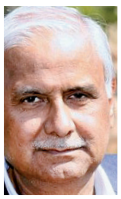
Squeezing RTI out of shape

RTI, one of the few weapons the common man has in his fight against the high and mighty, is about to lose its edge



Jagdeep S Chhokar

While folks working with the right to information (RTI) were still reeling from the supreme court judgment on the appointment of information commissioners in the Namit Sharma case, came the prime minister's speech on the seventh year celebrations of the RTI Act on October 12, again raising the sceptre of "frivolous and vexatious" use of the law. The RTI Act now seems to be suffering from what might be called a double whammy, first the judiciary and now the bureaucracy-politics nexus!

part 1

Judicial Attack

When you file an RTI query, you are seeking information. Is that similar to seeking justice? You ask, for example, about the amount spent on the rual job gaurantee scheme in a district. That information may lead to justice by fixing wrongs, if any. But that comes later.
Our lawmakers drafted the RTI Act to empower every citizen, and to that aim, they kept the whole process as simple as possible – unlike courts. Now the supreme court has converted information commissions into judicial tribunals.

The Namit Sharma petition seems to have been specifically drafted to convert the information commissions into any other, regular judicial tribunal. The first three "prayers" in the petition are given below. The others were of an interim nature.

"Prayers
It is therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to:-

a issue a writ in the nature of mandamus or any other appropriate writ, order or direction, declaring sub sections 5 & 6 of Section 12 & Sub Sections 5 & 6 of Section 15 of the Right to Information Act, 2005 as ultra vires the Constitution of India being violative of Articles 14,16, 19(i)(g) & 50 of the Constitution of India; and

b issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing the Respondent to amend the Right to Information Act, 2005 in consonance with the directions of this Hon'ble Court and /or the ratio laid down in *Union of India Vs. Madras Bar Association*, (2010) 11 SCC 1; *Pareena Swarup Vs. Union of India* (2008) 14 SCC 107; L. *Chandra Kumar Vs. Union of India*, (1997) 3 SCC 261; *R.K. Jain Vs. Union of India* (1993) 4 SCC 119; S.P. Sampath Kumar Vs. Union of India, (1987) 1 SCC 124; and

c issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing respondent to incorporate there should a provision for appointment of retired Judges of High Court or this Hon'ble Court as Chief Information Commissioner, retired District Judges as State Information Commissioners and mixed appointment of technical as well as Judges of the Bench as Information Commissioners respectively."

The court appears to have been magnanimous in not declaring any of the sections or sub-section of the RTI Act as unconstitutional but it has taken the extraordinary step of changing the entire character and thrust of the RTI Act by "reading into it" meanings that the legislature never intended. Let us take the two impugned sections one at a time.

Almost half of the judgment (Para 54 to Para 103) is devoted to the discussion under the heading

part 2

If it's justice, you need judges on board

The RTI Act says information commission will have people with 'knowledge and experience'. What sort of knowledge and experience? If an information commission is delivering justice, then of course it needs judges on board, laymen won't do.

"Constitutional Validity of Section 12(5)". The operative part of Para 103 reads:

"103. The above detailed analysis leads to an *ad libitum* conclusion that under the provisions and scheme of the Act of 2005, the persons eligible for appointment should be of public eminence, with knowledge and experience in the specified fields and should preferably have a judicial background. They should possess judicial acumen and experience to fairly and effectively deal with the intricate questions of law that would come up for determination before the Commission, in its day-to-day working. The Commission satisfies abecedarians of a judicial tribunal which has the trappings of a court. It will serve the ends of justice better, if the Information Commission was manned by persons of legal expertise and with adequate experience in the field of adjudication. We may further clarify that such judicial members could work individually or in Benches of two, one being a judicial member while the other being a qualified person from the specified fields to be called an expert member. Thus, in order to satisfy the test of constitutionality, we will have to read into Section 12(5) of the Act that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law. Such appreciation and application of legal principles is a *sine qua non* to the determinative functioning of the Commission as it can tilt the balance of justice either way" (underlining added).
The conclusion of the "detailed analysis" contained in the paragraph above, is reflected in the final "order and directions" thus:

"106 (2). The provisions of Sections 12(5) and 15(5) of the Act of 2005 are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus,

we hold and declare that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof."

The underlined parts of summary of the "detailed analysis", in Para 103 above are problematic.

part 3

But that was not the intention

The idea originally was to make information about the functioning of the government available to people as simply as possible. In fact, the precursor to the RTI Act specifically identified "the existing legal framework" as one of the "several bottlenecks" in the "free flow of information for citizens and non-Government institutions".

