Downgrading the Status of Chief Information Commissioner
Proposed Amendments to RTI Act

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The right to information, much like the right to vote, is rooted in the same fundamental right, with the offices of the chief information commissioner and the chief election commissioner, respectively, operating at the same level of autonomy, towards the enforcement of these rights. The proposed amendments to the Right to Information Act, which reportedly seek to downgrade the status of the chief information commissioner and information commissioners, reduce the autonomy of this constitutional institution and are, consequently, an assault on the right to information and democracy.

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If liberty and equality, as is thought by some are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost

—Aristotle

Fundamental rights are not mere liberties or freedoms. Rights often impose restraints on the legislature, whereas freedoms or liberties restrain only the executive. Originally, rights were conceived as negative rights, because they forbade the state from interfering with people's liberties (for example, the United States Bill of Rights). The Constitution of India, too, guarantees several rights, couched in both positive and negative aspects. For instance, Article 21 states that "no person shall be deprived of life or personal liberty." Thus, while the state has an obligation not to deprive anybody of their life without appropriate legal procedure, it does not guarantee life. Hence, this right is couched in negative language.

Similarly, Article 14 guarantees protection against discrimination. Except for the provisions where affirmative action is provided, the right to equality, as expounded in Article 14 of the Constitution, is also negative in nature. Article 14 not only prohibits the state from treating equals unequally or unequals equally, but also enjoins upon it to strive to minimise the inequalities in income, and endeavours to eliminate inequalities in status, facilities and opportunities, not only amongst individuals, but also amongst groups of people residing in different areas or engaged in different vocations.

A Fundamental Right

Similarly, the right to information has a positive connotation, mandating the state to provide access to information.[1] It is, therefore, a positive right. Directive Principles of State Policies, on the other hand, can be classified as positive assertions; but are only recommendatory in nature and, thus, not enforceable. To enforce a positive right, the state has to create appropriate mechanisms. For instance, the enforcement of the right to work necessitated the creation of an elaborate mechanism under the Mahatma Gandhi National Rural Employment Guarantee Act. Similarly, the Right to Information (RTI) Act, 2005, demands that a multistep process be made available in order to access information.

In the pre-independence days, the colonial state was secretive. The constitutional state, on the other hand, does not have the luxury of secrecy, but must be positively transparent. The right to information can, therefore, be understood in the context of two relationships: between one person and another, and between an individual and the state. While the first is an ethical characteristic, the second is an essential component of good governance, as laid down by law.

E M Sudarsana Natchiappan, chairman of the parliamentary standing committee (PSC), which was tasked with analysing the RTI Bill, 2004, told the committee on 14 February 2005:

> Another aspect is about implementation of fundamental rights. It is the constitutional obligation on the Government of India to enact a law and that law is meant only for the protection of citizens and not against any State Government or any local body. That is why the fundamental rights have not been mentioned in the three lists, namely, Union List, State List and Concurrent List. These are not mentioned because these are fundamental rights. (Rajya Sabha 2005)

Referring to the role of the information commission, Natchiappan further stated:

> The Commission (IC) has to see to it that this right to information is properly implemented. If it is not properly implemented, then the Commission has to enforce it. It will be its constitutional obligation. If this organization is not going to function properly, then what is the purpose of bringing this enactment? We are not enacting this law just to become a part of the statute book. (Rajya Sabha 2005)

Witnesses and representatives from different organisations—who deposed before the standing committee and presented their views on the bill—with regard to the constitution of the Central Information Commission, appointment

of information commissioners, and their powers and functions, stated:

> This is the essence of the Bill in the sense that the mechanism of access to information will depend on effectiveness of this system. It should therefore be ensured that the Commission and its functionaries perform their duties independently and with complete autonomy. For this, it is necessary to elevate their status to that of the Election Commission of India. (Rajya Sabha 2005)

The PSC exhaustively discussed each and every provision of the RTI Bill, before recommending that the chief information commissioner (CIC) is to have a status equal to that of the chief election commissioner (CEC). It is against this background that we need to understand the equality of status between the Central Information Commission and Election Commission of India as constitutional institutions.

Contesting Constitutionality

According to media reports, the government is contending that the CIC cannot be equal to the CEC, because the latter is a constitutional institution, while the former is just the creation of a statute and hence, a level below (Jain and Banerjee 2018; Chatterji and Bagriya 2018; *Times of India* 2018). This could be based on a misunderstanding about the constitutionality of the right to information and the functions of the CIC under the RTI Act, 2005, in realising this right.

For instance, can one say that the right to vote (Article 325) is not a fundamental right, merely because it is not included in Part III of the Constitution? Voting is, in fact, the expression of opinion or free choice and, as such, is a fundamental right because it is inherent in the freedom of speech and expression. The Election Commission of India makes elaborate arrangements, independent of the government and political parties, to enforce this fundamental right, basic to democracy. Similarly, although the right to information is not specifically mentioned, it still falls under the rubric of Article 19(1)(a), that is, the right to freedom of speech and expression, which has to be independently interpreted by the Central Information Commission to direct the resisting officials. Both, the right to vote and the right to information are hardly different, but are, two aspects of the same fundamental right to freedom of expression.

