

TURNING RIGHT TO INFORMATION LAW INTO A LIVING REALITY

Access to Information and the Imperative of Effective Implementation

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INTRODUCTION

As a human right, the right to access to information (ATI) has come of age. Over thirty countries have passed ATI laws in the past few years. Along with the excitement that this global trend has promoted has come a growing recognition of the importance of effective implementation. Much of the advocacy effort over the past decade has been directed towards persuading a nation-state government to agree to an ATI law. But passing the law, we have come to realise, is in a sense the easy bit. Examining the motive of government when passing the law is important when preparing for the implementation phase. Where a government has passed the law merely to satisfy, for example, an international financial institution prior to the grant of a loan or aid, then there is likely to be a doubt about its true commitment to effective implementation.

Until 1990, the only countries with ATI laws were similar in socio-economic disposition: Sweden, the United States, Canada, Australia and New Zealand. Obviously this group of countries are long-established democracies with significant resources to support the implementation of law and policy. Now, valuably, a new body of experience is growing, as a far more diverse group of countries battle to meet the challenge of effective implementation. New lessons are emerging that can be shared. This paper seeks to contribute to the process by enumerating the primary factors that are likely to determine whether or not an ATI law will be implemented effectively and, thereby, become a living, useful reality for citizens seeking to extract greater accountability from those in power. First, it sets out some points of departure. Second, it offers an implementation checklist, or framework for implementation from the governmental/holders of

information side. Thirdly, it considers the civil society dimension to implementation; how it can play its part in ensuring effective implementation.

POINTS OF DEPARTURE

The first point of departure for this paper is the simple proposition that implementation is crucial; without effective implementation an ATI law – however well drafted - will fail. The second is that effective implementation is a two-way deal: between the holders of information (government) and the requesters (citizens and Civil Society Organisations). Recognising that there is dual responsibility helps us understand the nature of the challenge and contributes to the design of viable solutions.

The third point of departure is that thinking about implementation is important not when the law is already passed, but at the time of drafting. The provisions must be crafted so as to anticipate the implementation challenges, such as: Will there be political will or will there be resistance? If so, the law may need to be more specific about the system and procedural requirements necessary to make the law workable in practice. Yet, the overall framework should be realistic and not over ambitious; it should be achievable. Arguably, the South African law, which has been described by international expert Tom Blanton as “the best ATI law in the world”, is too ambitious in its range and scope and that the capacity of the South African executive is insufficient to cope with the demands of the legislation. For this reason, both the legislative committee and the South African civil society pressure group – the Open Democracy Campaign Group – pushed for a higher level of specificity when drafting the implementation provisions relating to procedures and systems. Now that the law is approaching its third year in force, it is easier to hold government departments that have not implemented the law properly to account. In other words, it is easier to demand and get adequate implementation of systems and procedures where the law is clear and specific, with sufficient level of detail, than where it is vague or general.

Fourthly, an ATI law creates a unique opportunity to profoundly alter the relationship between governed and government - to build a new covenant of trust and to “change the rules of the game”, as ARTICLE 19 Executive Director Andrew Puddephatt puts it. Poor implementation destroys the expectations that have been created when passing the law. A double harm is perpetrated: the opportunity to re-build trust is lost and the credibility of government is further undermined by its failure to live up to its promises of a new open culture.

Fifthly, and most importantly, this paper approaches the whole topic of effective right to information law from the perspective of socio-economic rights. As I have argued elsewhere¹, and as the work of MKSS’ right to know campaign in

¹ In Calland R. & Tilley A. (eds). *The Right to Know, The Right to Live: Access to Information & Socio-economic Justice*. The Open Democracy Advice Centre (ODAC). Cape Town. 2002.

Rajasthan has proven, a right to information law can be used emphatically to make a difference to the lives of the poor.

A FRAMEWORK FOR EFFECTIVE IMPLEMENTATION; AN ATI LAW IMPLEMENTATION CHECKLIST

As I suggest above, ATI implementation should be seen as a dual responsibility of the holders of information (government) and the requesters (citizens and civil society organisations). Increasingly, policy advocates are recognising the importance of covering non-state actors and owners of information when drafting ATI laws. The South African law, the Promotion of Access to Information Act 2000 provides, uniquely, for the comprehensive right to access privately held information, “where it is necessary to protect or exercise another right”. Other new laws, such as the one Jamaica passed in July 2002, is typical of the new trend in that it covers those entities which, whether private or public, undertake “public functions”. The next section of this paper is directed at what is necessary for effective implementation in terms of the holders of information, and contemplates governmental compliance, though much of the analysis would also apply to the case of implementation by a private entity.

Political Will and “Mindshift”

Most governments are used to doing things in a secretive fashion. The notion of transparency is invariably far beyond the range of experience and mindset of most public bureaucrats (and even more so in the case of the private sector). Therefore, it is necessary to achieve a fundamental mind-shift. At the same time, the necessary political will for a change in approach away from secrecy must be created.