It must be said, with due respect to the hon'ble supreme court, that its conclusion that "The Commission satisfies abecedarians of a *judicial tribunal* which has the *trappings of a court*," is erroneous. This conclusion seems to reflect a somewhat different understanding of the entire purpose of the RTI Act than what is stated in the preamble of the Act itself which is reproduced below:

"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto.

WHEREAS the Constitution of India has established democratic Republic;

AND WHEREAS democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed;

AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including efficient operations of the Governments, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information;

AND WHEREAS it is necessary to harmonise these conflicting interests while preserving the paramountcy of democratic ideal;

Now. THEREFORE, it is expedient to provide for furnishing certain information to citizens who desire to have it."

It is interesting the supreme court did take note of the "Objects and Reasons" for the enactment of the 'Freedom of Information Act, 2002', the predecessor of the RTI Act of 2005, which it summarised in the judgment as follows:

"27. In terms of the Statement of Objects and Reasons of the Act of 2002, it was stated that this law was enacted in order to make the Government more transparent and accountable to the public. It was felt that in the present democratic framework, free flow of information for citizens and non-Government institutions suffers from several bottlenecks including the *existing legal framework*, lack of infrastructure at the grass root level and an attitude of secrecy within the Civil Services as a result of the old framework of rules. The Act was to deal with all such aspects. The purpose and object was to make the government more transparent and accountable to the public and to provide freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto" (italics added).

From a simple and plain reading of the above, the preamble of the RTI Act of 2005, and the Statement of Objects and Reasons of the Freedom of Information Act of 2002, it will be clear that the essential purpose of these the two legislations was, and still is,

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Bringing the judicial style of working to CIC might affect the user-friendly nature of commissions as the processes would become more complicated. Also no time-frame has been given by the apex court for the implementation. This has halted the working of some information commissions. When chief information commissioners at central and state levels are retired or serving judges, expert members would not enjoy the equality.

Ninety percent of the RTI Act would have died had disclosure of file notings been restricted, as file notes are at the heart of the Act. Similarly, (information on) examination papers and selection process is one big area where lack of transparency pervades, and that would have been washed away as well. The amendments (proposed but dropped by the cabinet) also barred queries on executive decisions till the process is completed. That, too, would have restricted the Act. So it's a welcome step and an important victory. But if the UPA is really serious about governance, it should pass the Lokpal bill.

to make information about the functioning of the Government available to citizens as simply as possible, without any impediments whatsoever. It is worth noting that the "Statement of Objects and Reasons of the Freedom of Information Act of 2002" specifically identified "the existing legal framework" as one of the "several bottlenecks" in the "free flow of information for citizens and non-Government institutions".

By treating the information commissions as a "*judicial tribunal*", and that too with "the *trappings of a court*", the supreme court appears to have gone against the very spirit of the RTI Act.

The court further says that the information commission "will serve the ends of justice better, if (it) was manned by persons of legal expertise and with adequate experience in the field of adjudication". While it is obviously beyond question that every law is meant to "serve the ends of justice" in the final analysis, but it seems worth remembering that the RTI Act is meant to serve an intermediate goal, of providing information to citizens, which, in turn, will assist them in seeking the final goal, of justice. Without having access to appropriate information, a citizen will be in a state of 'ignorant bliss' without having any idea of what justice is she being denied.

The RTI Act was enacted precisely because citizens found it impossible to get justice in "the existing legal framework" through the normal courts with all their "trappings", so that citizens could get information on what they were being denied, without "the trappings of a court" and then take steps to get justice.

The above discussion will also show that the court's observations about "administer(ing) justice to the people", answering "critical legal questions", observing "niceties of law", "application of legal principles", and "tilt(ing) the balance of justice", are not applicable to the information commissions in the same way as they are to what might be called regular and usual "judicial tribunals". The assumption of the supreme court that all or most of the appeals and complaints before the info commissions involve legal questions is negated by the observation of former information commissioner Shailesh Gandhi, who worked in that capacity for five years, that "85% percent of the cases need no legal interpretation".

part 4 Judicial /administrative tribunals and information commissions

The supreme court relies on several previous judgments to conclude that information commissions are like judicial or administrative tribunals – like central administrative tribunal (CAT), for example. But the judgment cited refer to those articles of the consititution with which the RTI Act has little to do.

Another disturbing issue is the determination of the court that the information commissions are like judicial or administrative tribunals in their purpose and functioning.

The petition prayed for the issue of a direction to the Union of India "to amend the Right to Information Act, 2005 in consonance with the directions of this Hon'ble Court and /or the ratio laid down in *Union of India Vs. Madras Bar Association*, (2010) 11 SCC 1; *Pareena Swarup Vs. Union of India* (2008) 14 SCC 107; L. *Chandra Kumar Vs. Union of India*, (1997) 3 SCC 261; *R.K. Jain Vs. Union of India* (1993) 4 SCC 119; S.P. Sampath Kumar Vs. Union of India, (1987) 1 SCC 124".

