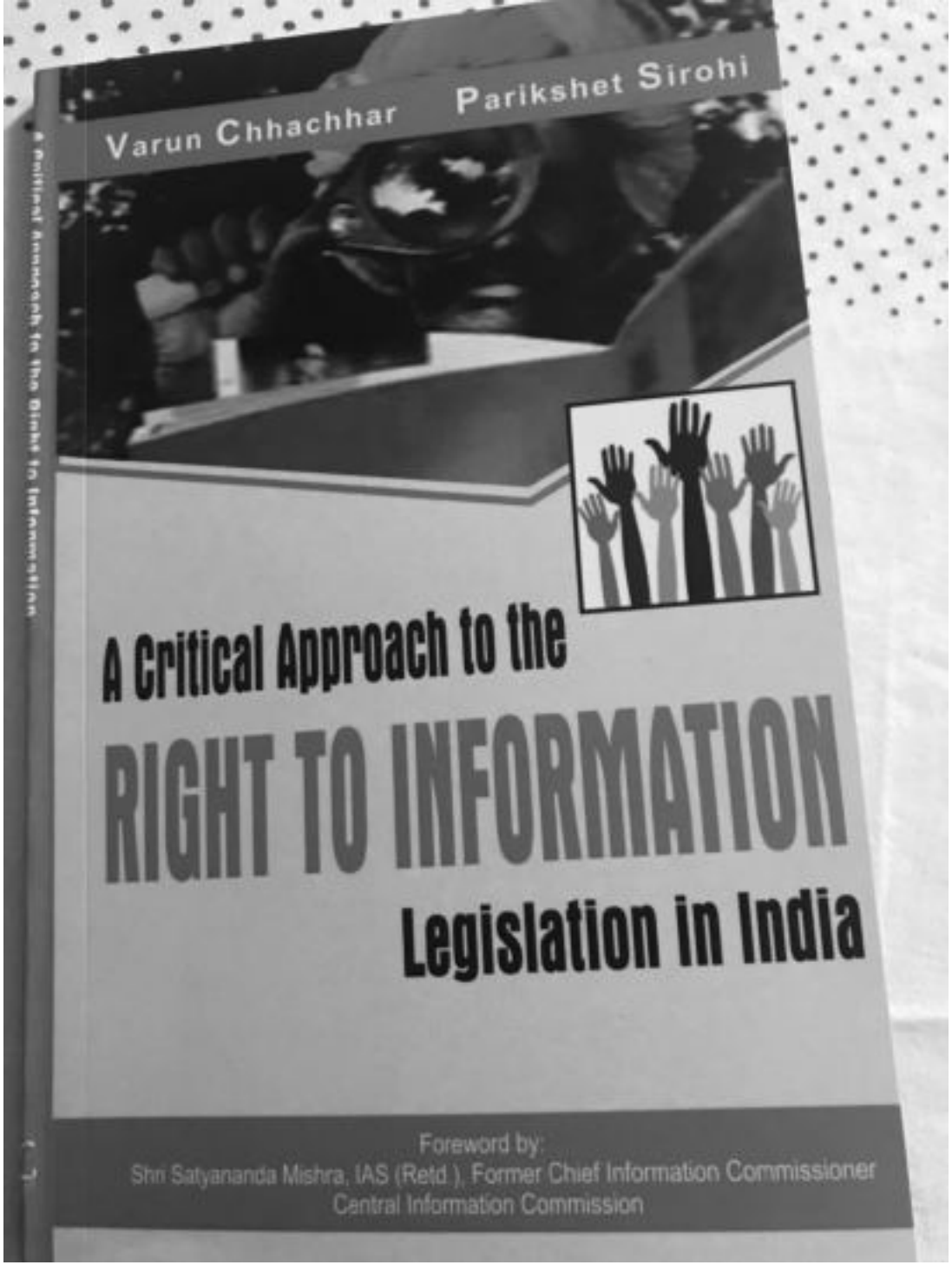

Right to Information as a Constitutional Right in Contemporary Indian Society with Special Reference to Judiciary

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ABSTRACT

The right to information is a hope for democratic framework around the globe, more so in India where the Right to Information (RTI) Act, 2005 works as a tool for eradicating corruption from society. It is important to understand the development of right to information law in India because it has given tooth to whistleblowers throughout the country and in fact around the globe. Right to information works like sunshine and acts like a disinfectant in a corruption ridden society like ours. The role by the judiciary in India towards better implementation of RTI is commendable and worth appreciation. The author has attempted to examine the development of right to information law in India as a constitutional right with special reference to our judiciary.

Introduction

Freedom of Information (FOI) is a basic human right. In order to make governments accountable, citizens have the 'right to know' and they have the right of access official documents.

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FOI has developed at a brisk pace in recent years, but it is hardly a new concept. The roots of the FOI principle date back to the 18th Century, which is often called the 'Age of Enlightenment'. In Sweden and Finland, the year 2006 was observed as the 240th anniversary of FOI. The world's first FOI legislation was adopted by the Swedish Parliament in the year 1766. This publication included the English translation of this Ordinance on freedom of writing and the press. The enlightenment thinker and politician Anders Chydenius [1] who belonged to the Finnish city of Kokkola, played a crucial role in creating the new law. The key achievements of the 1766 Act were the abolishment of political censorship and the gaining of public access to government documents[2]. Although the innovation was suspended from 1772-1809, the principle of publicity has since remained central in the Nordic countries.

Over recent decades, Chydenius' legacy has received increased global recognition. With the creation of the United Nations and international standards on human rights, the right to information began to spread. Today, FOI is recognized under international law. Article 19 of both the Universal Declaration on Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 provide that every person shall have the right to seek and impart information. There is growing recognition that the right to seek information is a part of right to freedom of information. Over the last forty years, there has been a dramatic increase in the number of countries that have adopted freedom of information laws. A milestone was the American Freedom of Information Act (FOIA) of 1966, and many countries started to follow the FOIA model of access to government documents. According to a global survey, some seventy countries of the world have now adopted comprehensive FOI laws and another fifty have legislations pending.[3]

After fifty five years of the coming into force of the Constitution of India, a national law providing for the right to information was passed by both Houses of Parliament on May 12 and 13, 2005. The Bill with 146 amendments was adopted by voice vote as the RTI Act, 2005. This law satisfied a long

raised through various peoples' movements, and gave content and meaning of the right to information which has been recognized in India since 1973 by the Supreme Court as a concomitant of the fundamental right to 'freedom of speech and expression' guaranteed under Article 19(1) (a) of the Constitution of India.[4] It was undoubtedly, one of the most significant events in the life of a democratic India. In a democracy, it is the people who are the sovereign. They appoint governments, as well as dismiss them. In order to wield such immense power, people of the democratic state need to have access to important information pertaining to development, investment, budgets and expenditure, official actions and proper working of governmental institutions and their servants . This Paper discusses the importance, significance and emergence of RTI in India and highlights the salient features of the RTI Act, 2005 and difficulties in its implementation.

