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Defanging RTI, Step by Step

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Ever since the Right to Information Act was enacted in 2005 there have been continuous attempts to dilute this potentially powerful law. The dilution has come from government action as well as by judicial interpretation.

The dilution of a landmark law and the rights it confers does not happen with a single amendment. The National Democratic Alliance (NDA) II's 2019 legislative amendments to the 2005 Right to Information (RTI) Act cap a process that has evolved over the past 14 years, covering the tenure of four governments.

There was an outcry when the latest bill was passed and there had been vocal protests when it was introduced in 2018. But these changes are the latest in a long, insidious process of increasing government control of the Central Information Commission (CIC). The first dilutions took place even before the RTI Bill 2004 became an act in 2005.

In the original version of the bill, the appointments committee for the Chief Information Commissioner and the 10 Information Commissioners was made up of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.

But an amended version of the bill replaced the Chief Justice of India with a cabinet minister nominated by the Prime Minister. At the state level, a similar composition of the committee to appoint the State Information Commissioners was provided for where the Chief Minister as chair nominates a cabinet minister to the committee. These changes made for a more government-controlled appointment committee.

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The amended version of the 2004 Bill also introduced a new class of government agencies that would be exempt from its purview. All intelligence and security agencies established by the central and state governments were taken out of its purview.

The triumphs of the RTI Act are better documented than the gamut of actions that have chipped away at it. These range from legislative amendments to judicial reviews to self-serving appointments of information commissioners and to vacancies in their ranks, leading to a huge pendency of appeals. And a growing roll call of martyrs with 84 RTI seekers murdered till now. All of this ranges across the tenures of the United Progressive Alliance (UPA) and NDA governments.

In 2006, less than a year after the RTI Act came into being, there was an abortive effort by the UPA I government to exclude file notings from its purview. The then cabinet had approved a set of proposals to amend the RTI Act, which activists got wind of. A "Save RTI Campaign" ensued and both allies and Opposition said they would oppose such amendments. Eventually the amendments were not tabled in Parliament.

In June 2013, the CIC held six political parties to be public authorities under the RTI Act and hence subject to the transparency and information requirements under the law. The parties refused to comply and the UPA II government responded swiftly. An amendment bill was introduced which sought to remove political parties from the ambit of the definition of public authorities and hence from the purview of the RTI Act. Section 2 of the RTI Act as amended in 2013 says that political parties cannot be treated as public authorities.

There was political consensus then and now the 2019 amendments have been swiftly passed because of the ruling party's majority in Parliament.

Dilution Takes Place in Many Ways

The five years of the first Narendra Modi government demonstrated the many ways in which the CIC can be made compliant. You appoint retired bureaucrats to the job, you keep posts of commissioners vacant, and the number of pending appeals comes down by a mere 4000 in five years. In May 2014, when the BJP government came to power, close to 35,000 appeals were pending before the

CIC. In June 2019, about 31,000 appeals were pending, over 9,000 of those pending for over a year. (Mint, 29 July 2019)

Who should be appointed to the CIC? On the criteria for selecting information commissioners the Supreme Court had ruled in the matter of Union of India vs. Namit Sharma [AIR 2014 SC 122]

> that persons of eminence in public life with wide knowledge and experience in all the fields mentioned in Sections 12(5) and 15(5) of the Act, namely, law, science and technology, social service, management, journalism, mass media or administration and governance, be considered by the Committees under Sections 12(3) and 15(3) of the Act for appointment as Chief Information Commissioner or Information Commissioners.

But in recent years nominations have been almost entirely from the ranks of retired bureaucrats. In February 2019 the Supreme Court hearing a plea on the matter asked the government why a shortlist of 14 had only former bureaucrats on it. The Court was told one of the 14 was a retired judge, the rest bureaucrats.

Five vacancies were filled up at the beginning of 2019, with a serving Information Commissioner being appointed Chief Information Commissioner. Four retired civil servants were appointed Information Commissioners.

The selection process of the current Chief Information Commissioner is described here. The search committee headed by the cabinet secretary consisted of five bureaucrats, one of whom was also an applicant to the post of Information Commissioner. The independent member of the committee was the director of a government-funded institute. Only four out of these six actually met to draw up a short list of candidates for the selection committee.