The most relevant judgment out of the five referred to above is *S.P. Sampath Kumar etc. vs Union of India & Ors* delivered on December 9, 1986. That particular judgment repeatedly makes it clear that the 'tribunals' that are being referred to have been created either in "substitution" of the high court or are intended to "supplant" the high court. The following three excerpts from the judgment should prove this beyond doubt.

"What is needed in a judicial tribunal which is *intended to supplant the High Court*..."

"Since the *Administrative Tribunal has been created in substitution of the High Court*..."

"It may be noted that since the Administrative Tribunal *has been created in substitution of the High Court*..."

No one should be in doubt that the information commissions are not, and never were, intended to either substitute for any court of law or to supplant it. Therefore, the judgments cited in the Namit Sharma petition actually are not relevant to the RTI Act or the information commissions at all. The hon'ble supreme court in its wisdom has decided to rely on these judgments for reasons which remain unfathomable.

The latest judgment referred to is *Union of India Vs. Madras Bar Association*, (2010), the concluding para of which reads as follows:

"We therefore find that these petitions relating to the validity of the NTT [National Tax Tribunal] Act and the challenge to Article 323B raise issues which did not arise in the two civil appeals. Therefore these cases cannot be disposed of in terms of the decision in the civil appeals but requires to be heard separately. We accordingly direct that these matters be delinked and listed separately for hearing."

The opening paragraph of the judgment is very informative:

"In all these petitions, the constitutional validity of the National Tax Tribunal Act, 2005 ('Act' for short) is challenged. In TC No.150/2006, additionally there is a challenge to section 46 of the Constitution (Forty-second Amendment) Act, 1976 and Article 323B of Constitution of India. It is contended that section 46 of the Constitution (Forty-second Amendment) Act, is ultra vires the basic structure of the Constitution as it enables proliferation of Tribunal system and makes serious inroads into the independence of the judiciary by providing a parallel system of administration of justice, in which the executive has retained extensive control over matters such as appointment, jurisdiction, procedure etc. It is contended that Article 323B violates the basic structure of the Constitution as it completely takes away the jurisdiction of the High Courts and vests them in the National Tax Tribunal, including trial of offences and adjudication of pure questions of law, which have always been in the exclusive domain of the judiciary."

It is clear from the above that the Madras Bar Association case, as in fact all other cases referred to in the petition, and on which the supreme court appears to have relied, are about tribunals set up under Articles 323A and 323B of the Constitution.

Since the RTI Act has no nexus with Articles 323A and 323B, and therefore is not intended to supplant or substitute any court of law, all these judgments cannot provide any guidance about how the information commissions should function.

Of course, the judgment repeatedly

mentions that the information commission is a quasi-judicial body but then ends up directing that it should function in court-like manner. What perhaps has been missed is that *it is not necessary to be trained in law to be judicious*. One does not have to be '**judicial**' to be '**judicious**'.

Dictionary meanings of judicious are (1) using or showing judgment as to action or practical expediency; discreet, prudent, or politic: judicious use of one's money; and (2) having, exercising, or characterized by good or discriminating judgment; wise, sensible, or well-advised: a judicious selection of documents. Given the overall purpose and tenor of the RTI Act, it is this kind of judicious mind that is needed to function effectively as an information commissioner, and not necessarily one having a formal degree in law. Such a "judicious" person will be perfectly capable of appreciating and applying legal principles, which is listed as one of the requirements by the court in Para 103 of the judgment.

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FORMER INFORMATION COMMISSIONER AT CIC

There are a lot of problems with the commission. But we need to understand that it does not work like a court. We know that a transparent method to appoint commissioners is required but filling all the posts with the retired judges is definitely not the right approach. Today a major problem with the commission is the pendency of cases. If the supreme court judgment is to be implemented, it would require each appeal to be heard by two commissioners rather than one. This will drop the output by 50% and pendency will further increase. It is an extremely dangerous move and it will kill RTI.

[Dropping RTI amendments] is not a major development as it is seen. Prime minister Manmohan Singh spoke about several issues at the RTI convention, and the supreme court gave four rulings over the last one year, which happen to restrict the Act. So what really has now prompted the government to announce this (decision to junk the proposed amendments)? My worry is what will follow next — the ideal situation would be for the government to issue a statement that the Act will not be amended at all.

part 5

"Reading into" and "reading down"

A brief introduction to a branch of knowledge called 'Interpretation of Statutes" shows that when a legislature drafts a law, every word in it is presumed to be intentional and carrying only the normal meaning.