To move the holders of information beyond the lip-service recognition of transparency’s virtues to the point where they are genuinely – conceptually, emotionally even – committed to it, requires a huge effort. The experience in South Africa and elsewhere around the world in countries that have a long historical tradition and culture of patrician or authoritarian control of public information suggests that once the first awkward requests arrive old attitudes resurface quickly. A law is never a panacea - without the will to implement effectively and the recognition that openness has a value that exceeds any passing discomfort caused by a “hard case request”, it will achieve little but dashed hopes. Thus, it is essential to get buy-in from senior political stakeholders.

Once that is achieved, it is important to build on it by identifying and cultivating “Champions” at key nodal points in Government. Education – developing a deeper conceptual awareness (building an understanding of the underlying rationale and philosophy) – is also an important related endeavour. And, clearly, getting adequate resources allocated – infra-structural, financial and human –

and specific budget allocations for the implementation of an ATI law provides an explicit and exacting test of whether the necessary political will exists.

Government System-building

Without good systems to process requests an access to information law will fail to deliver on expectations. For this to happen, an adequate information management system must be designed and established. In turn, this system must have viable relationship with the more general system of archiving. Many countries that have recently passed ATI laws, such as Jamaica, have rather precarious record-keeping traditions or, in previously authoritarian governments, such as South Africa, many records have been lost or deliberately destroyed. As the work of organisations such as the National Security Archive in Washington DC or the South African History Archive in Johannesburg has shown, often it not just the existence of the record, but the pattern and, therefore, the interlocking or related records that are also significant². This factor adds to the need for proper record-keeping systems and archives if the ATI law is to be useful and useable in reality.

Part of this process involves the creation of “road-maps” of the records that exist. This is as important for the holders of information as it is for the potential requesters. Without knowing what records there are, and where they are, it is hard to imagine an implementation regime that will be anything other than frustrating for both holders and requesters. Many modern ATI laws such as the South African law include, for this reason, provision for the creation of such ‘road-maps’.

The most important component of such a record-keeping system, in terms of its direct relationship with the ATI law, is the categorisation of records in terms of the duty to disclose under the law. All ATI laws include exemptions to disclosure, tightly and precisely defined if they are to accord with best standards. Declaring the maximum number of records as automatically open is the best approach: it limits the decision-making process for government – and is therefore less of a drain on resources – and is clearly better for the requester, because the disclosure will be automatic. Indeed, the best implementation model is to not only categorise as automatically disclosable but also to publish at the point the record is created. This is what in Freedom of Information lexicon is known as the “right to know” (RTK) approach. Contemporary developments in the use and

² There is a rather controversial debate surfacing in some places about the extent to which when implementing an ATI law governments should ‘look backwards’ in terms of old records. The approach that I have come to prefer, for largely pragmatic reasons, is where the government concerned is short of resources to encourage it to implement a new system of record-keeping for the future and to not worry about past records. The prospect of having to organise – and finance – a new system for all old records, is daunting for such governments and may well have a chilling effect in terms of their overall enthusiasm for implementing their new ATI law. This view is unlikely to be attractive to historians, however, especially those “activist archivists” concerned with security history.

application of ICT (Information, Communication Technology) assists this process, of course, in line with the modern notion of “e-government”.

Internal systems and rules are crucial – the “internal ATI law”. Applying to access the record of the internal system is one way of discovering the extent to which a government agency is taking the implementation issue seriously. Things to look out for would be training and the development of manual for line managers and information officers and/or their units, and internal rules relating to good practice and important procedural matters such as compliance with time limits. Also, good practice suggests that there should be a thorough internal system for recording requests, such as an electronic database that can itself be subjected to public and parliamentary scrutiny.

Related to this is the question of line management responsibility for implementation and request decisions. Good implementation will lead to clear delineation of responsibility, supported, for example, by changes in officials’ job descriptions and/or performance contracts and criteria. Most modern ATI laws create “information officers” or similar positions. One obvious way to test the strength of the implementation is whether or not such officials have in fact been appointed and whether they received specialist training.

For the public, linked to the ‘road maps’ mentioned above, it is important to know who to contact and how. Most modern ATI laws include such requirements; the South African law, for example, requires government to have the name and contact details of the information and deputy information officers listed in all telephone directories.

Governments that are committed to the effective implementation of an ATI law will quickly draw up an implementation plan. If they are wise, they will consult with the potential user community. One of the causes of optimism in the Jamaican case is that despite its government’s historical culture of secrecy, within a month of having passed its ATI law in mid 2002 the Prime Minister had through his Minister of Information created an implementation unit. In turn, the unit soon carried out an implementation consultancy exercise with civil society, ably facilitated by the Carter Center’s ATI project.

