Dismantling the walls of secrecy

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It all began in 1990 when the Mazdoor Kisan Shakti Sangathan (MKSS), a collective of farmers and labourers, was formed in Devdungri, a Rajasthani hamlet. Members of the collective were working for a state employment generation scheme, yet were being paid significantly less than the guaranteed minimum wage. On demanding their legal entitlement, they were told that official records did not reveal their having done the necessary work. Access to these records was denied, ostensibly because they were secret state documents. When a sympathetic officer or two did give them access to some documents, they found serious anomalies. Entries and signatures were being faked to draw exaggerated wages, most of which were pocketed by officials.

The MKSS also discovered some panchayati raj documents in which exaggerated bills for rural projects had been submitted. This disclosed information was placed in the public domain through live wire village- based public hearings (jan sunwais) and, as the establishment and the people lined up on two sides of the disclosure demand, it became clear that information access would require a strong legal backing.

The realisation dawned that secrecy enabled corrupt officials to siphon off minimum wages and other entitlements of the poor. A movement demanding the right to information was thus born and its first champions were the disempowered rural workers in a remote rural area of Rajasthan.

The initial slogans, hamara paisa, hamara hisaab (Our money, Our accounts) and hum janenge, hum jiyenge (We will know, We will live), redefined the discourse to give real shape to traditional urban claims of transparency. The idea spread to the rest of the country in a few years and has now captured public imagination in a manner with few parallels in independent India.

Long before the beginning of the popular movement, the Supreme Court had declared the right to information to be a fundamental right in a plethora of cases. In the Raj Narain (1975), S.P. Gupta (1981) and Indian Express Newspapers (1986) cases, the Supreme Court held that the fundamental right to freedom of speech guaranteed under Article 19(1)(a) of the Constitution was based on the foundation of the freedom of right to know and all citizens must have the right to know about the activities of the state. The right was reiterated in the Association for Democratic Reforms case (2002), when the Supreme Court ordered candidates contesting elections to legislative bodies to declare their assets and any criminal antecedents.

However, the MKSS experience gave a distinct and additional constitutional grounding to the right to information. The struggle of poor workers demanding access to their wage records had established a clear link between access to information and ones livelihood and quality of life. One could now see that the right to information was not only necessary for the protection of freedom of speech but also for respecting the right to life with dignity constitutionally guaranteed under Article 21.

However, a judicial declaration that the right to information is a constitutional right was not enough to make it a reality for most people. Enabling legislation that defined the scope of the right and provided for a dedicated enforcement mechanism was needed to realise it practically. Some State governments began to respond to the growing clamour for legislation. Between 1997 and 2004, nine State governments in chronological order Tamil Nadu, Goa, Rajasthan, Karnataka, Delhi, Maharashtra, Assam, Madhya Pradesh and Jammu and Kashmir passed right to information laws. In 2002, Parliament enacted the Freedom of Information Act. However, only a few of these Acts were sincere attempts to make the right available to citizens. Many (including the parliamentary Act of 2002) merely paid lip-service to the idea. Some were even retrogressive. Popular opposition to the 2002 Act ensured that it was never brought into force.

After over a decade of struggle, a meaningful right to information was realised when the current Parliament fulfilled the Congress partys election promise by enacting the Right to Information Act, 2005. The National Advisory Council, which counted the MKSS Aruna Roy among its members, played a significant role in drafting this powerful legislation.

The surest way to evaluate the 2005 Act is to count the feathers it ruffled. Soon after it came into being, the Department of Personnel and Training (the nodal agency for the Acts implementation) declared on its website that file notings were not liable to be disclosed under the Act. File notings detail the chronology of the decision-making process, the persons who had access to a file and the rationale behind a decision. As such, access to them is crucial in order to determine whether a decision was taken by the right authorities following the correct procedure and on relevant considerations. After clear rulings by the Central Information Commission that the departments interpretation was wrong, the Union Cabinet in 2006 cleared an amendment to the Act. Had the amendment been passed by Parliament, it would have excluded access to file notings and other aspects of the decision-making process. Trenchant public criticism and protests led to the dropping of the amendment.

Even former President A.P.J. Abdul Kalam expressed misgivings about the inclusion of the Presidential Secretariat in the purview of the Act. Disclosure of the correspondence between the then President and Prime Minister in the aftermath of the pogrom in Gujarat in 2002 was stalled on the basis of the claim that it was constitutionally privileged communication. The Information Commissions order to disclose the correspondence have been stayed by the Delhi High Court. The Army too sought blanket exemption from the

scope of the Act. The problem with these demands is that Section 8 of the Act already has a list of grounds on which sensitive information can be kept secret. What these authorities were demanding was blanket exemption for all information held by them, sensitive or otherwise.

Perhaps the most cynical episode in this saga of institutional exceptionalism is the recent controversy surrounding the office of the Chief Justice of India. In a 1997 resolution, the judges of the Supreme Court decided that they would declare their personal assets to the Chief Justice. Subhash Agrawal, an applicant, wanted to know whether such declarations were being made. The application was dismissed by the Public Information Officer of the Supreme Court. On appeal, the Central Information Commission held that Agrawal had the right to this information within the scope of the Act, thereby ordering the Supreme Court to disclose it. Surprisingly, the Supreme Court has decided to appeal against this order before the Delhi High Court, resulting in a curious constitutional anomaly.