A portion of Para 103 of the judgment, which deals with Section 12(5) of the RTI Act, reads as follows:

"Thus, *in order to satisfy the test of constitutionality, we will have to* ***read into*** *Section 12(5) of the Act* that the expression 'knowledge and experience' includes basic degree in that field and experience gained thereafter and secondly that legally qualified, trained and experienced persons would better administer justice to the people, particularly when they are expected to undertake an adjudicatory process which involves critical legal questions and niceties of law" (emphasis added) (Para 103).

In a somewhat similar vein, Para 53 of the judgment that deals with Section 12(6) of the RTI Act reads,

"53. Having noticed the presence of the element of discrimination and arbitrariness in the provisions of Section 12(6) of the Act, we now have to examine whether this Court should declare this provision *ultra vires* the Constitution or **read it down** to give it its possible effect, despite the drawbacks noted above. We have already noticed that the Court will normally adopt an approach which is tilted in favour of constitutionality and would prefer **reading down** the provision, if necessary, by adding some words rather than declaring it unconstitutional. Thus, we would prefer to interpret the provisions of Section 12(6) as applicable post-appointment rather than pre-appointment of the Chief Information Commissioner and Information Commissioners. In other words, these disqualifications will only come into play once a person is appointed as Chief Information Commissioner/Information Commissioner at any level and he will cease to hold any office of profit or carry any business or pursue any profession that he did prior to such appointment. It is thus implicit in this provision that a person cannot hold any of the posts specified in sub-section (6) of Section 12 simultaneous to his appointment as Chief Information Commissioner or Information Commissioner. In fact, cessation of his previous appointment, business or profession is a condition precedent to the commencement of his appointment as Chief Information Commissioner or Information Commissioner" (emphasis added).

The above two paragraphs of the judgment stand in stark contrast to each other. Whereas Para 53 clarifies the true intention of the legislature which was implicit in the phraseology of Section 12(6) and enhances the aims and objects of the RTI Act, the excerpt of Para 103 given above works to do just the opposite—defeat the aims and objectives of the RTI Act as has been explained above.

"Reading into" and "reading down" legislation refers to a field of law called 'Interpretation of Statutes' which lays down rules and conventions for interpreting various legislations. Some of the well-known principles of interpretation, relevant to the issue at hand, are the following:

- Legislature enacts a law with a definite purpose. The *object and purpose of the Act is required to be advanced in order to achieve its goal*. In case of possibility of more than one construction owing to the ambiguity, *the interpretation which fulfils or furthers the object of the statute*

in question must be adopted. The interpretation which will defeat or frustrate the purpose of law must be rejected.

- Legislature uses certain language to open its mind. The language is the only source of the intention of the Legislature. Therefore, the legislative intent is to be primarily gathered from the language of the statute. If the words of the statute are sufficiently clear, they themselves give out the intention of the Legislature. In such cases, natural and ordinary meaning should be attributed to them. But where the words are ambiguous, the courts have to ascertain their true meaning and *adopt that interpretation by which the legislative intent is carried out*.
- Every word in a statute must be examined in its context. It is a settled principle that in interpreting the statute the words used therein cannot be read in isolation. Their colour and content are derived from their context and therefore, every word in a statute must be examined in its context.
- There is a strong presumption that Legislature is a good writer in its own field and does not commit any kind of mistake. This means that *every word used by Legislature in the language of statute has been used mindfully, intentionally, and suitably, and the language employed by Legislature is proper and does not suffer from any mistake*. The consequence is that the courts cannot add, substitute or reject the words or modify the language on the ground of likelihood of errors. The courts have to read the language as it is and give effect to it in its true sense.
- The court cannot proceed on the assumption that the Legislature does not know what is says or that it has made a mistake. It must be presumed that the exact and correct words are used in the statute. *Court cannot presume that Legislature has not used appropriate words to express itself and in result, while it intended to say something else, a different meaning is coming out because of wrong selection of words*. Court also cannot presume that certain words which should have been present in the language to avoid ambiguity are missing. Court is further prevented from presuming that the unsuitable words have been employed by the Legislature leading to uncertainty or unjust results. Court also cannot presume that certain words are excessive in the language and even without them, the meaning of provision is clear. As such *the court is barred from undertaking any addition, substitution, rejection or supplying of words or to modify the language of the statute*. The errors may creep into legislation due to various reasons and at different stages of the process of enacting of the law. *It must be assumed that there is no defect and the Legislature had intended what it has said.*
- *It is presumed that Legislature has each word in its ordinary and natural sense unless otherwise is proved beyond doubt*. This presumption attains greater force when the words are precise and suffer from no ambiguity. Therefore, *it is the duty of the courts to first assign plain and ordinary meaning to the words*. The question is: What is meant by plain and ordinary meaning? By plain and ordinary meaning, it is meant the literal and popular meaning. *Statutes should prima facie be construed literally, but that only means that the document is to be construed according to the grammatical and ordinary sense of the actual words employed in the Act itself*. The court should not proceed to attribute any other meaning to the words of a language except their plain and ordinary meaning unless it is crystal clear that they are ambiguous and reasonably bear a technical meaning rather than plain and natural meaning.
- The term *Casus Omissus* means cases of omission. The rule of *Casus Omissus* provides that *omissions in a statute cannot, as a general rule, be supplied by construction. The omissions of Legislature cannot be rectified by the courts. A matter should have been provided but actually has not been provided in a statute, cannot be supplied by the courts. No cannon of construction permits the courts to supply a lacuna in a statute left by the Legislature by inadvertence, because such an attempt amounts to making of law, which is beyond powers of judiciary*. It should be kept in mind that the authority to enact, repeal, modify or amend any law rests with the Legislature alone and doctrine of separation of powers strongly prohibits interference of one arm of government into the functions of another.