Importance and Significance of RTI in India

The Constitution of India speaks in the flame of "We the people of India".[5] The two major institutions of governance, namely Parliament and the state Legislatures have representatives of the people elected through free and fair elections.[6] Every adult of more than eighteen years of age is entitled to vote,[7] and no person is to be ineligible to vote on grounds of religion, race, caste or sex.[8] These representative bodies, unless earlier dissolved, have a tenure of five years.[9] If a legislature is dissolved prematurely, fresh elections are held. The legislatures and the governments are supposed to be responsible to the people. The questions which arise are:

- whether such responsibility can be reinforced;
- how will the people judge whether the legislatures or the governments have acted in their interest; and
- whether the governments have fulfilled the promises, which they made in their election manifestoes.

In the Legislature, the Opposition must act as a watchdog on behalf of the people. However, if it acts partisan in the interest of a political party rather than the people, then the question is who will

check the same. The obvious answer comes in the form of civil society, i.e. the general public. No democracy can be meaningful where civil society cannot audit the performance of the elected representatives, the bureaucrats and the other functionaries who act on behalf of the State. In order to be able to audit the performance of the Government, the people have to be well informed of its policies, actions and failures. Therefore an informed citizenry is a condition precedent to democracy. The right to vote which the Constitution gives to every person above the age of eighteen years, and which has been exercised in elections during the last sixty five years has doubtlessly created political awareness among the people. The right to vote has, therefore, proved to be an instrument of political empowerment. However, an uninformed citizenry exercises its right to vote in light of individual benefits. In order to develop a free and full grown democracy, an educated and well-informed citizenry remains a pre-condition; only then will the right to franchise serve social welfare purposes and ensure public participation in state politics.

Emergence of the Right to Information as a Phenomenon

It is the poor, the minorities and the disadvantaged sections of the population, including women who should have maximum stakes in the successful functioning of a democracy. Peoples' demand for the right to information is phenomenal. In ancient Rome, the Patricians monopolized the knowledge of the laws, while Plebeians suffered from ignorance. There was a bitter struggle for access to knowledge of the law, which resulted in the first codification of the law in Rome called the 'Twelve Tables'.[10] In England, Jeremy Bentham's crusade for codification for the laws and his dislike of the Blackstonian doctrine of legal philosophy and criticism of the theory of natural law arose out of his belief that uncertainty and unpredictability of the laws were products of evil.[11]

In India, the caste system monopolized access to knowledge in the higher castes. B.R. Ambedkar, the chief architect of the *Indian Constitution*, was someone who had suffered the miseries of having been born in a most marginalized caste. He attempted

to awaken the suffering people against this tyrannical system and demanded access to knowledge for all. The White racist regime in South Africa and the Whites in the United States also kept the Blacks away from knowledge. Knowledge has always been synonymous with power, and power includes liberty. Equal access to knowledge has thus been an important issue in the struggle for social and economic equality.

The British colonial government in India kept itself at a distance from the people. It thrived on the culture of secrecy and distrust of the local people. Such a culture also produced distrust of the government amongst the people. The culture of secrecy continued even after independence and even after India became a republic. It is an unfortunate fact that the governments of independent India functioned in the same milieu as that of the colonial government until recently.[12] The colonial government was not responsible to the people. It thrived on secrecy, which was a weapon for keeping the people away from power. However, the governments in independent India, both at the Centre as well as in the states, drew their power from "We the people of India",[13] and they unfortunately continued this tradition of secrecy. The Official Secrets Act (OSA), 1923 acted as a remnant of colonial rule shrouding everything in secrecy.

From Secrecy to Disclosure

The OSA enacted during the colonial era, governs all matters of secrecy and confidentiality in governance. This law largely deals with matters of security and provides a framework for dealing with espionage, sedition and other assaults on the unity and integrity of the nation. However, given the colonial climate of mistrust of people and the primacy of public officials in dealing with the citizens, OSA created a culture of secrecy in our country. Confidentiality became the norm and disclosure the exception. While Section 5 of OSA was obviously intended to deal with potential breaches of national security, the wording of the law and the colonial times in which it was enacted / implemented, made it into a catch-all legal provision converting practically every issue of governance into a confidential matter. This tendency

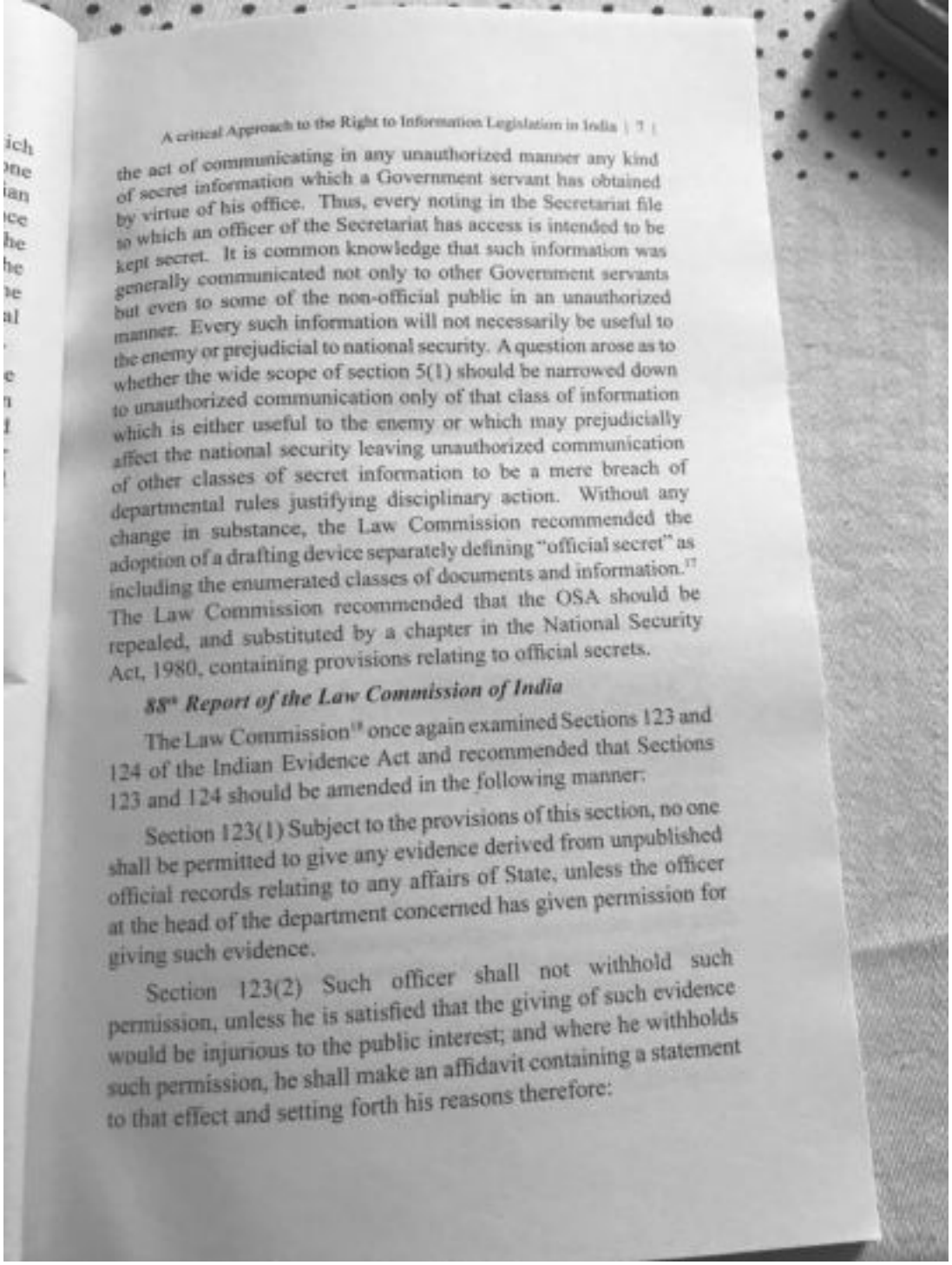
was buttressed by the Civil Service Conduct Rules, 1964 which prohibit communication of an official document to anyone without authorization. Not surprisingly, Section 123 of the Indian Evidence Act, enacted in 1872, prohibits the giving of evidence from unpublished official records without the permission of the Head of the Department, who has abundant discretion in the matter. Needless to say that even the instructions issued for the classification of documents for security purposes and official procedures displayed this tendency of holding back information.