The four candidates shortlisted were retired IAS officers, no women among them. Three out of these four weren't even applicants for the job, in terms of responding to the advertisement issued! Two serving Information Commissioners who had applied for the job were not on the shortlist. Yet the search committee's minutes of the meeting indicate that its members also considered names of other serving and retired civil servants who had not applied at all! How many of all these people considered met the criteria of eminent persons in public life?

But perhaps they would have done a better job of safeguarding the government's interests than Information Commissioners who did not come from their ranks.

In January 2017, acting on an RTI activist's application, Information Commissioner Sridhar Acharyulu, a former law professor, ordered the Delhi University to allow inspection of records of students who had passed the BA course in 1978, the year in which Prime Minister Narendra Modi passed the examination. He was quickly stripped of the human resource development portfolio.

Ruling on rejected requests for information filed under this Act is part of the job of those who sit in the CIC. Because the public information officers in government offices covered by the RTI Act frequently reject requests filed. Of late the Commission has reported that rejection rates are coming down with only 4 per cent of applications rejected overall in 2017-18. But the devil is in the details. The Home and Finance ministries rejected around 15% each of the applications they received that year.

A study conducted by the Commonwealth Human Rights Initiative on the 2016-17 statistics furnished by 25 public sector banks and the Reserve Bank of India to the CIC found that while the banks account for 9% of the total applications received, they account for 33% of the rejections of requests.

Dilution by Judicial Interpretation

While there have been outstanding judgments delivered upholding the right to information, the judiciary has also done its bit over the years to weaken the application of the law. By giving rulings on the CIC's orders that do not widen the scope of the Act and by upholding the right to privacy in dubious circumstances, including their own right to privacy.

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When the central law was passed in 2005, Section 8 of the Act listed exemptions to disclosure of information some of which had the caveat "unless the competent authority is satisfied that the larger public interest justifies the disclosure of such information." Section 8 (2) of the Act overrides the provisions of the Official Secrets Act to say "a public authority may allow access to information, if public

interest in disclosure outweighs the harm to the protected interests." An assessment that the information commissioners giving rulings under the Act were expected to make.

When they denied information some of the appeals ended up in the Supreme Court. But the higher judiciary in many cases has chosen not to widen the application of the RTI.

On at least three occasions, the constitutional court protected the right to privacy of judges and the judiciary.

1) Judges' Assets case (2007-2010)

In November 2007, a Delhi-based transparency advocate asked the Central Public Information Officer (CPIO) of the Supreme Court of India for a copy of the resolution adopted by the full court of the Supreme Court of India that required all judges to submit details of their assets to the Chief Justice of India; and asked whether judges were complying with this requirement.

When the CPIO of the SC refused the document, the matter went to the CIC which upheld disclosure. The CPIO then supplied a copy of the resolution but not information on compliance. The CPIO also challenged this CIC's decision before the Delhi High Court – a first in independent India where the highest Court of the land challenged the decision of an administrative tribunal in a Court over which it exercises appellate jurisdiction.

A single judge bench of the High Court upheld disclosure of information on compliance, but not on the assets disclosed thereafter. The case also went to a full bench of the same court which upheld the right to privacy of SC judges. In this case, repeatedly, the contents of the asset declarations of judges were treated as personal information attracting the protection of exemptions.

2) Protecting the Privacy of a High Court (2011-2013)

Copies of files and minutes of meetings of judges of the Madras High Court relating to a criminal contempt petition that had been filed against a tahsildar and other public servants in relation to a property dispute were sought under the RTI Act.

Subsequently, the matter escalated to the Madras High Court and a division bench ruled in 2013 against disclosure of the information. It extended the fundamental right of privacy under the Constitution and the exemption for personal information and privacy under Section 8(1)(j) of the RTI Act to itself, the entire High Court, even though these protections are meant for only for individuals.