Without being presumptuous, it is

necessary to point out that the learned and hon'ble court seems to have overlooked the essence of the above principles, particularly in its pronouncement in Para 106(2) which reads as follows:

"106(2). The provisions of Sections 12(5) and 15(5) of the Act of 2005

are held to be constitutionally valid, but with the rider that, to give it a meaningful and purposive interpretation, it is necessary for the Court to 'read into' these provisions some aspects without which these provisions are bound to offend the doctrine of equality. Thus, we hold and declare that the expression 'knowledge and experience' appearing in these provisions would mean and include a basic degree in the respective field and the experience gained thereafter. Further, without any peradventure and veritably, we state that appointments of legally qualified, judicially trained and experienced persons would certainly manifest in more effective serving of the ends of justice as well as ensuring better administration of justice by the Commission. It would render the adjudicatory process which involves critical legal questions and nuances of law, more adherent to justice and shall enhance the public confidence in the working of the Commission. This is the obvious interpretation of the language of these provisions and, in fact, is the essence thereof."

In its above pronouncement, the hon'ble court seems to be reading things into the statute that were not intended by the legislature. It is evident from the principles of interpretation given above that had the legislature intended that at least half of the information commissioners should be judges or be from the legal fraternity, it would have said so in the RTI Act itself.

It must, however, be noted that the hon'ble court has not actually changed the law but it *has* made a definitive pronouncement as follows:

"106(4). There is an absolute necessity for the legislature to reword or amend the provisions of Section 12(5), 12(6) and 15(5), 15(6) of the Act. We observe and hope that these provisions would be amended at the earliest by the legislature to avoid any ambiguity or impracticability and to make it in consonance with the constitutional mandates" (italics added).

part 6 Implementation has its own problems

Even if only judges are found to be qualified exeprts to run information commissions, their appointment terms and retirement age limits clash.

In Para 106(8) of the judgment, the hon'ble court has said, "We are of the considered view that the competent authority should *prefer* a person who is or has been a Judge of the high court for appointment as Information Commissioners. Chief Information Commissioner at the Centre or State level shall *only* be a person who is or has been a Chief Justice of the High Court or a Judge of the Supreme Court of India" (italics added).

As has been pointed out by several commentators, this direction is likely to create several complications in the implementation of the judgment, given that the retirement ages of information commissioners and chief information commissioners on the one hand, and of the judges of the high courts and supreme court are similar.

Here again, the hon'ble court seems to have overlooked one of the cannons of interpretation according to which it is presumed that the intention of the Legislature is always fair and it does not do anything which is unreasonable. Legislature never intends to create any kind of inconvenience. As such, no law should be so interpreted as to arrive at unreasonable results. A construction by which inconvenience is caused should be avoided.

Another anomaly in the same paragraph is the observation that "A law officer or a lawyer may also be eligible provided he is a person who *has practiced law at least for a period of twenty years as on the date of the advertisement*". The anomaly arises from the fact that Article 124(3) of the Constitution provides that a person who has

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The judiciary can interpret the law or can expand it if there is no clarity. They cannot indulge in lawmaking when something is clearly mentioned in the law. The positive aspect is that if there is at least one judicial member, it will ensure greater say of law in decision-making. But the downside is that it will reduce the output of the commission. The cases heard and disposed of would be drastically reduced and it will become an expensive process.

The decision of the cabinet to withdraw amendments to the RTI act is welcome indeed. This matter had been hanging over people's right to know like the proverbial sword of Damocles since August 2006. Many experts, activists, organisations, advocates and votaries of RTI have worked hard to turn around the government's thinking on the issue of file notings which formed the crux of the proposed amendments.

