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Title: India's Right To Information Movement Makes A Breakthrough
Volume 1 Issue 1

Abstract

The article analyses the Indian *Right to Information Bill 2004* that was tabled in Parliament in December 2004. The article provides a brief history of the development of the Bill within India, including the civil society activities which spurred the Indian Government into tabling the new Bill, which replaces the *Freedom of Information Act 2002*. It then proceeds to summarise the key provisions in the new Bill and detail the key deficiencies still remaining in the Bill. Finally, it provides a status report on where the Bill is now, and the anticipated process for enactment.

India's Right To Information Movement Makes A Breakthrough

In a government...where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people...have a right to know every public act, everything that is done in a public way, by their public functionaries...The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.

- Justice K K Mathew, Supreme Court of India (*State of UP v Raj Narain*, AIR 1975 SC 865.)

For more than two decades, the Supreme Court of India has recognised the right to information as a constitutionally protected fundamental right, established under Article 19 (right to freedom of speech and expression) and Article 21 (right to life) of the Constitution. (Constitution of India, 1950): The Court has recognised the right to access information from government

Slough, P and Rodrigues, C (2005) India's Right To Information Movement Makes A Breakthrough. Open Government: a journal on Freedom of Information. Volume 1 Issue 1 Published 21 March 2005

departments is fundamental to democracy. Activists at the grassroots have famously relied upon the right to demonstrate that access to information is also essential to ensuring effective participatory development. (Mishra, 2003)

Proponents of the right to information in India have long made it clear that the legal right to information simply recognises the moral fact that information held by the government on behalf of the public, collected with public money and accumulated by public servants rightfully belongs to the people. Information is not a gift, graciously bestowed by India's leaders – it is no less than every person's human right.

A hard fought battle

Unfortunately, while the Indian public have increasingly been aware of the importance of the right to information, MPs have been reluctant to transform the right into a practical legal reality. The movement grew from the grass roots in Rajasthan, where people exercised their fundamental human right to information to highlight the gross discrepancies between money awarded to development activities in Rajasthan and the actual completion of such projects (Roy et al., no date). Over time, the campaign has spread throughout the country, with the Second National Right to Information Convention held in Delhi in October 2004 celebrating the 10 year anniversary of the right to information campaign in India.

During the last decade, some notable wins have been notched up by campaigners. Nine states have already passed right to information laws – in

Tamil Nadu (1997), Goa (1997), Rajasthan, Karnataka, Delhi, Maharashtra (2002), Madhya Pradesh, Assam and Jammu Kashmir (2004). At the national level though the progress has been much slower. Although the *Freedom of Information Act 2002* ("FOI Act") was passed by Parliament in December 2002 and received Presidential assent in January 2003, a commencement date was never notified such that it has never come into force and remains a paper tiger. In any case, the FOI Act was a very weak law, which failed to give proper effect to the constitutional right to information. The exemptions were broadly drafted, no independent appeals mechanism was established and no penalties were included.

Consequently, even after the passage of the FOI Act, campaigners continued to advocate for the speedy implementation of an effective right to information law. In 2004, these efforts were bolstered when the newly-elected United Progressive Alliance (UPA) Government specifically promised in the Common Minimum Programme (CMP), which set out the Government's key objectives for its term, that it would make the FOI Act more "progressive, participatory, and meaningful" (Government of India, 2004)

The Congress Party, the biggest member of the UPA coalition, set up its own National Advisory Council (NAC) comprised of eminent civil society persons to oversee the implementation of the CMP. The NAC included in its member Aruna Roy and Jean Dreze, key figures in the Indian right to information movement and members of the National Campaign for the People's Right to Information (NCPRI). The NAC immediately took an interest in the right to

information, discussing the issue at its very first meeting. Based on submissions by CHRI, the NCPRI and other civil society groups, as quickly as August 2004 the NAC submitted a set of recommendations for amending the FOI Act to the Prime Minister's Office.

On the 23 December 2004, the UPA Government finally tabled a new *Right to Information Bill* ("RTI Bill") in Parliament (Right to Information Bill, 2004) Unfortunately, between August and December 2004, it appears that the bureaucrats responsible for drafting the legislation got their hands on the NAC amendments and used this opportunity to remove and/or dilute some key recommendations in the final version of the Bill. This is not entirely surprising. The bureaucracy is probably well aware of the potential for the right to information to finally make them accountable to the public – and it is doubtful that they are keen to see that happen.

