Unending Struggle for Right to Information

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It is interesting that through five years of dithering over the bill on the right to information, the position of the central governments which has been run by two United Front governments, the BJP and its allies, has remained the same. The bill, as presented in parliament last month hardly does justice to the struggle to bring transparency to issues of governance.

A dithering over it for years, the central government has finally introduced the Freedom of Information Bill, 2000 in parliament on July 25. This is itself, will have to be considered an achievement. But, the struggle is far from over. In fact, the struggle has just started as the bill, presented in parliament, hardly does justice to the cause.

The very title of the bill is questionable. It is well established that the right to information is a fundamental right. The statement of objects and reasons (SOR) enclosed with the bill states that "the proposed Bill is in accord with both Article 19 of the Constitution as well as Article 19 of the Universal Declaration of Human Rights". There is, therefore, no question of watering it down to mere freedom of information which is to be at the whim and fancy of a government functionary. What is given by the Constitution cannot be diluted by a statute. In fact, the objective of the bill should merely be to operationalise the right to information given by the Constitution. The title of the bill should, therefore, more appropriately be Right to Information Bill, 2000 and not the Freedom of Information Bill, 2000 as proposed by the government. Paragraph 5 of the SOR states that the Freedom of Information Act will be consistent with the objective of having a stable, honest, transparent and efficient government. It is not clear how the act is expected to contribute to the stability of the government. The word 'stable' in the last but one line of paragraph 5 of the SOR may therefore be deleted.

The next question is to whom should the proposed act apply? Ideally, it should apply to all sections of the society and not just the government sector as provided in the bill. The private section, registered societies, charitable and other trusts, and other any state or central law must be covered by the provisions of the proposed act. For, right to information of a citizen needs to be exercised with reference to all such entities. This is particularly relevant in the context of the expanding role of the private sector and the impending downsizing of the government. It is not just the government bureaucracy which is impervious and unresponsive to people's grievances. As much, if not more, is the wooden-headedness and lethargy of the private sector. There is no reason why non-government organisations (NGOs) charitable trusts or trade unions should not be as accountable and as transparent as the government in a democracy. The ambit of the bill therefore needs to be expanded to cover all sections of the society.

In the very preamble of the bill, it is stated that freedom of information has to be "consistent with public interest". The concept of public interest can prove to be a dangerous one in the hands of the government. Why should it be left to the government to decide what is in the public interest? It is worth nothing that all denial of information so far and the rigours of the secrecy laws in force have also been justified by the government in 'public interest'. Once it is accepted that the right to information is a fundamental right, the question of it being in the public interest or otherwise does not arise. It is therefore suggested that the words, "consistent with public interest" appearing in the preamble of the bill may be deleted.

Enforcing Implementation

Looking at the resistance to the enactment of the law on the subject so far, it is necessary to ensure that the bill will be brought into force as soon as possible after it is passed by parliament. These anxieties are well borne out from the experience of a number of bills passed by parliament. There had been unconscionable delay in issuing requisite gazette notifications to give effect to them. These include the Prasar Bharati Bill, the Delhi Rent Control Bill and so on. It is therefore necessary to provide explicitly in section 5 (3) of the bill that the act shall come into force on the expiry of three months from the date of its passage by parliament.

The construction in section 3, namely, "Subject to the provisions of this Act, all citizens shall have freedom of information" is clumsy and meaningless. As stated earlier, the Constitution itself recognises right to information as one of the fundamental rights. there is therefore no need to provide for freedom of information separately. The bill should instead recognize the constitutional sanctity of right to information and should state that it is meant to operationalise that right.

Section 4 deals with obligations of public authorities to furnish certain information *suo motu* periodically. As compared to the earlier drafts prepared by the ministry and circulated for soliciting informal reactions as also the recommendations of the Shourie Committee, the provision is much more restrictive and needs to be liberalised to give freedom to various offices to review their own interactions with the public and to provide *suo motu* as much additional information as they deem necessary from time to time. The whole objective must be to make the act, by and large, redundant in terms of the need for a person to approach the government offices for information.

Section 4 (e) states that certain information pertaining to the proposed projects may be made available to the persons affected or likely to be affected by the project, in particular, "in the best interest of maintenance of democratic principles". It is suggested that the words, " and the canons of natural justice" may be added at the end of the sub-section after the word 'principles'. It is also proposed that the word 'maintenance' as above be substituted by the word 'promotion'.

Section 6 contains a welcome new provision to enable making requests for information through electronic media. It may be provided that in such cases, wherever feasible, replies, including intimation regarding quantum of fees to be remitted by the applicant, may also be sent by electronic media. This will save time and effort in transmission of information considerably.

Section 8 of the bill relates to exemption from disclosure of information. This section deserves the most careful scrutiny. It contains exemptions marked (a) to (g). Most of these sub-clauses contain several exemptions lumped together under one sub-clause. Thus, in effect, the exemptions from disclosure are many more than appear a first glance. Each of these exemptions needs to be discussed and analysed fully to understand all the implications. A few are considered illustratively hereafter.

