Without Fear and Favour : XII

Review and Update All Laws

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Justice A.P. Shah's judgment in the Delhi high court on the applicability of the Right to Information (RTI) Act has in the main focused attention of all concerned on that part of this path-breaking law, which constitutes the "hard core" or the very marrow of a dry-bone called the administration, if you please. And when I say administration I mean the executive side of the three sides of State governance, divided into the executive, the legislature and the judiciary. When I deemed it fit to dedicate a Handbook for the Public Information Officers (PIOs), moved as I was by their 'plight' in the first convention called in New Delhi to celebrate the first anniversary of this salutary law (*Handbook for PIOs, under the RTI Act, 2007; Natraj Publishers, Dehradun*), I devoted a whole chapter, chapter 7, to this particular aspect. I had recommended the PIOs that 'if at all you are required to really master any provisions of the RTI, these will obviously relate to the exemptions from disclosure…and I had hastened to add...that this is not with a view to block access to information or discourage applicants from applying but for other pertinent reasons' (p 100) .

These days newspapers and electronic channels are replete with edits, articles, middles and conferential talk-shows discussing thread bare these very provisions and their intended or unintended meanings. At the very outset it was explained by me that 'what needs to be very carefully observed is that wherever 'public interest' or 'larger public interest' justifies disclosure every other consideration became secondary, less important and even irrelevant'. Uttarakhand Information Commission, from day one,

has closely followed this golden rule, has even modified in some cases its earlier more 'conservative and rule bound' interpretations. No wonder from day one we have been providing free access to 'note-side' of any file (it is an altogether different matter, however, permit me to add, that outside the secretariat the very practice of a file being divided into the Notes–side and the other Correspondence-side is neither followed nor insisted upon almost universally !). We have already stream-lined flow-of-information related to some sets of 'private bodies' which could be accessed by a public authority " *under any law for the time being in force* ". In this context the process settled by this Commission related to information held by 'private enterprises'(the industrial units established under the central industrial concessional package, at Bahadarabad, Pantnagar etc ; and , recently CBSE affiliated privately managed schools), are the cases in point.

Supreme but fallible

Hailing Justice Shah's historic judgment Rajeev Dhavan in his middle *Supreme but fallible* (*The Indian Express, January 14; page 10*) has raised many a issues and undoubtedly these would trigger expression of further view-points on the part of both sides. For the practitioners of the RTI; and they already are a veritable league of stakeholders i.e. the managers, the users, the reporters, the activists -- the high plateau of debate on the RTI has now been reached, what with the Supreme Judiciary arraigned on the one side and the widest possible interpretation of the exemption-provisions, on the other. Indeed it is time to reflect, and thereafter act, on the various points raised through this most engrossing, and epoch-making debate. As regards, guarding the independence of the judiciary, Rajeev Dhavan, infers that by *'taking a balanced view, the high court (has) held that a judge's notes and draft judgments not placed on record could not be disclosed. The efficient functioning of the judiciary (has been) protected but accepted international standards of information accountability*

(were required) to be adhered to.' The high court has also significantly held that ***'in interpreting the RTI Act a bold and expansive rather than a narrow interpretation would have to be given—even if it affected the judges who could not interpret themselves above law'.***

The exemption provisions which in this matter have been brought under a juridical micro-scope are – Section, 8(1)(e) - *the fiduciary relationship* ; Section 8(1)(j) – the personal information or the *"privacy"* clause. Dhavan holds that the 'fiduciary clause' was not really relevant, as every law student knows that 'fiduciary' relations have a special meaning relating to administration of the trusts, including corporate management…according to him to expand its interpretation would amount to 'swallowing the Act itself '. This was equally true of the idea of '*confidentiality*'…as no authority (now) can get out of the RTI Act, simply by making information 'confidential'. If so, he rightly says, the RTI Act would be ruined. How logically has the Second Administrative Reforms Commission recommended harmonization of the entire bunch of archaic 'confidentiality enactments' in their very First Report has also been examined in my Handbook for the PIOs (p 103 - 105). It is indeed about time that the repressive confidentiality statutes, dating back to 1860 vintage and spanning over to the current times, are both reduced in number and humanized in consonance with the spirit of the age we are living in.

The 'privacy' exemption relates to personal information which has no relation to 'public activity or interest'. Tax returns, medical information, private relations would all be protected, subject to public interest. Once, says Dhavan, the Supreme Court (for itself and MPs) had declared that information about financial assets related to public duty and accountability, this did not invade privacy. Delhi high court, according to him, has rightly emphasized that disclosures about financial assets are part of judicial accountability, including norms of transparency. Dhavan's

curiosity is indeed focused on the fact—that the attorney general wants to appeal, and he wants to know, 'Is this his (attorney general's) view or that of his client, the Supreme court, and per force, the CJI ?. So watch out, you discerning RTI practitioners, good times are ahead, as far as distance learning lessons on RTI are concerned. 'The Doctrine of Necessity', is it likely to be in use ? - just watch out.

The Laws in Force

What indeed attracted my attention in this interesting debate, rather the article by Rajeev Dhavan, related to the definition of 'right to information' and the expression that ***'this information had to be held under some law'****(emphasis added by me),* which Dhavan has dismissed as simply 'fallacious'.

Explaining reasons of his summary rejection of attorney general's view Dhavan avers that *'ninety nine percent of information held by most authorities is not retained under a "law" but executive authority. The terms of the Act are clear and such an approach, according to him, does a disservice to Parliament's clear intentions'*. I really do not think so and feel that this matter really calls for some deeper examination. This 'executive authority', in all three organs of governance, holds or retains all information only under one law or the other, and any information which does not pass this acid test, cannot be called legally retained or held. It is this aspect, a little complex, which is purely administrative in its nature, deserves to be examined in some depth.