In *Sama Alana Abdulla v. State of Gujarat*[14], the Supreme Court had held that the word 'secret' in clause (c) of sub-section (1) of Section 3 of OSA qualified official code or password and not any sketch, plan, model, article or note or other document or information. It further laid down that when the accused was found in conscious possession of the material (map in this case) and no plausible explanation has been given for its possession, it has to be presumed as required by Section 3(2) of the Act that the same was obtained or collected by the appellant for a purpose prejudicial to the safety or interests of the State. Therefore, a sketch, plan, model, article, note or document need not necessarily be secret in order to be covered by the Act, provided it is classified as an 'Official Secret'. Similarly, even information which does not have a bearing on national security cannot be disclosed if the public servant obtained or has access to it by virtue of holding office. Such illiberal and draconian provisions clearly bred a culture of secrecy[15].

Recommendations of various bodies

43rd Report of the Law Commission of India

The Law Commission in its 43rd Report [16], summarized the difficulties encountered with the all-inclusive nature of Section 5 of the OSA in the absence of a clear and concise definition of 'official secret' by stating that the wide language of section 5 (1) may lead to some controversy. It penalizes not only the communication of information useful to the enemy or any information which is vital to national security, but also includes



the act of communicating in any unauthorized manner any kind of secret information which a Government servant has obtained by virtue of his office. Thus, every noting in the Secretariat file to which an officer of the Secretariat has access is intended to be kept secret. It is common knowledge that such information was generally communicated not only to other Government servants but even to some of the non-official public in an unauthorized manner. Every such information will not necessarily be useful to the enemy or prejudicial to national security. A question arose as to whether the wide scope of section 5(1) should be narrowed down to unauthorized communication only of that class of information which is either useful to the enemy or which may prejudicially affect the national security leaving unauthorized communication of other classes of secret information to be a mere breach of departmental rules justifying disciplinary action. Without any change in substance, the Law Commission recommended the adoption of a drafting device separately defining "official secret" as including the enumerated classes of documents and information.[17] The Law Commission recommended that the OSA should be repealed, and substituted by a chapter in the National Security Act, 1980, containing provisions relating to official secrets.

88th Report of the Law Commission of India

The Law Commission[18] once again examined Sections 123 and 124 of the Indian Evidence Act and recommended that Sections 123 and 124 should be amended in the following manner:

Section 123(1) Subject to the provisions of this section, no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, unless the officer at the head of the department concerned has given permission for giving such evidence.

Section 123(2) Such officer shall not withhold such permission, unless he is satisfied that the giving of such evidence would be injurious to the public interest; and where he withholds such permission, he shall make an affidavit containing a statement to that effect and setting forth his reasons therefore:

Provided that where the Court is of opinion that the affidavit so made does not state the facts or the reasons fully, the Court may require such officer or, in appropriate cases, the Minister concerned with the subject, to make a further affidavit on the subject."[19]

Section 123(3) where such officer has withheld permission for the giving of such evidence, the court, after considering the affidavit or further affidavit, and if it so thinks fit, after examining such officer or, in appropriate cases, the Minister, orally-

(a) Shall issue a summons for the production of the unpublished official records concerned, if such summons has not already been issued;

(b) Shall inspect the records in chambers; and

(c) Shall determine the question whether the giving of such evidence would or would not be injurious to the public interest, recording its reasons therefor.

Section 123 (4) Where, under sub section (3), the court decides that the giving of such evidence would not be injurious to the public interest, the provisions of sub-section (1) shall not apply to such evidence".

Section 124(1) No public officer shall be compelled to disclose communications made to him in official confidence, when the court considers that the public interests would suffer by the disclosure.

Section 124(2) Where a public officer who is a witness is asked a question which might require the disclosure of any such communication, and he objects to answering the question on the ground that the public interests would suffer by its disclosure, the court shall, before rejecting his objection, ascertain from him, in chambers, the nature of his objection and reasons therefor.

Section 124 (3) Nothing in this section applies to communications contained in un-published official records relating to any affairs of State, which shall be dealt with under section 123.[20]

Recommendation of H.D. Shourie Committee

The H.D. Shourie Committee[21] also examined Sections 123 and 124 of the Indian Evidence Act and recommended amendments, which are on similar lines as those suggested by the Law Commission of India in its 88th Report.

Report of the Second Administrative Reforms Commission (2006)

The Administrative Reform Commission 2006[22] studied all these recommendations and is of the view that the existing provisions need amendment on the lines indicated below:

a. Section 123 of the Indian Evidence Act, 1872 should be amended to read as follows:

(1) "123.(1)Subject to the provisions of this section, no one shall be permitted to give any evidence derived from official records which are exempt from public disclosure under the Right to Information Act, 2005.

(2) Where he withholds such permission, he shall make an affidavit containing a statement to that effect and setting forth his reasons therefore.

(3) Where such officer has withheld permission for the giving of such evidence, the Court, after considering the affidavit or further affidavit, and if it so thinks fit, after examining such officer or, in appropriate cases, the Minister, orally:

a) Shall issue a summons for the production of the unpublished official records concerned, if such summons has not already been issued.

b) Shall inspect the records in chambers; and

c) Shall determine the question whether the giving of such evidence would or would not be injurious to public interest, recording its reasons therefore.

(4) Where, under sub-section (3), the Court decides that the giving of such evidence would not be injurious to public interest, the provisions of subsection

(1) shall not apply to such evidence. Provided that in respect of information classified as Top Secret for reasons of national security, only the High Court shall have the power to order production of the records."

Section 124 of the Indian Evidence Act will become redundant on account of the above and will have to be repealed.

Role of Judiciary

The common man did not have any legal right to know about the public policies and expenditures. It was quite ironical that people who voted the persons responsible for policy formation to power and contributed towards the financing of huge costs of public activities were denied access to the relevant information. This culture of secrecy resulted in the prolific growth of corruption at all levels in the country. In the face of non-accountability of the public authorities and lack of openness in the functioning of the Government, abuse of power and unscrupulous diversions of the public money became the order of the day. Indian democracy soon recognized the efficacy of the 'right to know' which is the *sine qua non* of an effective participatory democracy and raised it to the status of a fundamental right. It was soon realized that with regard to functioning of the Government, disclosure of information must be the ordinary rule, while secrecy must be the exception, justifiable only when it is in public interest. The strongest exposition in this regard came from K. K. Mathew, J. in *State of U. P. v. Raj Narain*[23] . It was emphasized that in "…..a government of responsibility like ours where all the agents of the public must be responsible for their conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by the public functionaries….." The facts of this case were that Raj Narain who challenged the validity of the then Prime Minister Mrs. Indira Gandhi's election, required the disclosure of the Blue Book which contained the tour program and security measures taken for the visit of the Prime Minister. Though the disclosure was not allowed, Mathew, J. held that "….the people of the country were entitled to know the particulars of every public transaction in all

its hearing...".