The proposed exemption regarding 'conduct of international relations' contained in 8 (a) looks innocuous on the face of it but, as past experience shows, excessive secrecy in such matters may be against the national interest. This was amply borne out by our ill-advised involvement in Sri Lankan affairs during the regime of Indira and Rajiv Gandhi. Section 8 (c) refers to "information, the disclosure of which would prejudicially affect the conduct of centre state relations". It is not clear what kind of information is proposed to be covered in this provision and why these matters need to be held back from the people at all. This is particularly so in a country with a federal structure. Sub-sections (d) and (e) refer to cabinet papers, internal notings on the file, advice tendered by ministers and officers and so on. There is no justification for keeping these matters under wraps once a decision is reached on any matter. People should have the right to know the basis on which a decision has been taken. There

should be no reason to keep the advice of anyone on files a secret. If these matters are to be kept secret, the whole purpose of passing the legislation on freedom of information or right to information will be frustrated. It is necessary to note in this context that generally there are two kinds of officers in bureaucracy. The first, now an endangered species, is of those officers who are objective, fearless, apolitical and upright and are not afraid to give their free and frank advice dispassionately. Such officers will be happy if their advice becomes known. But, there are a large number of other officers who are prone to crawl when asked to bend and are happy to give advice as will suit the requirements of their advice to become public knowledge at any time. If administration has to be made accountable and transparent, undue secrecy in these matters has to be done away with. For obvious reasons, the bureaucracy as also the ruling political elite find it convenient to perpetuate the existing culture of secrecy.

Similarly, the provision pertaining to commercial secrets contained in section 8 (f) appears innocuous. It would be recalled that this very justification was invoked to keep back from the people the Power Purchase Agreement entered into by the government of Maharashtra with Enron. As is well known, this led to disastrous consequences and has become a major problem for generations to come. Thus, in all matters pertaining to exemptions, the overriding concern must be to safeguard national and public interest. We must take into account our past experience in these matters. It will be hazardous to turn a blind bye to it. All exemptions proposed in the bill deserve to be looked at afresh in this light. Substantial changes are necessary in this section if the basic purpose of the proposed act is not to be frustrated. It is also necessary to make an overriding provision in the bill that any information which cannot be denied to parliament and state legislature will have to be made available under the proposed act.

Welcome Provision

Section 8 (2) contains a welcome provision that. "Any information relating to any occurrence, event to matter which has taken place, occurred or happened 25 years before the date on which any request is made under section 6 shall be provided to any person making a request under that section". This automatically provides protection from public disclosure to all secret and confidential papers for a period of 25 years. First, this period is too long and needs to be reduced to 20 years. Second, there should also be more frequent reviews of such papers every five years so as to release such of them which need not be retained for a longer period. Third, there should be a Records Commission comprising eminent public figures, academics and senior government officers to review such matters and the decision of the commission should be final, unless it is set aside by the minister in charge of the subject concerned for reasons to be record in writing. Fourth, all powers retained by the government under the proviso to this sub-section- 'Provided that where any question arises as to the date from which the said period of 25 years has to be computed, the decision of the central government shall be final"- should be entrusted to the Records Commission.

Section 9 relates to the grounds for refusal to allow access to information in certain cases. Sub-section (d) thereof pertains to request (which) " relates to information which would cause unwarranted invasion of the privacy of any person". A reference may be made in this context to the proviso to section 11 which states that, "Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party". A proviso on similar lines needs to be incorporated in section 9 to ensure that public interest is not compromised.

Section 11 pertains to third party information. It provides for calling for representation, if any, from the third party against furnishing of any information. The time period to be given to the third party to make such a representation is proposed as 50 days. This is too long and needs to be reduced to 30 days.

As brought out in section 12, appeal is to be preferred to such authority as may be prescribed by rules separately. This is fine but it is necessary to note that appeals must be to authorities which are closer to the applicant. It is hoped that appeals will not have to be filed to the state government. It will be difficult for individual applicants to visit the state headquarters to pursue their appeals.

Section 14 states that, " The Provisions of Official Secrets Act, 1923, and every other Act in force shall cease to be operative to the extent to which they are inconsistent with the provisions of this Act". This is fine but it is necessary to add the words, 'Rules and Manuals' after the words 'every other Act' to ensure that even if no action is taken expeditiously by the government to amend the rules and manuals which are in contravention of the provisions of the Freedom of Information Act, such provisions will cease to have any effect from the date the act comes into effect.

Section 15 states that, "No court shall entertain any suit, application or other proceedings in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act". The purpose of this provision is not clear. Such a provision will imply that a citizen will be left only with the remedy of writ petitions to the high court. Such a course of action is costly. Section 15 therefore needs to be deleted. It should be left to the discretion of a court to admit any civil suit, keeping in mind the fact that the law provides for its own separate appellate procedure.

The following minor changes also need to be carried out in the bill:

(i) In section 4 (e), line 2, the word 'or' may be changed by the word 'and' so that information pertaining to new projects can be made available to people affected by the project as also the general public.
(ii) In section 7(3) (ii), the word 'rejections' in the phrase 'appeal against such rejections' may be substituted by the word 'rejection' as it is obviously a typographical error.
(iii) In section 10, line 3, the word 'obtain' is clearly misplaced and needs to be substituted by the word 'contain'

The Shourie Committee as also the earlier draft bills prepared by the government contained a provision for setting up freedom of information councils in each state and at the centre to oversee the implementation of the act. This very worthwhile provision has been deleted in he bill introduced in parliament. As a result, there will be no institutional mechanisms or forums for taking a periodic review of the implementation of the act. This is a retrograde step. Such councils need to be set up not only at the state and the central level but also need to be established at the district levels to give a push to the speedy implementation of the act.

It is interesting that during the last five years of extensive discussions on the bill, the position of the central government has remained unaltered, with regard to the basic features of the bill, irrespective of which political party/parties were in power. During this period, the central government was rules by two United Front governments as also the BJP and its allies. It is further interesting that the nature of the political party in power in the state government also seems to make no difference to the fortunes of the legislation on the right to information. It is not therefore surprising that the act on the subject passed in Tamil Nadu governed by DMK and its allies has hardly anything to commend itself. The same is true of the bill on the subject passed in July-August 2000 in Maharashtra which is ruled by the

coalition of the two Congress parties. It is disconcerting that in this important area of governance, the interests of bureaucracy and the ruling political elite seem to coverage against the empowerment of the common man. After 50 years of independence, there can be no more eloquent commentary on our democracy!