did not give any reasoning, had no ratio and forgot to even mention the complete section is becoming the defining precedent for refusing information. It did not even consider the earlier decision on R. Rajagopal and is therefore *per incuriam*. Most governments have issued circulars mentioning this judgment and laying down that personal information should be denied unless a larger

public interest is demonstrated. It is highly unlikely that a PIO or FAA will ever come to such a conclusion. Even at the level of Information Commissioners there will be less than 1% decisions which declare that an exemption applies and yet the information must be disclosed as there is a larger public interest in disclosure.

Across the country information about MLA funds expenditure, officer's leave, caste certificates, file notings, educational degrees, beneficiaries of subsidies and much more are being denied. Many PIOs are denying information which may have the name of a person claiming it is personal information and hence exempt. I would also point out that whereas in the ADR PUCL judgment the apex court had ordered that citizens have a right to know about the assets of those who want to become public servants (stand for elections) the Girish Deshpande judgment ruled that citizens had no right to know about the assets of a public servant! Most information relates to some person. Infact in section 4 of the RTI Act government is mandated to provide information about the monthly remuneration received by each officer, details of beneficiaries of subsidies, and particulars of recipients of concessions, permits and authorizations granted by it. Many PIOs are refusing to provide even this information. This judgment is per incuriam but has now authorized denial of most information which can be termed personal.

There are other judgments of the Supreme Court which have not been too kind to the RTI Act. The Supreme Court has guarded and broadened the scope of Article 19 (1)(a) consistently until 2010. After that it appears that the court has steadily constrained the right to information beyond what the law made by parliament and the constitution envisage. The Chief

Justice of India Justice S.A. Bobde observed in December 2019 that the extensive use of the RTI Act has created “a sense of paralysis and fear” in the government, precluding those in the government from taking decisions. Underscoring the “abuse” of the Act, the CJI said there is a need to lay down guidelines on its use, since the RTI was not an “unrivalled” right.¹

Before that in November 2019 in *Subhash Chandra Agarwal vs, Supreme Court the Supreme Court (5 judge bench)* said in Paragraph 59: “Reading of the aforesaid judicial precedents... would indicate that personal records, including name, address, physical, mental and psychological status... are all treated as personal information. Similarly, professional records, including... evaluation reports, disciplinary proceedings, etc. are all personal information. Medical records... information relating to assets, liabilities, income tax returns... are personal information. Such personal information is entitled to protection from unwarranted invasion of privacy and conditional access is available when stipulation of larger public interest is satisfied. This list is indicative and not exhaustive.”

It reiterates the Girish Deshpande judgment and puts its stamp on it. Significantly, it did not mention the proviso. It is very painful that Section 8 (1)(j) of the RTI Act is being truncated and given a meaning which is not borne out by the law passed by parliament nor sanctified by Article 19 (2) of the Constitution. The Right to Information is being amended by the apex court not sanctified by the law or the constitution.

¹ <https://theprint.in/judiciary/how-supreme-court-has-not-upheld-the-spirit-of-rti-act-over-the-years/339204/>

There is a need for citizens, the legal fraternity and the judiciary to discuss and debate these matters and in particular address these issues. The fundamental right to information must be interpreted as per the provisions of the law and Section 8 (1)(j) must be properly understood. Citizens have rightly protested against an amendment in the RTI law by parliament which altered the positions and tenures of the Commissioners. The Supreme Court has enlarged the scope of denial in a very significant manner, but the citizens are not even discussing this. The Supreme Court's rulings are slowly being spread across the nation. Governments have issued circulars highlighting these and slowly PIOs are realizing the excuse these give them to deny information whenever they do not wish to give information.

It is my submission like the Supreme Court's orders on section 8(1)(J) are not as per the law passed by parliament or in line with the constitution. The fundamental right to information of citizens is being curtailed without the backing of the law. In this situation there were some PIOs and information commissioners who were giving information as per the law. Now the Digital Personal Data Act is going to convert this into a law.

3. Digital Personal Data Protection

Section 44(3) of the Data Protection Bill amends the RTI Act Section 8 (1)(j) to read as exempting

(j) information which relates to personal information

With this amendment all information which can be related to a person could be legally denied. Most information could be shown as being related to a person and hence the law would become a Right to Deny Information

for PIOs who do not wish to give information. **Incidentally, this proposal is tacit admission that any current denial of information on the grounds of it being ‘personal information’ only, was illegal.** Whenever a PIO wants to deny information, he will be able to link it to some person. Thus, RTI would become a RDI: Right to Deny Information, rendering it as an ineffective tool. As per Section 38(2) it will override all existing laws. Thus, it would override the RTI Act as well. This will make it extremely difficult for an official to disclose information, since he would have to decide whether providing the information demanded is likely to run afoul of the Data Protection Act. Given the fact that the Data Protection Act has a provision for a maximum penalty of 250 crores, the normal action will be denial of information. This appears to be a Right to DENY Information masquerading as a Digital Personal Data Protection bill.

There is another way of looking at the issue of privacy and RTI. Privacy is a social construct and varies with countries. The Puttaswamy judgement while declaring privacy as a fundamental right did not give specific lists which could be used by Public Information Officers. There is a simple way of looking at this. The State has no right to intrude routinely on the privacy of a person. Hence information which is routinely collected may be assumed to be in the course of a public activity. If they are an invasion of privacy, it should not be permitted. Article 19 (2) of the Constitution gives the limits on exercise of Article 19 (1)(a). There are only two words relating to privacy: decency or morality. Hence it would be alright to deny disclosure of information which would violate ‘decency or morality’. Such information should not be disclosed to parliament also. Thus, the exemption under Section 8 (1)(j) was well crafted and in consonance with

the constitution.

5. Right To Information Endangered

The right to information is empowering individual citizens and they are accessing records which expose arbitrariness and corruption. This is actualization of democratic ideal that they are the rulers of the nation. The nation must realise that the curbs on freedom of speech, right to publish and right to information are interlinked and must be treated with equal importance. Citizens must discuss and debate these judgments freely. If they are not vigilant the RTI Act will be damaged and constrained very significantly. At stake is a fundamental right of citizens which is being endangered.