3) Judges' Medical Expenses Reimbursement Case (2010-2015)

A petitioner sought information under the RTI Act about the total amount of monies reimbursed to judges of the Supreme Court (all those serving and some retired) for incurring medical expenses while in office. The CPIO of the apex court said records were not kept in a way that such information could be supplied. The CIC directed that record-keeping be improved, whereupon it went to the High Court which ruled that record keeping to facilitate any query that may come under RTI was not feasible. The petitioner filed a special leave petition before the Supreme Court which threw it out with the bench observing among other things that:

> We understand that we are getting the reimbursement from public money for our treatment and we are entitled for it as per the service conditions of judges... there should be some respect for privacy and if such informations are being disclosed, there will be no stopping... Today he is asking informations for medical expenses... Tomorrow he will ask what are the medicines purchased by the judges. When there will be a list of medicines he can make out what type of ailment the judge is suffering from. It starts like this. Where does this stop?

Then there have been several judgements where the High Court has upheld the CIC's order for disclosure, but the Supreme Court has overruled it to deny information; for example, Inst. Of Chartered Accountants vs. Shaunak H. Satya AIR 2011 SC 3336.

In 2013 the Supreme Court's interpretation in Girish Ramchandra Deshpande vs. Central Information Commission & Ors. (2013) 1 SCC 212 did not uphold the principle of "public interest in disclosure outweighing the harm to the protected interests." The respondent was an enforcement officer against whom there had been an enquiry. There was an enquiry report which the judgement denied access to. It said, "It would cause unwarranted invasion of privacy of individuals and has no relationship to any public activity or interest."

The petitioner sought details of the respondent's moveable and immovable properties and other details of his financial transactions. He sought details of gifts he had accepted. It was decided that this information featured in the respondent's income tax returns. The Supreme Court had to consider whether this information qualified as "personal information" as defined in clause (j) of Section 8 (1) of the RTI Act. The Supreme Court held in this case that income tax details can be disclosed only if they are in "the larger public interest". It said, that "in this case it would cause unwarranted invasion of the privacy of the individual and has no relationship to any public activity or interest."

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Amazingly, the judges accepted the claim of privacy for public servants for matters relating to public activity which are on public records. The judgement also ignored the proviso in Section 8 (1) "Provided that the information, which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person."

The Girish Deshpande judgment ignored an earlier 1994 judgement of the Supreme Court in the matter of right to privacy:

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 official duties. (R Rajagopal and Anr. vs State of Tamil Nadu (1994), SC)

In doing so this ruling helped to water down the RTI Act. Former Central Information Commissioner Shailesh Gandhi and advocate Sandeep Jalan say that the Girish Deshpande judgement has set an unfortunate precedent. This judgment has resulted in most information about public officials being denied including that regarding their work. According to Shailesh Gandhi:

Consequently arbitrary favours by Public servants and their corruption have been obscured from the eyes of the public. The Maharashtra government has issued a circular based on this judgement in which it instructs that all personal information of public servants must be refused because of the Girish Deshpande judgement.

Weakened by Murders

Transparency is a tough goal to achieve in a country with an entrenched bureaucracy and corruption to hide. A disproportionate price is paid by the information seekers on the frontline. The grim postscript to the saga of the assaults on transparency is the martyrs' roll call. To date 84 RTI activists have been killed, 169 assaulted, 183 harassed or threatened and seven deaths by suicide.

However, the current government has failed to protect RTI activists by operationalizing The Whistleblowers Protection Act which was passed and notified in 2014.

In addition, in 2017 the Department of Personnel and Training (DoPT) issued the new RTI Draft Rule 12 which permitted Central Information Commissioners to allow appeals to terminate on the death of an appellant. This overturned a 2011 recommendation of CIC. In a full court meeting held on 13 September 2011, it had passed the following resolution:

the Commission resolves that if it receives a complaint regarding assault or murder of an information seeker, it will examine the pending RTI applications of the victim and order the concerned Department(s) to publish the requested information suo motu on their website as per the provisions of law.

The objective in 2011 was to ensure that release of information would not be stymied by the murder of the RTI activist. The NDA government's draft rule endangered activists further by ensuring that the appeal was terminated upon the death of the applicant. After protests, the proposed rule was shelved.

Beyond legislation then, accountability for dilution rests equally with judges and the government of the day.

References:

The Hoot Archive/ Right to Information