The right of the public to hear and be informed is also within the concept of the freedom of speech. The act of the Government when it insisted upon a newspaper to maintain a particular level of circulation does not abridge the freedom of speech but only enriches and enlarges it. In other words, under the theory of freedom of speech, not only is the right of the citizens to speak preserved but also the right of the community to hear. Thus, a policy for the distribution of newsprint and maintenance of circulation at its highest possible level, furthers the right of the community to hear and will only advance and enrich that freedom.[24] In modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government and judiciary because as per constitutionalism, it is for the people, by the people and from the people. However like other rights, even this right has recognized limitations; it is by no means, absolute. It is no doubt true that in a democratic framework, free flow of Information to citizens is necessary for proper functioning, particularly in matters which form part of public record.[25]

The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transaction which can at any rate have no repercussions on public security.[26] To cover with the veil of secrecy, the common routine business is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and justify their acts is the chief safeguard against oppression and corruption. The principle of the rule of non-disclosure of records relating to the affairs of the state is a concern for public interest.[27]

It is obvious from our Constitution that we have adopted a democratic form of government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they

should be governed and they are entitled to call upon those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that people should have information about the functioning of their Government. It is only if people know how the government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy.

The citizen's right to know the facts about the administration of the country is thus one of the pillars of democratic state. It is for this reason that the demand for openness in Government is becoming increasingly prominent in different parts of the world. This demand for openness in Government is principally based on two reasons. It is now widely accepted that democracy does not consist merely in people exercising their franchise once in five years to choose their rulers and once the vote is cast, then retiring in the passivity and not taking any interest in the functioning of the Government. Today, it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means that people should not only cast their intelligent and rational votes but should also exercise sound judgment on the conduct of the Government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government - an attitude and a habit of mind. This important role of people can be fulfilled in a democracy only if it is an open Government where there is full access to information with regards to the functioning of the Government.[28]

The disclosure of assets and liabilities of candidates contesting elections is one of the important aspects to which extensive reference has been made in *Association for Democratic Reform's Case*[29]. The Apex Court did consider it, after an elaborate discussion, as a vital piece of information as far as the voter is concerned. Unfortunately, the observations made by the court in this regard have been given a short shrift by Parliament with little realization that such information is necessary to give

effect to the freedom of expression. To nullify the effect of the Supreme Court judgment and the subsequent notification of the Election Commission, the Parliament inserted Section 33B in the Representation of Peoples Act, 1951 by an Amendment Act of 2002. The amended Act provided that only the candidates who are elected are required to give details of their assets and liabilities to the concerned presiding officers of the Houses to which they are elected, and not the candidates who are not elected. The People's Union for Civil Liberties moved the Supreme Court challenging the constitutional validity of the newly inserted 33B in the case of *People's Union of Civil Liberties* v. *Union of India*.[30] The court observed that voter's speech and expression in case of election would include casting of votes, that is to say, voters speak out or express by casting vote. For this purpose, information about the candidate to be selected is must. The voter's right to know the antecedents, including criminal past of his candidate, contesting elections for MP or MLA position, is much more fundamental and basic for survival of democracy. The little man (voter) may think over before making his choice of electing law-breakers as law-makers.

The Supreme Court in *Union of India vNamit Sharma*,[31] was called up to decide whether or not the appointees to the Information Commission must possess judicial qualifi cations. The Supreme Court in its earlier judgement in *Namit Sharma v Union of India*,[32] had decided in September , 2012 that Information Commissioners are judicial tribunals performing 'functions of wide magnitude' including function of judicial and quasi-judicial nature. Moreover, the Information Commission "is judicial tribunals having all the essential trappings of a court". Therefore, to be appointed as an Information Commissioner, an individual must possess the judicial acumen and expression requisite to "fairly and effectively deal with the intricate problems of law that would come up for determination before the Information Commission".

However, when this judgement of *Namita SharmaCase* was to be implemented, there were practical diffi culties, one of them being diffi culty to fi nd a large numbers of competent judges

to be appointed as Information Commissioners in Information Commissions across the country. Another problem noticed was that carrying out the judgement under Right to Information Act would require immediate changes in the Right to Information Act. Therefore in reaction to the judgement of *Namita SharmaCase*, the government fi led a review petition before Supreme Court and the Court found that it had "made a patent error of law". The Court overruled its own judgement of 2012 and held that "although Information Commissions have a duty to act judicially and perform quasi-judicial functions" they need not necessarily have the experience and acumen of a judicial officer.From this discussion, it can be seen that Indian judiciary has played a positive role in recognizing and developing the right to information in the Indian Republic.

Challenges to an Archetypal Democracy

The inability of our governments to provide effective governance and a semblance of justice to the poor and marginalized has had its own consequences. Apart from the suffering that the lackadaisical attitude of Government functionaries has inflicted on the citizens of India, it has also fostered a violent response. From the late 1960s onwards, there has been a festering armed revolution in various parts of the country. Originally known as Naxalism, after the Naxalbari village of West Bengal from where it originated, a new and somewhat transformed version of the armed "revolution" is now more popularly known as Maoism. A few years back, the then Prime Minister had declared Maoism to be the greatest threat to India's internal security[33]. The popularity of Maoism has ebbed and waned over the years. In the early 1990s, with the opening up of the economy, many believed that corruption and the poor delivery of services could now be tackled through the three pillars of the new economic order namely privatization, liberalization and globalization. The dismantling of the *license raj* regime[34] and the inclusion of the private sector into core economic activities was seen as the way to break the nexus between the corrupt bureaucrat and politician, and deliver essential services and economic growth to the citizens of India.

However, nearly two and a half decades down the line, we see that even though the economy has grown tremendously, the stock exchange is doing well and India has all but weathered the global economic meltdown, the plight of the poor and the marginalized seems no better than what it was then. What we are now seeing is that corruption at top levels of the Government is increasingly being replaced by crony capitalism and the fruits of economic gain are not being shared with the poor and the downtrodden. Maoists hitherto fought against misgovernance by organs of the State; now they are fight against the usurping of natural resources and land by corporations intent on building factories, mining natural resources, and displacing local populations. Booker Prize winning author Arundhati Roy suggests that places where violence is seen as a form of opposition to the Memorandum of Understanding (MoUs) being signed between governments and profit seeking corporations, can more appropriately be called "MoUist corridors"[35]. Perhaps an alternate to the armed struggle that started around Naxalbari village of West Bengal in the late 1960s is the RTI movement that started around Devdhungari village in Rajasthan in the early 1990s. Reacting to similar types of oppression, corruption and apathy, a group of local people, led by the Mazdoor Kisan Shakti Sangathan[36] (MKSS), decided to demand information from the Government. "Armed" with this information, they proposed to confront the Government and its functionaries and demand justice.