A law that is put together by consulting people will be defended by people themselves. The people have defended the law against a rollback in this case.

Everybody who lent a hand to push for this change of thinking deserves to be congratulated. The government also deserves to be congratulated for changing its mind.

been an advocate of a high court (or of two or more such courts) for *at least 10 years* is eligible to be appointed as a judge in the supreme court. Similarly, Article 217(2) of the Constitution provides that a person with an experience of 10 years as an advocate in a high court is eligible for appointment as a high court judge. It seems strange that a person is eligible for appointment as a judge of the supreme court but may not be eligible to be appointed as a chief information commissioner!

A point worth noting

The judgment correctly lists Namit Sharma as the "petitioner" and the Union of India as the "respondent". However, the judgment does not mention any arguments on behalf of the respondent. It *appears* from the judgment, though it cannot be said with complete confidence, that there were no averments on behalf of the respondent! Does one assume that the respondent, the Union of India, was in agreement with all the prayers and contentions of the petitioner?

part 7

"No robes, no lawyers, no liveried attendants"

That is what the central information commissioner said, "because what the citizen seeks does not go with so much of serious formality".

The central information commissioner's view

Before moving on to discussing the prime minister's speech, it is worth considering what the chief information commissioner (CIC) said in his welcome address on the seven-year celebration of the RTI Act. Some relevant portions of the address are discussed below.

While specially welcoming the minister of state for personnel and training, the CIC said, "We need him the most at this time when we have reached the fork under our feet and not sure which way the future lies." The expressions "reach(ing) the fork" and not being "sure which way the future lies" are very meaningful in the situation that the RTI Act currently faces.

The CIC almost directly commented on the Namit Sharma judgment when he said, "The approach of the Commissions in all these years has been to act like an umpire standing right on the field along with the players and not sitting on a pedestal and pronounce oracles. *Openness of approach, informality in style and simplicity of systems* have characterised the functioning of the Commissions. *No robes, no lawyers, no liveried attendants* because what the citizens seek does not go with so much of serious formality. *Excessive judicialisation of the Information Commissions will rob these institutions of their flexibility*" (italics added).

The following observation highlights why the RTI Act is different from other legislations: "The right to information is *the mother of all other rights of citizens*. Intelligent and responsible use of this right *has the potential to correct many infirmities in the government and make corruption difficult*. Therefore, it is extremely important that the civil society and the media do not lose sight of the right to information, and keep supporting it steadfastly" (italics added).

The CIC also expressed his helplessness with inaction, or inadequate action, on the part of the central and state governments thus, "We have been exhorting government authorities both in the Centre and the States to appoint responsible Information Officers, train them regularly and, most importantly, to modernize record-keeping at all levels. We have hardly met with much success. Similarly, all our efforts to ensure proactive disclosure as mandated under the Right to Information (RTI) Act have been ineffective. Seven years after the enactment of the law, most public authorities, both in the central and state governments have not made the complete disclosure which they should have done within 120 days. Poor record-keeping and failure to disclose the mandated information are the twin causes for the increase in the RTI demands and the dissatisfaction of the people at large."

part 8

Meanwhile, PM has other concerns in mind

Instead of nurturing the UPA baby, the prime minister seems hell-bent on strangulating it. What otherwise is the point of brining to the table concerns of privacy and obligations and so on?

This brings us to the speech made by the prime minister on the seven-year celebration of the RTI Act on October 12. Amongst many other things, the prime minister, admitting that there was "some confusion about the implications of the recent Supreme Court order regarding the composition of the Central and State Information Commissions", said that "the government has decided to go in review before the Supreme Court in this matter". It is to be hoped that the Union of India will be more active and do better in the review than it did in the original petition!

The prime minister's speech was extremely important in view of the repeated attacks that the RTI Act has faced, and survived, in the recent months though it must be said, with immense sadness, that several RTI activists have not been so lucky.

The prime minister, after a few, and brief, laudatory references to the RTI Act, immediately moved on to "some obvious areas of concerns about the way the Right to Information Act is being used presently". He then pointed out that he "had flagged a few of them when I addressed this Convention last year", thus stressing that, according to him, it seemed to be a recurring problem.