Leaving aside various dimensions from which one could proceed further with the issue and the argument advanced, what indeed deserves to be discussed, analyzed and really acted upon urgently, in this state and in this context too, is first to know precisely how many Laws i.e. Acts and Rules, are in existence, at this point of time ? The first, an Act, being the legal framework of a particular

subject e.g. The Indian Forest Act, 1927 (subject being the forest and framework the IFAct, 1927); and the Rules, being the manner in which the various provisions of an Act are going to be implemented, e.g. in the instant case, take the example of the Van Panchayat Rules, 2006, explaining how the Van Panchayats, constituted under the IFAct, 1927 are gong to be managed or administered. As we all know, the Rules are framed under some provisions of a particular Act. One Act, obviously, could have one or more than one Rule.

State of Laws in Uttarakhand, and UP

Do we know, in this new State of Uttarakhand, how many Central and State 'Laws' are in actually in place ? How many such Acts, Central or State, have Rules or Rules, as explained ? Readers may be surprised to know that till date, in its tenth year of existence, Uttarakhand does not know precisely how may Central or State Laws are in existence in this state, and how many Rules are there to implement and regulate each of these Acts. It is a different thing altogether that Uttarakhand Information Commission has already asked the Law and Legislative Affairs department to let it, and the public at large, know precisely this information and after verification mount it on its own web-site. This also is happening thanks to a provision in the RTI Act itself - section 4(1)(b).

Further, each Department, does know the subjects allocated to it, under one Rule – ***Uttarakhand Karya (Bantwara) Niyamavali 2006***, framed under Article 166 of the Constitution of India, which inter alia is expected to include all Laws i.e. Acts and Rules, the Department is officially responsible for implementation within the State. This List, actually, an Appendix, is supposed to enlist all Laws i.e. Acts and Rules, and should indeed be the desiderata to decide the main issue at stake and raised by the attorney general i.e. *"information held under some law"*. It is usually, under the Rules framed to regulate particular Law, the executive are expected to go

in some detail and precisely lay out the various formats under which the 'flow of information" should take place, (i) between various tiers of administration, (ii) between the Centre and the States, and between (iii) the Government and 'private bodies', if so required by a particular enactment. *So the issue is indeed not so generic in its nature, as Rajeev Dhavan has made it out to be, but very specific, as explained just now.* So, ***"this information had to be held under some law"*** cannot be summarily rejected but has got to be deeply pondered over and wherever the linkages are found to be not precisely defined, the same has to be set right.

This writer having been involved in an Herculean task of De-regulation exercise, undertaken under a World Bank supported project in erstwhile Uttar Pradesh, which not only tried to enlist all Laws i.e. Acts and Rules, but also Regulations, Manuals, Instructions which had a 'force of law', but also recommended de-regulation of an extensive scale of all statutes which have become redundant, outdated; amendment in existing laws and including sun-set clauses in all new statutes. This exercise has acquired more relevance now in view of separation of Uttarakhand from a more than two century old State like UP on the one hand and requirements of RTI, as just mentioned.

Next Steps for Improved RTI implementation

The following steps are recommended to achieve the dual objective which has just been mentioned :

(i) Enlist, cross-check and finalize a List of all Central and State Laws, Acts and Rules, known to be in force in Uttarakhand, department-wise; set apart the list of statutes which are to be de-regulated, superceded by some other law, not to be enforced in the State (this has to be undertaken, both at the Centre and State levels, simultaneously),

(ii) Secretariat Administration (Establishment)department to ensure that all of these Laws / Acts and Rules figure in the department-wise lists included in the Uttarakhand Karya (Bantwara) Niyamavali, 2006 notified in the State; and wherever necessary update it, enlist or delete Acts and Rules,

(iii) Frame Rules, for the Acts where hitherto not done, and ensure that Acts are not regulated through GOs, OMs etc (in one case a meeting proceeding was shown as having the force of a GO !),

(iv) Revive making compendiums of GOs, called Manuals, for every department, update them and after digitization, upload them in the departmental UIC web-site,

(v) All information (a) between various organs and tiers of each department;(b) between departments,(c) between Centre and States, and (d) between Government and 'private bodies', should be exchanged only through authorized MISs (Management Information System) and through no other mean; formats prescribed for filing periodical returns.

Overdue Administrative Reforms

Only after the above has been fully implemented one would be able to say authoritatively whether any 'information' is indeed 'held under some law' or not. RTI Act also envisages that any 'records' which are not required by a public authority must be duly 'weeded out' under the Rules framed and the Destruction of Records Act, enacted as far back as in 1917. Every 'public authority' has now to be very precise about all 'records' in its control and custody. However, one must also bear in mind that 'information' is now a much bigger concept than the 'record' of yore. In this age of information technology we will also have to re-interpret 'information' with reference to the 'records', the public

authorities have so far been used to. The road to achieving the objectives of the RTI Act is through a long and tortuous tunnel called 'administrative reforms' and the attention paid to this aspect of governance, as is well know, indeed is a matter of serious concern.

It was rightly predicted at the time of notification of the RTI Act, five years back, ***'now that the romance for the struggle for the transparency is over, the tedious process of system-building has to take over'.*** It is this near universal lack of interest in this *process of system-building*, a sine quo non, for effective implementation of the RTI Act, which indeed is responsible for creating the troubles we witness every now and then. It is high time that we paid attention to this system-building and carried out necessary related measures of administrative reforms, plugging the gaps identified.

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