Even as the right to freedom of speech and expression guaranteed by the Constitution in 1950 includes the right to information, so does Article 19 of the Universal Declaration of Human Rights (UDHR)—which came into existence on 10 December 1948—state that the right to freedom of opinion and expression is inclusive of the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers."

The right to information is, thus, a fundamental right under Article 19(1)(a), and Article 19(2) restricts the legislature from shrinking it. Because the right to information is a constitutionally rooted and judicially interpreted fundamental right, Parliament has the prerogative to legislate on it, and this applies to states as well. This means, the executive cannot meddle with this right. The power is shifted from a small group of individuals (like the council of ministers) to the larger group of legislators (like Parliament and state assemblies).

Historical Context

The Indian Constitution endorsed the British-era Indian Evidence Act, 1872, which, in Section 76, provides for access to public documents.[2, 3] If a public officer has custody of public documents, any person has a right to inspect these documents. The officer can collect a legal fee and must furnish a copy of the document, with a certificate written at the foot of such a copy stating that it was a true copy. The certificate was to be dated and sealed. These copies were to be called "certified copies." Thus, the right to inspection and to possess certified copies of public documents—which are basic rights prescribed under the RTI Act in 2005—have been available since 1872. However, these have not been implemented effectively. This right to access public documents was not known to people, either during the British rule or in independent India. On the basis of this 19th-century law and with the guaranteed right to freedom of speech and expression since 1950, the right of access has assumed constitutional status.

In 2005, the RTI Act expanded this right with a mandatory full-fledged mechanism to practically facilitate the sharing of official information, with prescribed consequences for unlawful rejection of requests, along with relevant exceptions. This detailed enactment was necessitated because Section 76 of the Evidence Act, 1872 was not clear and, as such, was not effective in compelling government officers to disclose public information. Further, a citizen had to possess enough resources to file a writ petition in a constitutional court. The access to justice via access to information is not a simple quest, but a traumatic task for the common Indian. In this regard, those in power should understand that the RTI Act did not originate from some file note of a clerk, which travels blindly up to the top levels of government. The demand for the RTI Act was not out of the blue; it was well-rooted in the constitutional framework, democratic rule of law and the good governance.

Currently, around 60 nations provide constitutionally guaranteed access to a official information (*Right2Info* 2012).[4] The fundamental status of this right has been recognised particularly in Latin America, much before the Inter-American Court's landmark judgment in *Claude Reyes v Chile* (2006). The Supreme Court of Canada, in *Ontario (Public Safety and Security) v Criminal Lawyers Association* (2010), held that the constitution recognised a right to freely seek and receive information. The right to information has also been given international legal recognition in 2009, by the European Court of Human Rights in *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v Hungary* (2009). Finally, the United Nations Human Rights Committee (UNHRC 2011) clearly recognised the right to information in its 2011 general comment on Article 19 of the International Covenant on Civil and Political Rights.

Judicial Interpretations

In India, through judicial activism, the courts have begun to carve out the right to information from Article 19(1)(a), which confers the right of freedom of speech and expression. In different contexts, numerous acts of the government

have been challenged as violative of Article 19(1)(a). While upholding this freedom, the courts in the following cases explained that newspapers educate and inform the people, and unreasonable curbs on this exercise of right by the press would result in denial of their right to information. All these rights strengthened the constitutional status of the right to information, much before the RTI Act in 2005.

In *Bennett Coleman and Co v Union of India,* regarding the restrictions on the import of newsprint under Import Order 1955, Newsprint Order 1962, and the Newsprint Policy of 1972–73, the Supreme Court agreed that these orders directly affected the right to freedom of speech and expression under Article 19(1)(a) of India's Constitution. The Court stated that

> The constitutional guarantee of the freedom of speech is not so much for the benefit of the press as it is for the benefit of the public. The freedom of speech includes within its compass the right of all citizens to read and get informed.

In *Indian Express Newspapers (Bombay) Pvt Ltd v Union of India* (1986) the imposition of 40% ad valorem on newsprint was challenged as unconstitutional. The Supreme Court held that

> The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgments.

A similar sentiment was expressed by Simon of Landsdale in *Attorney General v Times Newspapers Ltd* (1973), who held that

> The public interest in freedom of discussion (of which the freedom of the Press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.

A classic judicial declaration explaining the essence and essential purpose of the right to information came in *State of UP v Raj Narain* (1975), where the Court declared:

> 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. To cover 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 parities and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.

In *S P Gupta v Union of India* (1982), the Supreme Court further explained the importance of the right to information as part of Article 19:

> Now it is obvious from the Constitution that we have adopted a democratic form of government where a society has chosen to accept democracy as its creedal faith and it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how the government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy. "Knowledge," said James Madison, "will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power of knowledge. A popular government without popular information or the means of obtaining it, is but a prologue to a grace or tragedy or perhaps both. 'The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic state. And that is why the demand for openness in the government is increasingly growing in different parts of the world."