From these modest beginnings, grew the movement for the right to information, a movement that could promise an alternative to the gun. But is the RTI movement really an alternative to the armed struggles that threatens many parts of India today? To answer this question, one has to look at the genesis and the outcome of both the armed struggles and the alternate, peaceful, movements in India. One common thread that seems to run through many struggles and movements is that they arise out of a sense of acute frustration among people who feel that their legitimate demands and grievances are being deliberately ignored by the system. On the other hand, movements like the RTI movement try and make

the system face up to its own contradictions and try and force the state to respond to the demands of the people.

Right to Information Act, 2005

The Government of India eventually acceded to the demand of public and various NGOs and introduced the FOI Bill, 2000 was sent to the Parliamentary Standing Committee on Home Affairs, which consulted civil society groups before submitting its Report in July 2001. The Committee recommended that the Government address the flaws in the draft Bill pointed out by civil society. Unfortunately, the Government did not implement that recommendation, to the detriment of the final content of the Bill. The national level FOI Bill, 2000 was introduced in Parliament in 2002. It was passed in December 2002 and received Presidential asset on January 2003, but was never notified.

The RTI Bill, 2004 was tabled before the Lok Sabha on December 23, 2004. This Bill was based largely upon recommendations submitted to the Government by the National Advisory Council (NAC) and took into consideration National Campaign for Right to Information (NCPRI)'s original draft Bill. NCPRI produced a comparative analysis of the RTI Bill, 2004 against the FOI Act 2002 and the original NAC Recommendations. The RTI Bill, 2004 was then referred by Parliament to the Standing Committee on Personnel, Public Grievances, Law and Justice for its consideration. The Commonwealth Human Rights Initiative (CHRI) also submitted its recommendations to the Parliamentary Standing Committee. A range of civil society activists also gave evidence before the Committee. The Report of the Committee, including a proposed amended version of the RTI Bill, was tabled in the Lok Sabha on March 21, 2005. On May 10, 2005, the RTI Amendment Bill 2005, which actioned many of the recommendations of the Parliamentary Standing Committee was once again tabled in the Lok Sabha. The Bill was passed very quickly and was approved by the Lok Sabha on May 11, 2005 and by the Rajya Sabha on May 12, 2005. On June 15, 2005, the then President gave his assent to the Bill. With presidential assent, the Central Government and State Governments had 120

days to implement the provisions of the Bill in its entirety. The Act formally entered into force on October 12, 2005.[37]

The basic object of the Right to Information Act is to empower the citizens, promote transparency and accountability in the working of the Government, contain corruption, and make our democracy work for the people in real sense. It goes without saying that an informed citizenry is better equipped to keep necessary vigil on the instruments of governance and make the Government more accountable to the governed. This legislation is a big step towards making the citizens informed about the activities of the Government.

Salient features of India's RTI Act, 2005

The RTI Act 2005 empowers every citizen to ask any questions from the Government or seek any information, take copies of any government documents, inspect any Government documents, inspect any Government works and take samples of materials of any work done by the Government or its various instrumentalities. Any citizen can seek information from any department of the Central or State Government, from Panchayati Raj institutions, and from any other organization or institution (including NGOs) that is established, constituted, owned, controlled or substantially financed, directly or indirectly, by the state or central government (Section 2(a) & (h)).

In each department, at least one officer has been designated as a Public Information Officer (PIO). (S) he accepts the request forms and provides information sought by the people (Section 5(1)). In addition to a Public Information Officer, in each sub-district/divisional level there are Assistant Public Information Officers (APIOs) who receive requests for information and appeals against decisions of the PIOs, and then send them to the appropriate authorities (Section 5(2)).

A person seeking information should file an application in writing or through electronic means in English or Hindi or in the official language of the area, along with the application fees with the PIO/APIO (Section 6(1)). Where a request cannot be made

in writing, the Public Information Officer is supposed to render all reasonable assistance to the person making the request orally to reduce the same in writing (Section 6(1)). Where the applicant is deaf, blind, or otherwise impaired, the public authority is supposed to provide assistance to enable access to the information, including providing such assistance as may be appropriate for the inspection (Section 7(4)). Besides the applicant's contact details, the applicant is not required to either give any reasons for requesting the information or any other personal details (Section 6(2)).

The Act provides for a reasonable application fee i.e. □ 10/- as prescribed by the Central Government, whereas in other states the fee amount may vary. Fee will be charged for each application and supply of information. However, no fee is chargeable from persons who are below the poverty line (Section 7(5)), or if the information is provided after the prescribed period (section 7(6)). A fee will be charged for obtaining a copy of the documents. The Central Government has prescribed fees of □ 2/-for each page created and copied. In some states the charges are higher. If the Information is not provided in the stipulated time limit then the information will be provided for free. (U/s 7(6)).

Whenever the PIO feels that the sought information does not pertain to his department then it shall be his responsibility to forward the application to the related/relevant department within five days and also inform the applicant about the same. In such instance, the stipulated time limit for provision of information would be thirty five days (u/s 6(3)). In case the PIO does not furnish information within the prescribed period or unreasonably troubles the applicant, then the applicant can file a complaint against him with the Information Commission. Where a PIO without any reasonable cause, fails to receive an application for information, or malafidely denies a request for information, or knowingly gives incorrect, incomplete or misleading information, or asks for high fees for furnishing the information; the applicant can file a direct complaint to the Central or the State Information Commission.

The PIO has been although given the discretion of denying information in some cases / matters. The various exemptions from disclosure of information are listed under Section 8 of the Act. If the sought information is in public interest then the exemptions enumerated in Section 8 can also be disclosed. To simply put it, any information that cannot be denied to Parliament or the Legislature of a State cannot be denied to a common citizen. In case a person fails to get a response from the Public Information Officer within the prescribed period or is aggrieved by the response received, or due to misuses of Section 8 of the Act, then (s) he can file an appeal within thirty days to an officer superior in rank to the PIO, namely the First Appellate Authority (Section 19(1)). When the appellant is not happy with the 1st appeal then (s) he has the option of filing a second appeal with the State Information Commission or the Central Information Commission, as the case may be, within a period of sixty days (u/s 19(3)).

The definition of "information" within the meaning of Section 6 of the Act shows that an applicant can get any information which is already in existence and accessible to the public Authority under the law. Under the Act an applicant is entitled to get copy of the opinions, advices, circulars, orders etc., but he cannot ask for any information as to why such opinions, advices, circulars, orders etc., have been passed, especially in matters pertaining to judicial decisions. A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order and or judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. A judge is not bound to explain latter on for what reasons he had come to such a conclusion[18].

The right to information is not an absolute right. It is a part of right to freedom of speech and expression. Section 8(1) (i) of the RTI Act balances right to privacy and right to information. It recognizes the fact that both the rights and the test of overriding

public interest is applied to decide as to whether information should be withheld or disclosed.[39] The privacy rights, by virtue of section 8(1) (i) of the RTI Act whenever asserted would prevail. However, that is not always the case, since the public interest element, seeps through that provision. Thus, when a member of the public requests personal information about a public servant, such as asset declarations made by him – a distinction must be made between the personal data inherent to the position and those that are not, and therefore, effect only his/her private life. This balancing task appears to be easy; but in practice, it is not so, having regard to the dynamics inherent in the conflict.

