

Right to Information as a Human Right and Developments in India
Presentation at Sarai by Debashish Sankhari, Commonwealth Human Rights Initiative.

Case 1: Alice lives in the tribal district of Chaibasa in Jharkhand – her husband wandered into the forest and was trampled by a wild elephant. As per the law she is entitled to claim compensation from the forest authorities when she produces a copy of the FIR and the post mortem report. The police officer at her local police station refuses to give her these copies.

Case 2: A familiar story of the Bhopal gas leak tragedy – people were not aware of the details of the gas that had leaked. Once established that it was Methyl-iso-cyanate - when Union Carbide was asked for the antidote to the gas – they said that it was a protected trade secret, hence could not be divulged.

Case 3: Enron – People were not given a fair chance to make representations expressing any reservations or opposition to the Dhabol Power project. The representations can be made only after salient features of the project are provided like the cost of the electricity generated, the basis for this calculations, total expenditure, area affected, etc. The company did not provide these details at all in the public notification and nobody could make any meaningful representation that could be sent to the approving authority (the Central Electricity Authority).

There is one common thread that runs through the above mentioned cases – and that is a **lack of access to Information**. Restrictions on the free flow of information - especially between government and citizen – has resulted not only in eroding the democratic principles enshrined in the Indian Constitution but has resulted in the failure of government policies and development schemes for bettering the lot of the poor. Denial of information has perpetuated the political, social and economic exclusion of millions; aided in the illegitimate retention and abuse of power by select segments of society; facilitated widespread corruption and impeded the fight against poverty eradication. With the lack of access to information, people are unaware of the developments schemes and are completely unequipped to engage in informed participation in their own development even if given a chance. Therefore, decades of development have been lost through decision making uninformed by the realities of those without a veritable voice.

The concept of human development is directly linked to human rights. A rights-based approach demands participation in governance and development, which guaranteed access to information can provide.

Needless to say when Alice is not granted a copy of the FIR and post mortem report, she was being denied access to compensation that was rightfully hers. Due to the lack of information about the effects of the deadly gas and its antidote, the right to life of the people itself was denied. The people of Maharashtra had no option to realise their voices against Enron. They were not only being denied the right to participate in their governance, and they were kept in the dark all the while electricity was being generated at a much higher than normal rate charged by the other companies and the bill was being footed by a public body.

The right to information is a basic right that underpins good governance, democracy, poverty eradication and the practical realisation of human rights. Good governance is not achieved simply by having efficient government or even a democratically elected government. The norms of freedom of information and the assurance of widespread citizen participation in public affairs and an active civil society are essential for the full realisation of democracy - a system of government responsive to the needs of its citizens - and to develop a culture of human rights and accountability. The recognition of right to information is crucial to achieving these ends hence the need for a guaranteed and legislated right to information.

World over legislation on access to information are known as 'Freedom of Information laws'. In India advocates for the issue insist on using the 'Rights' language and calling the legislation the 'Right to Information Law'. This distinction may appear to some as playing with semantics. However, there is a very important distinction that should not be ignored. It must be kept in mind that 'Rights' in general imply corresponding duties. In the context of the right to information the citizen's right to information casts a duty on the government to ensure that information sought is provided. On the other hand, 'freedom' does not convey a strong and clear sense of duty on the government to provide information to the public, as the public, in this case, does not hold a 'right' to information.

Constitutional position

While some countries recognise Right to Information explicitly in their Constitutions¹, in others the judiciary has interpreted the Right to freedom of speech and expression to include the Right to Information. The Right to Information has not explicitly been recognised in the Indian constitution. However, the Supreme Court of India has interpreted through various decisions that the right to information is a part of the Right to Freedom of Speech and Expression under Article 19(1)(a) of the Indian Constitution. In addition, the Supreme Court of India has gone on to say that the Right to Know is an integral part of the Right to Life and unless one has the Right to Information the Right to Life cannot be exercised².

Why a specific legislation?

In addition to recognising this right as a fundamental guarantee, it is necessary to enact an enabling law, which will operationalise this Fundamental Right. This essentially means that there is a specific need to enact legislation that will put in place a system through which government information can be accessed.

The Developments in India

The demand for RTI laws has been growing with time. While there have been some significant developments at the state level, the central government has been dragging its feet on the issue.