On merits, the Supreme Court does not have a case. Its appeal claims that there is no provision either in the Constitution of India or under any other law which requires the Honble judges of the Supreme Court to declare their assets to the Honble Chief Justice of India.

To begin with, the claimant did not ask for details of judges assets he only wished to know which judges had complied with the (admittedly voluntary) resolution of the court. But even if he had, the Supreme Court itself had ordered politicians to declare their assets in Association for Democratic Reforms case (2002), suggesting that this was a constitutional imperative. Why should the same logic not apply to judges?

Deprived of any normative constitutional argument, the appeal filed by the court further argues that the office of the Chief Justice of India is altogether distinct from the Supreme Court of India as an institution and therefore the Chief Justice of India is not a Public Authority, as defined in Section 2(h) of Right to Information Act. Even semantically, this is a bizarre argument. Section 2(h) of the Act includes any authority or body or institution of self-government established or constituted ... by or under the Constitution within its definition of public authority.

Article 124 of the Constitution says that There shall be a Supreme Court of India consisting of a Chief Justice of India and [certain other judges]. Section 2(e) of the RTI Act further provides that competent authority means ... the Chief Justice of India in the case of the Supreme Court. Could the language be any clearer?

While it is important to continue to fight the backlash, it is also important to look ahead. Section 4 of the RTI Act has the greatest potential, but remains among its most underused provisions. It imposes an obligation on public authorities to publish a wide range of information, including all relevant facts while formulating important policies or announcing

the decisions which affect the public and as much information suo motu to the public at regular intervals through various means of communication, including Internet, so that the public have minimum resort to the use of this Act to obtain information.

The provision wisely predicts that the number of applications seeking information will decline in proportion to the volume of information proactively disclosed. The under-realised potential of this far-reaching provision is evident in the case of the Official Gazettes. The gazettes are one of the most significant sources of information. Article 366(19) of the Constitution defines public notification to mean a notification in the Gazette of India, or the Official Gazette of a State. In other words, anything published in an Official Gazette is deemed to have been communicated to the public at large. Every Act, proposed Bill, order, regulation and rule is notified in gazettes. One would, therefore, assume that they should be the most easily accessible document. In this age of cyber connectivity, they should surely be published online.

In fact, Section 8 of the Information Technology Act, 2000 envisaged as much by providing that whatever information is required to be published in the gazette may be published online as an electronic gazette. Such publication will obviate the need to file RTI applications to obtain information that is supposed to have already been notified to citizens. Even people without direct access to the Internet may find it easier to access the gazettes through local non-governmental organisations (NGOs) or cyber cafes rather than through government departments.

The issue is fundamental to the idea of the rule of law and democracy. Gazettes publish laws which are supposed to guide a citizens behaviour. In courts, ignorance of law is no excuse. To ensure that the legal presumption of knowledge of laws is not entirely unfounded, access to laws and other public notices should be made as easy as possible. One should certainly not have to pay for them.

It is often presumed that the obligation of suo motu publication under Section 4 is not backed by any provision of the RTI Act. This is mistaken. Under section 19(8)(a)(iii), the Central and State Information Commissions are empowered to require the public authority to publish certain information or categories of information. This power is in addition to the power to direct disclosure to an individual applicant. The commissions must start resorting to this power for classes of information routinely being requested. In the long term, proactive publication of information is the only satisfactory way of dealing with the increasing workload of and procedural delays in the functioning of the information commissions.

The other important objective should be to expand the scope of public authorities liable to disclose information. This should include political parties, religious and charitable organisations, NGOs, and other private bodies performing functions of a public nature (for example, pharmaceutical companies, providers of health and education services, and

housing societies). This expansion is particularly important given the post-liberalisation rollback of the state. When an increasing number of public functions are being performed by private bodies, it is imperative to supplement institutional understanding of public authority in Section 2(h) with a functional understanding of bodies (public or private) that perform functions of a public nature.

Several other issues also need attention. It has been alleged that the Delhi High Court grants interim stays on rulings of the Central Information Commission as a matter of course. Without judicial support, the Act is as good as dead. Further, the colonial Official Secrets Act, 1923, continues to exist. Even though Section 22 of the RTI Act of 2005 specifies that in the event of any inconsistency between the two Acts, the 2005 Act shall prevail, the continued existence of the 1923 Act creates scope for confusion. Another provision with its roots in colonial history (although re-enacted by independent India) is Section 197 of the Code of Criminal Procedure, 1973, which requires prior governmental sanction to prosecute public servants. Since governmental sanction is rarely forthcoming, this provision is one of the most powerful obstacles to accountability.

Further still, violence and harassment faced by whistle-blowers and applicants need to be addressed. A whistle-blowers charter in the manner of the British Public Interest Disclosure Act, 1998 is urgently required. Geographically, the 2005 Act does not extend to Jammu and Kashmir. The States Act of 2004 is woefully inadequate and needs urgent revision.

Implementing these suggestions might help dismantle the walls of secrecy and give practical shape to some of the popular demands for institutional transparency. Bereft of transformative subaltern imagination, however, they remain humbly academic (and a bit too lawyerly).

As Aruna Roy says, the real democratic political potential of the RTI discourse lies in the inversion of power relationships, particularly on the margins. There is no doubt the voices that will emerge from the next Devdungri will surprise us with their sagacity, pragmatism and creativity.

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