Decisions supporting RTI Act 2005

The Basel Convention, it cannot be doubted, effectuates the Fundamental Rights guaranteed under Art 21. The right to information and community participation for protection of environment and human health is also a right which flows from Article 21. The Apex court has held – "the Government authorities have, thus to motivate the public participation. These well-enshrined principles have been kept in view by us (court) while examining and determining various aspects and facets of the problems in issue and the permissible remedies".[40]

If public access to the personal data containing details like photographs of public servants, personal particulars is requested the balancing exercise, necessarily dependent and evolving on a case by case basis, would take into account of many factors which would require examination having regard to each case[41]. In a case where the question was whether, an applicant has any right to get information regarding correspondence / notings relating to appointment of Judges was objected to by the Prime Minister's Office, the matter was referred to Chief Justice of India for being placed before appropriate Bench[42].

A Division Bench of the High Court held that the evaluated answer-books of an examinee writing a public examination conducted by statutory bodies like CBSE or any University or Board of Secondary Education, being a 'document, manuscript

record, and opinion' fell within the definition of "information" as defined in section 2(f) of the RTI Act. It held that the provisions of the RTI Act should be interpreted in a manner which would lead to greater dissemination of information rather than withholding the same; and in view of the right to information, the examining bodies were bound to provide inspection of evaluated answer books to the examinees. Consequently it directed CBSE to grant inspection of the answer books to the examinees who sought information.[43] The High Court however rejected the prayer made by the examinees for re-evaluation of the answer-books, as that was not a relief that was available under RTI Act. The Act only provided a right to access information, but not for any consequential reliefs.

The court further held that RTI is a cherished right and is intended to be a formidable tool in the hands of responsible citizens to fight corruption and to bring about a greater degree of transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. With regards to other information, that is information other than those enumerated in section 4(1) (b) and (c) of the Act, equal importance and emphasis are given to other public interests like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc. Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it would adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, or to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a

tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of Government departments prioritizing 'information furnishing' at the cost of their normal and regular duties. In view of the foregoing, the order of the High Court directing the examining bodies to permit examinees to have inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI Act and the safeguards and conditions subject to which 'information' should be furnished.[44]

Loopholes and Flaws in the Act

As much as the Act has empowered the citizen and given them a "weapon" to keep the public officers in check, not everything about it is foolproof. The Act has its flaws – some of them in its implementation, and some in its interpretations. One of the latest blows to the Act has come in the form of a judgment of the Apex Court in *Namit Sharma v. Union of India*[45]. In this case, the constitutional validity of provisions dealing with the eligibility criteria for Information Commissioners at both the Central and State level, was challenged. The Act provides that members of the State and Central Information Commission should be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. It was the contention of the petitioner that the Information Commission performs duties of judicial and quasi-judicial nature but the qualifications prescribed for the same are vague, general and *ultra vires* the Constitution. The Supreme Court upheld the validity of the sections but ruled that the Information Commissions are "quasi-judicial authorities" or "tribunals" performing judicial functions and they will have to work in a Bench of two members comprising one judicial member and the other a qualified person from a specific field. The judicial members will be appointed in

consultation with the Chief Justice of India and Chief Justices of the High Courts of the respective States, as the case may be. About the consequence of such a move, former Central Information Commissioner Shailesh Gandhi opined that, "Effectively the disposal of pending cases will drop to about 50% of the current disposals. This will lead to Commissions deciding cases after five years or more in the next few years."[46]

As individual citizens and civil society groups discover more and more ways to use the law, various efforts to undermine the RTI are also gathering momentum. The Government of India's purported intention in 2006 to amend the RTI Act was postponed after public disquiet, but was again revived in 2009 by the nodal department of the Government handing RTI, namely the Department of Personnel and Training (DoPT). Information Commissions are also being starved of resources. For a long period of time last year, there are only six Central Information Commissioners instead of the allotted eleven, and limitations on hiring additional staff prevent them from clearing their backlog of complaints. At the state level matters are worse in a lot of States. In Orissa and West Bengal, for example, the Information Commissioners are so far behind that they will need more than ten years to clear their present backlog of complaints, according to a survey by the Public Cause Research Foundation and this is if they do not entertain any appeals over the next decade. The long delays in providing the information to the applicant defeats the very purpose for which the Act was passed.

With the experience of a decade behind them, bureaucrats are getting cleverer at sidestepping the law when it comes to providing information. Aware of the long delays involved in an appeal, officials routinely refuse to disclose even basic information about Government activities by claiming that doing so would violate the right to privacy. In a lot of cases, they have begun to require applicants to prove their citizenship before they accept a request filed under the RTI Act. The arcane structure of the bureaucracy itself has come to the aid of bureaucrats and applicants are routinely sent like a football from one PIO to another.

Another issue that made its appearance, mainly thanks to the report of the Administrative Reforms Commission, was the effort to exempt so called "frivolous and vexatious" applications. The first report of the Second Administrative Reforms Commission (ARC), presented in June 2006, had the unfortunate recommendation that the RTI Act should be amended to provide for exclusion of any application that is "frivolous or vexatious".

Meanwhile, a threat to the Act from a new quarter, namely the judiciary, emerged in 2007. An RTI application was filed before the Supreme Court Registry asking, among other things, whether judges of the Apex Court and High Court judges are submitting information about their assets to their respective Chief Justices.[47] This information was denied even though the Central Information Commission subsequently upheld the appeal. The main issue was whether the office of the Chief Justice of India (CJI) was within the purview of the RTI Act. The matter was then appealed to by the Supreme Court Registry before the High Court of Delhi, where a Single Judge ruled that the CJI was covered under the RTI Act.[48] A fresh appeal was filed by the Supreme Court Registry before a Full Bench of the Delhi High Court which also ruled against the Registry and upheld the ruling of the Single Judge[49].

Interestingly, the real issue was no longer the assets of the Supreme Court judges. In fact, perhaps at least partly in response to public pressure and perception, judges of the Supreme Court and various High Courts (including Delhi) had already put the list of their assets on the websites of the respective courts. The dispute seemed to be about more sensitive issues, arising out of recent controversies about the basis on which High Court judges were recommended for elevation to the Supreme Court. Newspaper reports suggested that some members of the higher judiciary were concerned that if the office of the CJI was declared to be a 'public authority' within the purview of the RTI Act, then the basis on which individual judges were recommended or ignored for elevation would also have to be made public.[50] Therefore, even as the Supreme Court prepared to listen to an appeal from itself to itself, great pressure was exerted on the Government to

save them the embarrassment of either ruling in their own favor, or ruling against themselves. This the Government could only do if it amended the RTI Act and excluded the office of the CJI (and presumably other such "high constitutional offices") from the purview of the RTI Act. Even while the appeal against the order of the Single Judge order to the Full Bench of the Delhi High Court was pending, the then CJI wrote a long letter to the then Prime Minister, trying to make out a case for the exclusion of the office of the CJI from the scope of the RTI Act. Among other things, he contended that "....Pursuant to the decision of the Delhi High Court and in view of the wide definition of information under section 2(f) of the RTI Act, several confidential and sensitive matters which are exclusively in the custody of the Chief Justice of India may have to be disclosed to the applicant-citizens exercising their right for such information under the RTI Act. Undoubtedly, this would prejudicially affect the working and functioning of the Supreme Court as this would make serious inroad into the independence of the judiciary.....In this scenario, I earnestly and sincerely feel that Section 8 of the RTI Act needs to be suitably amended by inserting another clause to the effect that any information, disclosure of which would prejudicially affect the independence of the judiciary should be exempted from disclosure.....".