In 1994, the Mazdoor Kisan Shakti Sangathan (MKSS), started a grassroots campaign for the right to information in Rajasthan. Emerging from a struggle for minimum wages and land rights, the movement drew a clear link between the denial of rights to the persons in the

¹ South Africa, Nepal, Ghana are some of the countries that guarantee the Right to Information as a fundamental right.

² Reliance Petrochemicals Ltd. vs Proprietors of Indian Express, AIR 1989 SC 190

community, the corruption in the administration and the right to information. This movement grew and the campaign resulted in the government of Rajasthan enacting a law on the Right to Information in 2000.

Prior to the Rajasthan Act, as early as 1997, Tamil Nadu and Goa became the first states to enact laws on Right to Information. Maharashtra and Karnataka also enacted their respective RTI law in 2000. The most recent entrant in this league has been the National Capital Territory of Delhi, which enforced the Delhi RTI Act in 2001. In 1998, the Madhya Pradesh government enacted a law on the Right to Information, which did not get enforced as the Presidential assent was denied to it. Subsequently, the government has issued executive orders to more than 50 government departments directing them to provide access to information to the people. Uttar Pradesh government has also issue similar orders on a pilot basis, restricting them to a few departments.

At the central level there have been several initiatives for preparing a law on the Right to Information. The Consumer Education and Research Centre (CERC) was involved in preparing a Bill, as also the Press Council of India. In 1997 the central government set up a Working Group on Right to Information and Transparency under the chairmanship of Shri H.D Shourie to look into the feasibility and need for a Right to Information legislation. The working group submitted its report in May that year with a draft Bill titled the Freedom of Information Bill 1997 (1997 Bill). The 1997 Bill was modified by the government and placed before the cabinet which referred the same to a Group of Ministers (GOM) – the 1997 Bill remained with the GOM from October 1997 to February 2000. In July 2000, the Freedom of Information Bill, 2000 (“Bill”) was introduced in the Lok Sabha. This Bill was referred to the Department-related Parliamentary Standing Committee on Home Affairs (“Committee”) by the Chairman of the Rajya Sabha in consultation with the Speaker of the Lok Sabha in September 2000 for examination and report.

The Standing Committee deliberated on the Bill after hearing the views of the Secretary, Ministry of Personal and Public Grievances and various individuals and organisations working on the issue. The Committee presented a Report, which was placed before both houses of parliament on July 25, 2001 (Report).¹ Since then the process has once again gone behind closed door and one does not really know what has been happening.

What should the Law say?

There is a great deal of debate on the content of the law. Civil society is agitating for a law that will be people friendly and will ensure that much information is put in public domain. Unfortunately, the laws that are being enacted are a far cry from the demands of civil society in India. To be a strong law on the Right to Information, the following minimum elements must be present:

1. **Duty on the Government:** Iron cast duty on the government and public bodies to give information to any person seeking the same.
2. **Inclusion of Private bodies:** Apart from the government and public bodies, there are strong arguments for the inclusions of private bodies as well. Today the private bodies

¹ A copy of the Report can be view at our Website, www.humanrightsinitiative.org

also influence and affect public life in a great number of ways. This is more true now in the context of the on going privatisation of public corporations and the growing role of private bodies in areas of infrastructure and public services, like power, telecom etc. The Bhopal Gas Tragedy is a strong example of the havoc the activities of a private body can play on the lives of common people. Therefore, information relevant to public interest, public health and environmental safety must be made accessible to the general public from private bodies. Goa RTI Act is the only one in India, which brings in private bodies under the obligations of the its RTI Act to provide information to the public.²

3. **Access as general rule:** Clearly stating access to information as the rule and refusal as the exception is an essential for removing any doubt that access to information is an inherent right of the people in a modern democratic society, that cannot be denied on mere administrative discretion. This will mean that the government duty bound to disclose/provide information to the public as norm and refuse information only in defined, narrow and exceptional circumstances.
4. **Minimum and narrow Exemptions:** The list of information that cannot be disclosed to the public (generally known as ‘exemptions’) must be minimal, specific and narrowly defined. The usual list includes categories like defence related information, information which can harm the law and order situation, commercial secrets, etc. The Constitution of India allows only reasonable restrictions to be applied to the fundamental freedom of speech and expression. The courts have also read these restrictions strictly and the same logic has to apply to the right to information as it is an accepted part of the freedom of speech and expression. Therefore, the law must not contain a long list of exceptions couched in terms general enough to ensure that all kinds of information can be refused taking the help of the law itself. This has happened in the case of the Tamil Nadu right to Information Act which has all of 22 exceptions, and the Shourie draft Bill, which, along with numerous exceptions contains an all-pervasive clause that information can be denied, viz, “If its disclosure does not subserve any public purpose”. A Right to Information does not need to disclose any specific need. If a person must show public purpose every time he seeks information, it would give unlimited discretion to public bodies to refuse information.