Enforcement Mechanism/Oversight

In essence, a law’s value is directly proportional to its enforceability. Thus, the establishment of an External Appeal Tribunal or Commission or Commissioner is vital for the success of an ATI law. In turn, the development of appropriate procedures must follow, and adequate resources allocated to underpin the independence and viability of the enforcement mechanism. As with the public bureaucrats, training is necessary as it is likely that this will be a new area of law and administrative justice. A public awareness campaign should be devised, about the law generally, but also specifically about the existence of the appeal

mechanism – which should be inexpensive and speedy as well as accessible. Automatic reviews of the enforcement mechanism’s effectiveness as well as the useability of the ATI law generally should be carried out.

THE CIVIL SOCIETY RESPONSE

Like a motor car, access to information laws need to be used – often – otherwise they seize up, decay and ultimately die.

The response from civil society needs to be energetic and committed. It also needs to be strategic, with a co-ordinated, cross sector approach and strategic alliances with, inter alia: investigative journalists, trade unions, churches, environmental groups and human rights organisations. Most importantly of all, the civil society response should aim to link the ATI law to “real life” civil society activism. As this paper argues at the outset, showing the nexus between access to information and socio-economic justice is crucial to promote the value of the law and thereby to generate the requests for information that will bring the new law to life through its useage.

There are different models of civil society response to the challenge of effective ATI law implementation³. First, what I term the *Rajasthan Model*, based on the example of the MKSS organisation in the Indian State of Rajasthan, whose defining characteristics are that it uses the law ‘in the field’, working with grass-roots, rural communities to apply ATI law to their direct benefit.

Second, there is the *Litigation-first* model, whereby effective implementation by the holders of information is “encouraged” by litigating as many unsuccessful requests for information as possible and/or by supporting the request and litigation strategies of other civil society organisations. For example, Public Citizen in Washington DC and Access to Information Programme (AIP) in Sofia, Bulgaria, litigate their own test cases and those of other organisations from civil society, acting in effect as specialist lawyers or law centres.

Third, the *Strategic Secondary Interest* model, which prioritises ATI not as a ‘first interest’ specialism, but as a vital strategic tool to serve the primary interest and so developing the expertise and capacity to do so, providing expert advice and support for networks doing similar primary interest work. Examples of this model are OMB Watch and National Security Archive in Washington DC.

Fourthly, and finally, The *Combined Strategy* model, which includes some or all of the following elements: specialist in ATI; providing technical and other support to civil society organizations; formed out of a network or campaign group; cross-sectoral foundations; working with key sectors to develop ATI strategy;

³ Again, it is neither the purpose of this paper to case-study any of the different models nor to offer a comprehensive survey of all forms of civil society activism in this field, but rather to point to the fact that there are a number of different broad approaches to choose from.

generating requests from citizens and citizen organisations; training both civil society and government; conducting advocacy around law reform; litigating in own name on seminal cases; acting as a law clinic for civil society organizations. This description is based largely on my own organisation, the Open Democracy Advice Centre in Cape Town⁴, a model that is being replicated by IPYS in Lima, Peru.

All of these models have merits. The most important thing is that civil society is active in using the ATI law. In that way, the holders of information can be held to account for their new responsibilities in the use, control and disclosure of information, and the overall objective, that greater openness will empower people so that they can take control of their lives, is achieved and becomes a living reality.

CONCLUSION

The Right to Know – a human right that has come of age – is the right to Live. Civil society activism, in different forms, must illuminate the potential that a right to information law presents. In return, the holders of information must take the open road, recognising that access to information laws create a unique opportunity to build a new relationship between those in power and citizens, in which the “rules of the game” are fundamentally transformed. Despite the potential, and the number of such laws that have been enacted in recent years, the prospect that they might make a meaningful contribution to a re-alignment of power relations may falter against the rock of weak implementation. Where an right to information law is inadequately implemented, it is counter-productive in many ways. It destroys the hopes and expectations raised by the passage of a new law. Having won the battle for legal reform, the imperative now is effective implementation. Knowing how to turn the right into a living reality, for the benefit of government, of the private sector and most of all for citizens especially the indigent and marginalised, is an opportunity that no-one can afford to miss.

⁴ ODAC's mission is to promote an open and transparent democracy; foster a culture of corporate and government accountability and transparency; and assist persons in South Africa to be able to realise their human rights. See: www.opendemocracy.org.za. Thus far, our overall strategy has been based on triple-legged approach: 1) Training, of both holders and requesters; 2) Monitoring and research related to the implementation of the South African law, and of international best practice, to support our advocacy for law reform and proper implementation; and 3) Litigation: ODAC's Litigation policy is to take on cases that “support our mission, represent the indigent, tend to result in access to information that will promote socio-economic justice, and have a broad impact on the advancement of rights”.