All this came together in October 2009, when just after the Annual RTI Conference, organized each year by the CIC, the DoPT organized a meeting of Chief Information Commissioners and Information Commissioners from across the country to discuss the proposed amendments.

Right to Information and File Noting

A file in public office is nobody's private affair. All such files contain various documents including file notings, which indicate the process and steps involved in making a decision. File Notings are the life of the file and the basis on which any decision is taken. They are that part of the file on which officers of different ranks write their comments. File notings are not individual officers' opinion note, but a compilation of different opinions and analysis of all the

positions and application of rules to the particular situation so that the final authority – like the Chief Secretary or Chief Minister or a Council of Ministers takes an appropriate decision in the matter. File notings, thus offer the reasons for the decision. Less than a year after the RTI Act came into force, there were rumours that the Government of India was intending to amend it, ostensibly to make it "more effective". Sympathizers within the Government confirmed that a bill to amend the RTI Act had been approved by the Cabinet and was ready for introduction in Parliament in the coming session. A copy of the draft Amendment Bill soon became available, though legally it would not be publicly accessible till it was presented in Parliament. A perusal of the draft Bill revealed that the main thrust of the amendments was to effectively remove "file notings"[152] from under the purview of the RTI Act. The genesis of this demand of the Government lay in the drafting of the RTI Act itself. When peoples' movements were drafting the RTI Act, they had under the definition of 'information', specifically added "including file notings". However, as it turned out, even without this phrase, the definition of 'information' was wide and generic enough to unambiguously include file notings. As soon as the RTI Act became operative, the DoPT stated on its web site that file notings need not be disclosed under the RTI Act. This was challenged by citizens, who appealed to the Central and State Information Commissions. Despite governmental efforts, various Information Commissions held that, as per the definition of 'information' under the RTI Act, file notings could not, as a class of records, be excluded. This forced the Government to try and amend the RTI Act itself. Unfortunately, the Government tried to perpetuate the myth that, in amending the RTI Act, they were actually trying to strengthen rather than weaken the Act. In a letter addressed to noted RTI activist Anna Hazare, the then Prime Minster wrote:

"...File notings were never covered in the definition of 'information' in the RTI Act passed by Parliament. In fact, the amendments being currently proposed expand the scope of the Act to specifically include file notings relating to development

and social issues. The overall effort is to promote even greater transparency and accountability in our decision making process".

Fortunately, the public did not buy this argument, especially as more than one Information Commission had held that the RTI Act, in its present form, did include file notings. Peoples' organizations reacted strongly to this attempt to weaken the RTI Act and restrict its scope and coverage. They organized a nation-wide campaign, including a *dharna* (sit-down protest) near the Parliament. Political parties were lobbied, the media was contacted, and influential groups and individuals were drawn into the struggle. A point by point answer to all the issues raised by the government, in favour of this and other proposed amendments, was prepared by RTI activists and publicly conveyed to the Government, with the challenge that the Government should publicly debate the issues.

In the face of grave opposition, the government beat a hasty retreat and the Amendment Bill, as approved by the Union Cabinet, was never introduced in Parliament. One would have expected that by now the Government would have learnt to leave the RTI Act alone, but that was too much to hope for. A Press Bureau release on December 1, 2005, stated that "....it has been decided however that file noting relating to identifiable individuals, group of individuals, organizations, appointments, matter relating to enquiries and departmental proceedings shall not be disclosed"[53]. This controversy rested, albeit only temporarily, till the January 31, 2006 decision of the Central Information Commission which unequivocally concluded that, "....*we are of the firm view , that , in terms of existing provisions of the RTI Act, a citizen has the right to seek information contained in "file noting" unless the matter covered in under section 8 of the Act*"[54]. In 2009, fresh rumours started circulating that the Government was once again proposing to amend the RTI Act. The real agenda remained "file notings" though this time around they were calling it "discussion/ consultations that take place before arriving at a decision". Other aspects were also included and mostly involved either non-issues (like whether Information Commissioners had to all sit together to give orders, or could they do so individually), or issues that

could easily be tackled by amending the rules (like defining "substantially funded" or facilitating use by Indians residing abroad), without touching the Act itself.

Conclusion

The RTI Act has been lauded by democracy advocates all over the world, since it is at par (or even better) than similar laws enacted in countries in the West. For instance, in the US and UK, the respective information disclosure acts require the applicant to disclose his personal details, whereas in India, no such details are required. The RTI Act is one legislation that is indeed, the pride of Indian democracy. The RTI Act, as it stands today, is a strong tool to uphold the true spirit of democracy. The need of the hour is that the RTI Act should be implemented to ensure that the objects of the RTI Act are fulfilled. Any attempt to dilute the provisions of the RTI Act will only quell its' success. A perusal of the decisions of the Apex Court and various courts on the subject of RTI has highlighted an unfortunate facet of their working that higher judiciary could only preach accountability to other organs of the State, *viz.* the Legislature and the Executive (sometimes even to the lower judiciary), but when it comes to following their own preaching they are fearful. They always comment on the rampant corruption in other walks of life, but when someone points a finger towards them, they become irate.

The Apex Court has itself mentioned in several cases that "... society's demand for honesty of a judge is exacting and absolute and the standards of judicial behavior, both on and off the Bench, are normally extremely high, therefore a judge must keep himself absolutely above suspicion."[55] But when the time came to follow in practice these theoretical ethical standards, they withdrew from their on-paper commitment of accountability. If the judiciary is to save its honour and independence, it needs to act on its own without waiting for the Legislature to intervene to enact a law for disclosure of assets by the judges. The Legislature is all set to bring an enactment on disclosure of assets by judges, which is already in the pipeline[56]. Though the newly introduced Bill was taken back for reconsideration, the reasons for doing so were that

the Bill was not in favour of the principle of "independence of judiciary"[5]. It is the right time for the judiciary to introspect and save its independence, which it itself has established as part of the basic structure of the Constitution of India. However, if this potential has to be actualized, a much more concerted push has to be given to strengthen the RTI regime in the next few years. In struggles as fundamental as those for power and control, there is no time to waste. If the people do not come together and recapture the power that is rightfully theirs, vested interests will exploit this weakness and grow stronger and more invincible with each passing day. So, the people of India, move ahead and the world watches your march with bated breath!