Here also the debate of protection of privacy becomes relevant. The law has to take into account the protection of an individual’s privacy. Personal information held by the government must be exempt from disclosure. However, if the public interest in disclosure in the public interest greatly outweighs the preservation of individual privacy, then disclosure should be allowed. Goa, Karnataka and New Delhi Act contain provisions for exemption of private information subject to larger public interest.

5. **Application process:** The application (the request for information) process has to be clearly defined and a definite official must be identified and made responsible for accepting the application and to process the same and provide the information or a

² The new Promotion of Access to Information Act, 2000 in South Africa dedicates an entire segment of the Act to access of information from Private bodies. It clearly states the right of a person to access to information (in certain cases) held by private bodies and provides in detail for a person to approach any private body and request for information.

reasoned refusal, as the case maybe. Generally, written applications or requests are required seeking information, but there may be legitimate cases where the person seeking the information cannot write without assistance or write at all, especially in a country where illiteracy is widespread. In this case, the law must stipulate that oral requests should be accepted and where reasonable assistance is required to help the person write a request, the assistance must be provided. In this respect, the central FOI Bill puts the burden on the government official to reduce the oral request into writing. The law in Goa and Delhi also take into account oral requests.

6. **Time Limit for administrative response:** The response time to the application has to be reasonable and timely. If excessive time were allowed to the administration to reply to the application or provide information it would nullify the requirement of timely information. For example, in cases of urgent information requirement like in matters of custody or emergency medical situations etc., information delayed is information denied and an information giving mechanism for the benefit of the people loses its meaning. This kind of situation is not satisfied in most Indian RTI laws, wherein the most common time limit is of 30 days from the time of receipt of the application for information. Only, the Goa RTI law provides for a situation of urgent requirement of information and it states that in cases of life or liberty, the information must be provided within 48 hours of the application for information. We believe that this provision must be incorporated in any RTI law to bring it closer to being a responsive and effective piece of legislation.
7. **Fees:** Most of the time a fee has to be paid for obtaining copies of documents or any other medium containing the desired information from the government. This fee has to be reasonable and provision for waiver in suitable cases must be provided as well. This is especially true in a country of abject and widespread poverty. The law must set out the basic guideline with respect to the upper limit of the fee, as it cannot be left to the discretion of the officials and it must be limited to the cost of processing and making available the information at the most. This will provide a space for the officials to set fee structure which will act as a deterring factor for asking information from the government. The Rajasthan RTI Act and the Central FOI Bill, do not contain any guideline with respect to an upper limit for the fee to be charged.
8. **Suo motu Disclosures (Duty to Inform):** A law on the Right to Information must cast a positive duty on government and public bodies to inform the public in case of certain projects and activities which relate to the public. This envisages giving information without being asked for it (by an application or request for information). It must be made mandatory to give out certain kinds of information on a mandatory basis. This kind of information would include the organisational structure of the government department/public body, its governing rules and manual, functions, information on proposed projects and schemes, and other relevant information which needs to be given out and updated routinely. The Karnataka RTI Act and the Delhi RTI Act impose this obligation on the government authorities. The Central FOI Bill also contains similar disclosure clauses.
9. **Independent Appeal Mechanism:** The information seeker must be provided an independent remedial mechanism to redress any grievance from the response to the

application for information. One core idea involved in the Right to Information is to pry open the administration and subject it to public scrutiny and make the government accountable to the people. This objective is completely lost where there is a complete lack of an appeal mechanism or it is within the establishment itself. It is of vital importance for the success of an RTI law for the appellate authority to be an independent agency separate from the government, which will deal with any appeal in an unbiased and efficacious manner. Some Acts in India provide for an independent appellate body like, Karnataka Act, the Goa Act, the Rajasthan Act and the Delhi Act. The appellate body itself varies, for example Goa and Karnataka (appeal at the second instance) lie to the State Administrative Tribunal, whereas in Delhi the appeal lies to the Public Grievances Commission. In the Tamil Nadu Act, Maharashtra Act and the central FOI Bill, the appeal mechanism is restricted to within the administration itself.