It has, therefore, rightly been said: "A successful democracy posits and awares citizenry" (*Union of India v Association for Democratic Reforms* 2002).

Attack on Autonomy

The Central Information Commission and state commissions are entrusted with the statutory responsibility of enforcing a fundamental right guaranteed by the Constitution of India, the freedom of speech and expression under Article 19(1)(a), which is part of basic structure of the Constitution, which means it cannot be tinkered with by any contemporary executive.

If this is the case, why is the government contemplating amendment of the RTI Act as reported in the media? It has been reported that

> The view in the government is that putting the CIC and information commissioners on par with EC functionaries may not be justified as, unlike the constitutional body empowered by Article 324 of the Constitution, the CIC is only a statutory body handling requests and appeals of citizens for information under the control of public authorities. (Jain and Banerjee 2018)

This view is, in fact, wrong because, what the RTI Act enforces is a constitutional right, similar to the enforcement of the right to vote by the election commissions. Yet, some administrative officers consider this an anomaly.

The report further states that

> the RTI Act provision linking the salary of the CIC and information commissioners to that of the CEC and [Election Commissioners] ECs, respectively, it seems, was drafted in a hurry and without much application of mind. It is time that we correct this anomaly.

This is the reported thinking of a government functionary, who also pointed out that the state information commissioner, in many cases, was an ex-bureaucrat who retired at the level of additional secretary.

> He may not have made the cut as secretary while in service but on appointment as state information commissioner, he gets elevated to the level of a Supreme Court judge. This is an anomalous situation. (Jain and Banerjee 2018)

While it is true that the political executive at the centre and in the states tends to appoint former administrators to fill a majority of the positions of commissioners, the RTI Act clearly provides for the appointment of eminent persons from eight different walks of life, only one of which is "administration."

The RTI Act is one that has been truly drafted by the people, with each word being thoroughly debated. Thus, before taking the bill to Parliament, the centre should consult with the people in order to facilitate extensive debate. Civil society

should actively participate by sending their objections to prevent the opinion of a small section of bureaucrats from prevailing over the larger public purpose of the act, and to save the RTI Act from dilution.

One can also consider that the penultimate RTI Bill in 2004 contained provisions for appointing deputy commissioners, who, as per subclause(8), would have to function as per the direction of the central government. However, the PSC recommended the deletion of this subclause, because it curbs independence and autonomy of the commissioners (Rajya Sabha 2005: para 24.3). Finally, when the bill was passed, the post of the deputy commissioner was given up and the subclause deleted. What was included was that the CIC, assisted by the information commissioners may

> exercise all such powers and do all such acts and things which may be exercised or done by the Central Information Commission autonomously without being subjected to directions by any other authority under this Act. (GOI 2005: Section 12.4)

In this regard, the PSC was of the view that

> [T]he Central Information Commission is an important creation under the Act which will execute the laudable scheme of the legislation and will hold an all India responsibility for this. It should, therefore, be ensured that it functions with utmost independence and autonomy. The Committee feels that to achieve this objective, it will be desirable to confer on the Information Commissioner and Deputy Information Commissioners, status of the Chief Election Commissioner and the Election Commissioner, respectively. (Rajya Sabha 2005: para 25.3)

Pillar of Democracy

It is too "literal" an interpretation to say that an institution would be constitutional only if explicitly mentioned in the Constitution. Purposive interpretation demands appropriate understanding of the CIC as a body ensure that people exercise their fundamental right of expression based on access to official information. In the same manner in which the CEC should have enough power to direct every level of administrative authority in order to secure an objective election process, the CIC too must have enough power to ensure access to information, which, until 2005, was withheld. Both the right to vote and the right to information stand on the same footing and are rooted in the same fundamental right. Hence, both the CIC and the CEC are equal in status, and should be equally independent of the government and political interests. They are not extended departments of the Government of India, but, rather, pillars of the Union of India. Like the judiciary, these two institutions should be separate from the legislative and the executive, in accordance with the theory of separation of powers propounded by Montesquieu.

NOTES

1 Article 21A, mandating that the state provide free and compulsory education to all children of the age of six to 14 years is another instance of a positive right.

2 Section 74 of the act defines public documents, while Section 75 states that all other documents are private.

3 Section 76 of the Indian Evidence Act, 1872, states that "every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal; and such copies so certified shall be called certified copies."

4 The constitutions of the following 60 countries guarantee a right to information: 12 countries in the Americas (Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela); 18 in Europe clearly grant a right to information (Albania, Bulgaria, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Sweden); seven in Europe arguably guarantee a right to information (Austria, Azerbaijan, Belgium, Georgia, Macedonia, Russia, Ukraine); six in Asia and the Pacific (Nepal, New Zealand, Pakistan, Papua New Guinea, Philippines, Thailand); and 17 in Africa (Burkina Faso, Cameroon, Democratic Republic of Congo, Egypt, Eritrea, Ghana, Guinea Bissau, Kenya, Madagascar, Malawi, Morocco, Mozambique, Senegal, Seychelles, South Africa, Tanzania, and Uganda).

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