(Endnotes)

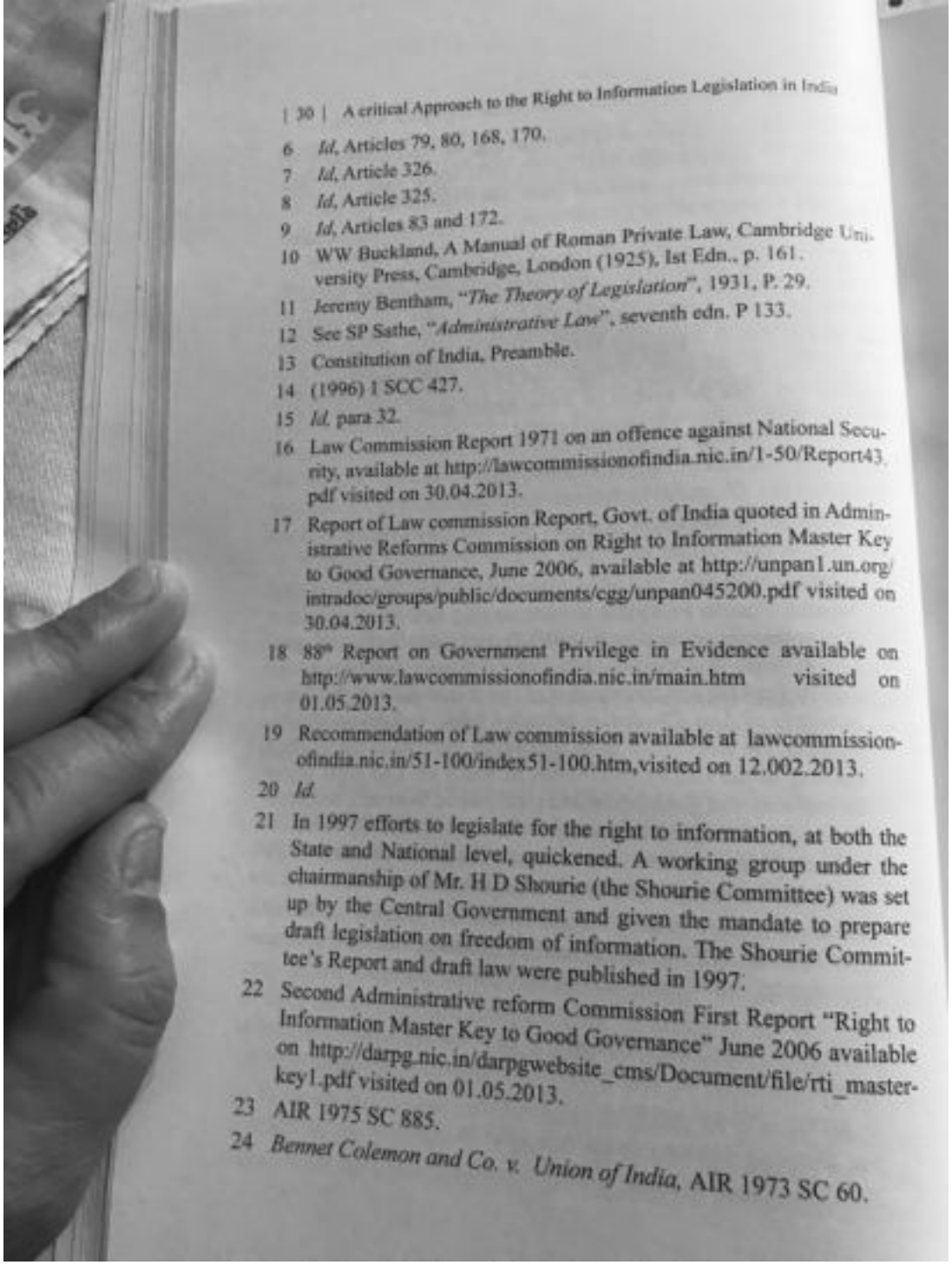
1 Anders Chydenius, 26 February 1729 – 1 February 1803) was a Swedish-Finnish Priest and an ecclesiastical member of the Riksdag, contemporary known as the leading classical liberal of Nordic history. Born in Sotkamo, Ostrobothnia, Sweden (today in northeastern Finland) and having studied under Pehr Kalm at the Royal Academy of Åbo, Chydenius became a priest, Enlightenment philosopher. He was elected as an ecclesiastic member of the Swedish Riksdag of the Estates in 1765-66, in which his Cap party seized the majority and government and championed Sweden's first Freedom of the Press Act, the most liberal in the world along with those of Great Britain and the Seven United Provinces. available http://en.wikipedia.org/wiki/Anders_Chydenius visited on 23.07.2012.

2 Manninen Juha, "Anders Chydenius and the Origins of World's First freedom of Information Law", published by Anders Chydenius Foundation, available at www.chydenius.net/eng/ visited on 21.12.2012.

3 Banisar, David (2006) "Freedom *of Information Around the world 2006*" available on http://www.freedominfo.org/documents/global_survey2006.pdf visited on 29.04.2013.

4 See *Bennett Coleman v India*, AIR 1973 SC 106.

5 The Constitution of India, 1950, Preamble.



6 *Id*, Articles 79, 80, 168, 170.
7 *Id*, Article 326.
8 *Id*, Article 325.
9 *Id*, Articles 83 and 172.
10 WW Buckland, A Manual of Roman Private Law, Cambridge University Press, Cambridge, London (1925), Ist Edn., p. 161.
11 Jeremy Bentham, "*The Theory of Legislation*", 1931, P. 29.
12 See SP Sathe, "*Administrative Law*", seventh edn. P 133.
13 Constitution of India, Preamble.
14 (1996) 1 SCC 427.
15 *Id.* para 32.
16 Law Commission Report 1971 on an offence against National Security, available at http://lawcommissionofindia.nic.in/1-50/Report43.pdf visited on 30.04.2013.
17 Report of Law commission Report, Govt. of India quoted in Administrative Reforms Commission on Right to Information Master Key to Good Governance, June 2006, available at http://unpan1.un.org/intradoc/groups/public/documents/cgg/unpan045200.pdf visited on 30.04.2013.
18 88th Report on Government Privilege in Evidence available on http://www.lawcommissionofindia.nic.in/main.htm visited on 01.05.2013.
19 Recommendation of Law commission available at lawcommissionofindia.nic.in/51-100/index51-100.htm,visited on 12.002.2013.
20 *Id.*
21 In 1997 efforts to legislate for the right to information, at both the State and National level, quickened. A working group under the chairmanship of Mr. H D Shourie (the Shourie Committee) was set up by the Central Government and given the mandate to prepare draft legislation on freedom of information. The Shourie Committee's Report and draft law were published in 1997.
22 Second Administrative reform Commission First Report "Right to Information Master Key to Good Governance" June 2006 available on http://darpg.nic.in/darpgwebsite_cms/Document/file/rti_master-key1.pdf visited on 01.05.2013.
23 AIR 1975 SC 885.
24 *Bennet Colemon and Co. v. Union of India*, AIR 1973 SC 60.

hierarchy, starting from near bottom, moving up to the appropriate decision making level, and then coming down for implementation of the decision and storage of the file.

53 Neeraj Kumar, "*Treatise on Right to Information Act, 2005*", (Bharat law House New Delhi 3rd Ed., (2011).

54 (CIC) (No. ICPB/A-1/CIC/2006, Satpal v. TCIL.

55 K.Veeraswamy v. Union of India, (1991) 3 SCC 655.

56 The Judges (Declaration of Assets and Liabilities) Bill, 2009 is presented before the Rajya Sabha on Jul. 29, 2009, Available at: http://www.judicialreforms.org/files/Judges%20 (Declaration%20of%20Assets%20an d%20 Liabilities)%20Bill%202009.pdf.

57 Manninen Juha, "Anders Chydenius and the Origins of World's First freedom of Information Law", published by Anders Chydenius Foundation, available at www.chydenius.net/eng/ visited on 21.12.2012.