He listed "frivolous and vexatious use of the Act in demanding information the disclosure of which cannot possibly serve any public purpose", and "infringement of personal privacy while providing information under the Right to Information Act" to be two of the major concerns. He then went on to speak about rights and responsibilities, in the following words:

"Rights, of course, cannot stand in isolation and must always be accompanied by reciprocal obligations. I had pointed out in my address to this Convention in 2008 that while asserting our rights we need to be equally conscious of our responsibilities and our commitments. I believe that all of us share a responsibility to promote more constructive and productive use of the Right to Information Act. This important legislation should not be only about criticizing, ridiculing, and running down public authorities. It should be more about promoting transparency and accountability, spreading information and awareness and empowering our citizen. I think that there is need for all of us to work towards building an environment where citizens see the government as a partner and not as an adversary."

Two concerns stand out in the above paragraph. One is about citizens becoming more aware and conscious of their rights, and using the information obtained to hold public authorities to account. The other, and related, concern is about the follies of public authorities becoming public knowledge.

A comparison of the PM's speech, delivered on October 15, 2006, on the completion one year of the RTI Act, with the one after seven years is revealing. Some pertinent observations of the PM in 2006 are given below:

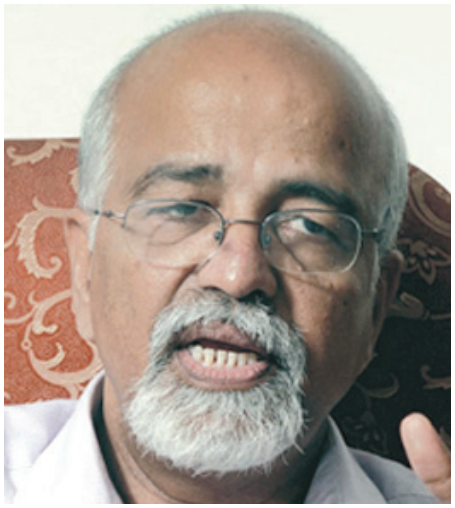
- "This is indeed a milestone of great importance in the evolution of Indian democracy...
- Presenting the case in support of the Bill in Parliament, I had expressed the hope that *the passage of the Bill will see the dawn of a new era in our processes of governance, an era of performance and greater efficiency, an era which will ensure that the benefits of growth flow to all sections of our people, an era which will help to eliminate the scourge of corruption, an era which will bring the common man's concerns to the heart of all processes of governance, an era which will truly fulfil the hopes of the founding fathers of our Republic...*
- What is of particular satisfaction is that it has become clear that the citizens of our country have owned this Act with their arms wide open. This has become, if anything, a 'Peoples' Law'...
- The implementation of RTI Act is, therefore, an important milestone in our quest for building an enlightened and at the same time, a prosperous society. Therefore, the exercise of the Right to Information cannot be the privilege of only a few...
- This Act is the consummation of a process initiated with the adoption of our Constitution...
- Hence, the criticality of the right to information and this Act is but the means for accessing it. We have kept these means simple, with overriding importance given to "public interest", sweeping aside much of the legacy of colonialism. In many ways, this Act is the logical culmination of the dreams of our founding fathers.
- The true determinant of success must be how many people have actually used this Act, and *their level of satisfaction*

SUBHASH CHANDRA AGRAWAL

RTI ACTIVIST

The court verdict on appointment of information commissioners has virtually signed a death warrant for the RTI Act. It implementation will effectively make approaching an information commission totally impractical.

The government's decision to withdraw the amendments is a positive step. But there is still lot of confusion. The PM's speech at the RTI convention had ideas to restrict the Act. So there has always been a double talk on RTI. This Act has always been seen as a hindrance to the governance system, but it is important to protect it.



"The approach of the Commissions in all these years has been to act like an umpire standing right on the field along with the players and not sitting on a pedestal and pronounce oracles. Openness of approach, informality in style and simplicity of systems have characterised the functioning of the Commissions. No robes, no lawyers, no liveried attendants because what the citizens seek does not go with so much of serious formality. Excessive judicialisation of the Information Commissions will rob these institutions of their flexibility."

Satyanand Mishra
Chief information commissioner, central information commission

with the information so obtained...

- ...(A) great deal more needs to be done. All public authorities must ensure that all records that can be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country...
- *I am sure that there will always be various opinions about the interpretation and implementation of some provisions of the Act. This is true of any legislation - particularly those that usher in far reaching changes. In a democratic society, sometimes, it takes time for new ideas to take firm root*. This is part of the learning curve any legislation has to undergo. We need to evolve a consensus to facilitate the effective exercise of the right to information by the needy, by those who are directly affected by the information. We need to balance the need for information with the limited time, material and human resources available with public authorities. Vexatious demands should not be allowed to deprive genuine information seekers of their legitimate claims on limited public resources. We must also realize that laws, over a period of time, adapt themselves to changing realities as societal perceptions change and most importantly, right to information is not a substitute for good governance. It has to support and aid the process of good governance...
- The positive manner, in which all stakeholders have responded to the challenges posed by this Act, encourages me to imagine that *a time may come when a citizen may not have to make an application for seeking information under this Act*. Public authorities could place on their own, more and more information in the public domain, with easy access as mandated by the Act...
- ...(I)t shall be our endeavour to strengthen the implementation of the Act in favour of genuine information seekers and the people. The Act has been a matter of pride for the UPA Government. It was a commitment we made to our people. Therefore, we are - as, if not more, interested in its abiding success.
- We will continue to pursue the goal of ensuring the fullest and freest flow of information under this Act. We shall work with all stakeholders for promoting effective usage of the rights granted under this Act. I assure you the complete support of our government in achieving fully the aims and objectives of this Act. *We remain firmly committed to its effective implementation in letter and spirit*" (Italics added).