10. **Penalties:** The provision for an independent appeal mechanism is essential for providing a remedial mechanism for the person seeking information. But to deter the official and persons responsible for providing the information from unnecessarily harassing, delaying or intentionally denying or providing wrong or inaccurate information, adequate provision for penalties must be fit into the legislation. Most of the laws in India that have penalty clause provide for disciplinary action against the erring government personnel in case of delay or wrongful denial of information. The central FOI Bill, Tamil Nadu Act and Maharashtra Act sorely lack in this respect with no penalty clause at all.
11. **Independent Monitoring Agency:** Without continued and independent monitoring the RTI law will become a dead-letter law. It is important that an independent agency is made responsible to monitor and review the functioning of the law, provide advice to the government on all matters related to the promotion of right to information, undertake documentation and research with respect to information management of the government with a view to improve the same, devise training and orientation of government employees on the culture of openness and transparency etc. Goa and Delhi Acts have constituted a body with the responsibility of monitoring and reviewing the law called the State Council for Right to Information. Typically this body constitutes of members from the government, representatives from the media, civil society, business section, etc.
12. **Protection of Whistleblowers:** The RTI law must contain protection for public officials who give certain exempted information where it is necessary to do so in overwhelming public interest or to disclose some serious corrupt practice, etc. This gives honest and alert officers the safety and assurance from fear of reprisal to come out with information in public interest or expose corruption and malpractice in government. All the RTI laws in India, except the Karnataka Act, provide for the protection of any person against any legal proceeding for anything done in good faith in pursuance of the respective RTI law.
13. **Publicity and Training:** The law must contain a mandatory procedure for publicising its contents. Often, laws are passed without their knowledge percolating down without sufficient speed or impact and therefore fail to bring about the desired change in the systems. The Right to Information law must also contain a strong aspect of training and orientation of public servants at all levels, in order to bring about an effective change in

the culture of secrecy and unwillingness to part with information. There are no provisions in any of the RTI laws in the country, which provide for suitable publication and awareness building amongst the people regarding the law.

Problems with the Indian Law on RTI

As it emerges from the discussion above, the legislation that have been enacted by the states as also the central Bill do not contain all the important components of a law on the right to information. For instance the Goa and the Tamil Nadu law do not contain provisions on the duty to provide information. The Maharashtra and Tamil Nadu laws have a long list of exceptions that keep out a lot of information from public domain. The central FOI Bill is also very weak, and in certain aspects it does not even stand at par with its counterpart in the States. For example, the FOI Bill does not contain any independent appeals mechanism nor does it contain any penalties. It further fails to provide for an independent monitoring agency.

Neither the laws enacted by the various states nor the FOI Bill being considered by the central government are satisfactory, as these laws keep a large area of information away from the purview of the public. There is no uniformity or consistency amongst the various state laws that have been enacted. That is why there is a demand that the central government must make a law which applies uniformly to the whole country and sets out clear procedure for getting information³. It is also important for the central FOI Bill to be a strong law setting out the minimum standards with regards to the components discussed earlier, for example setting out a reasonable time limit for response from administration in cases of urgent request for information. This will mean that the States will also have to conform to the minimum standards set out in the central law and therefore, certain definite minimum standards will be assured to all information seekers in the country.

The process of law making itself in most cases has been non-participatory. The laws made by the government have been passed without much discussion or debate and without taking into consideration people's views on the issue. As a result of this, the laws are not people friendly and the common person is not aware of existence of legislation, which is meant for their benefit.

Conclusion

The realisation of Human Rights is dependent on a democratic society, where the people are empowered with information and knowledge, are able to scrutinise the functioning of their government and are capable of participating in a meaningful manner in the governance of the community. To this end, the RTI law is a tool, as it gives entitlement and the mechanism to obtain information from the government with which citizens can become empowered by acquiring a weapon to hold the government accountable, participate in governance and exercise their rights.

It must be kept in mind that mere enactment of a law does not mean that government will start implementing it in an effective manner. Civil society organisations, NGO's and others have a responsibility to ensure effective implementation. The same is true for the

³ Detailed analysis of the state laws can be found on the CHRI website www.humanrightsinitiative.org

implementation of the RTI law as well. They have an important role to play, for example, in using the law for the benefit of the people, disseminating information, analysing information, generate debate on various issues and in carrying the voice of the voiceless to policy makers.

Commonwealth Human Rights Initiative.