Of course, the judgment repeatedly mentions that the information commission is a quasi-judicial body but then ends up directing that it should function in court-like manner. What perhaps has been missed is that it is not necessary to be trained in law to be judicious. One does not have to be 'judicial' to be 'judicious'.

The positive tone and tenor of the 2006 speech seem to have been replaced by a deep concern for preventing citizens from "criticizing, ridiculing, and running down public authorities".

Concern for privacy

The second major concern of the PM seemed to be "infringement of personal privacy". He also revealed that a group had been constituted to advice the government about the basis on which the privacy law

should be formulated. Coincidentally, the Report of the Group of Experts on Privacy (Chaired by justice AP Shah, former chief justice, Delhi high court) became available on October 16, just four days after the PM's speech. As expected by the PM, this Group of Experts did apply their minds specifically to the issues on the interface of the Right to Information and the Right to Privacy, and this is what they said:

"4.2. The Right to Information: In many countries citizens are able to hold governments transparent and accountable through Freedom of Information laws, Access to Information laws, and Public Information laws. In India, the Right to Information Act works to promote transparency, contain corruption, and hold the Government accountable to the people. The RTI establishes a responsibility on public bodies to disclose preidentified information, the right of citizens to request information held by public authorities from public information officers, and creates a Central Information Commissioner responsible for hearing/investigating individual complaints when information is denied. In the context of the RTI Act, every public authority must provide information relating to workings of public authorities as listed under section 4 (1(b)) to the public on a suo motu basis at regular intervals. Section 8 of the Act lists specific types of information that are exempted from public disclosure in order to protect privacy. In this way *privacy is the narrow exception to the right to information. When contested, the Information Commissioners will use a public interest test to determine whether the individual's right to privacy should be trumped by the public's right to information*. There exist more than 400 cases where the Central Information Commissioner has pronounced on the balance between privacy and transparency.

4.3. *When applied, the Privacy Act should not circumscribe the Right to Information Act*. Additionally, RTI recipients should not be considered a data controller" (italics added).

Just for the sake of complete clarification, Section 8(1)(j) of the RTI Act is reproduced below:

"8. (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,—

xxx xxx xxx xxx

(j) 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."

It should be clear from the above that the RTI Act does not permit "unwarranted invasion of the privacy of the individual" *unless* "the larger public interest justifies the disclosure of such information". There is, thus, no conflict whatsoever in the provisions of the RTI Act and the requirements of personal privacy, and any issues raised under this are red herrings.

It seems strange that a person is eligible for appointment as a judge of the supreme court but may not be eligible to be appointed as a chief information commissioner!

part 9 What does this double whammy mean?

It is quite clear that the RTI Act is under serious attack. The bureaucracy and the political establishment have always had an acute sense of discomfort due to their actions being open to public scrutiny. This transparency has made it extremely difficult, if not impossible, to cut sweetheart deals under the garb of confidentiality and secrecy. The repeated attempts, made with regular frequency, at diluting the RTI Act and making it toothless under the garb of making it easier to implement are eloquent testimony to this phenomenon. The recent withdrawal of the proposal to amend the Act by the Cabinet is at best an attempt to lull the civil society in to complacency.

The higher judiciary has had an interesting response to the RTI Act. On the one hand, it has been very supportive of the Act in its pronouncements on various decisions of the CIC that have gone up to it for adjudication. However, on the other hand, it has not taken kindly to the demands of opening up its inner workings, even on the administrative side, to public scrutiny. This apparent unwillingness for public scrutiny has created some bizarre situations such as the supreme court filing an appeal in a high court, and when the high court decision was not to its liking, the administrative side of the supreme court filing an appeal to the judicial side of the same supreme court!

The RTI Act will need all the support of the people and what may be called the RTI community to save it from this twin onslaught. The adversaries are powerful and ingenious, and the struggle will be long and hard, it might even be an unending one and may even turn into a war of attrition but it must be won. ■

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