Despite these setbacks, campaigners remain hopeful that a stronger Act can still be passed by Parliament. It appears that a special group of Ministers is to be made responsible for reviewing the RTI Bill, and already, the Bill has been referred to the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for consideration. The public has been encouraged to write to the Committee, calling on members to recommend that the Bill be improved to bring it into line with best practice standards – and then passed as a matter of priority.

Key provisions in the new Bill

The RTI Bill 2004 purports to set out to provide a 'practical regime of right to information for people to secure access to information...in order to promote transparency and accountability. (Right to Information Bill, 2004: preamble)

It will come into force on the 120 day of its enactment – a step forward considering that the FOI Act was never implemented because the law itself omitted a date for it to come into force.

Coverage

- Only "citizens" can request information from a "public authority", defined as any body constituted under the Constitution or a law made by Parliament, or any body owned or controlled by the Central Government.

This definition does not include private bodies which perform public services or which receive funds or concession from the Government.

(Right to Information Bill, 2004: ss.3 2(g))

- The Bill covers only "public authorities" set up under the Central Government or the administration of Union Territories. It does not cover any State public authorities or extend to Jammu and Kashmir (due to the special constitutional status of that territory). (Right to Information Bill, 2004: ss.1(2), 2(g))

Access and Its Limits

- The "right to information" is defined broadly, to include a right to copy and inspect records, take certified samples and inspect public works.

Information which can be requested also includes information "relating to

a private body that can be accessed by a public authority under any law in force" (Right to Information Bill, 2004: s.1 (d)).

- Public authorities must also proactively publish a wide range of information about their organisation, including information about: its decision-making processes; its rules and regulations; departmental budgets, including expenditure; the categories of documents it holds; consultation opportunities; recipients of subsidies; and proposed development activities (Right to Information Bill, 2004: s.4)
- The exemptions are quite broadly defined, with a relatively low standard of harm required, if any. In addition to common exemptions to protect national security, international relations, legally confidential or commercially sensitive information and privacy for example, the Bill also provides a blanket exemption for all documents of Cabinet or the Council of Ministers, and does not cover a range of intelligence and security agencies such as Intelligence Bureau, Central Reserve Police Force, National Security Guards, Directorate of Revenue Intelligence and Central Economic Intelligence Bureau (Right to Information Bill, 2004: s.21)
- A blanket public interest override has been included "if public interest in disclosure of the information outweighs the harm to the public authority" (Right to Information Bill, 2004: s.8 (3))

Applications

- Citizens must request information in writing (including by email).
Applications are submitted to a Public Information Officers (PIO) or an

Assistant PIO who is appointed at the sub-divisional or sub-district level.

An application fee will need to be paid (to be prescribed).

- Applications must be responded to within 30 days, except in cases concerning the life and liberty of the person where information must be provided within 48 hours. Where no response is received, this will be deemed to be a refusal. Applications must be rejected in writing.
- Where applications are approved, a fee will be imposed for accessing the information. However, if the application is not dealt with in time, fees will not be collected. Where third party information may be disclosed, the third party must be given a right to make representations before a decision is made.

Appeals & Penalties

- If a person feels they have been wrongly denied information, they can appeal to the officer immediately senior to the PIO in the concerned Public Authority (Right to Information Bill, 2004: s.16(1)).
- A second appeal can be lodged with an independent "Central Information Commissioner" (CIC), a newly established position under the law. The CIC and his/her Deputies constitute an independent, impartial appeals mechanism. They will have the powers of a civil court and can override public authorities and require disclosure. Their decisions are binding (Right to Information Bill, 2004: ss.16(2)-(11) and Chapter III).

- Penalties can be imposed on PIOs of up to Rs. 25,000 or a prison term extending up to five years for “persistently failing to provide information within the specified period” (Right to Information Bill, 2004: s.17).

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Implementation

- The CIC must submit an annual report to Parliament on the implementation of the Act and can also make recommendations for improving implementation (Right to Information Bill, 2004: s.22).
- The Central Government is advised to develop educational and training materials on RTI for the public and for its officers. At a minimum it must provide a User’s Guide for the public (Right to Information Bill, 2004: s.23).

Still room for improvement

The RTI Bill 2004 is a major improvement on the FOI Act 2002. However, there are still a number of key deficiencies in the Bill which should be amended as a matter of priority. Amendments will improve the effectiveness of implementation by ensuring the public’s right to access information is not unjustifiably fettered and by institutionalising incentives and sanctions for government officials to dispense with their historical culture of secrecy and seriously commit to implementing a regime of open government.

The biggest criticism of the Bill from civil society has been directed at the fact that the RTI Bill has narrowed the coverage of the law from what was

originally contained in the FOI Act, by excluding State public authorities from its scope. This raises important constitutional questions which go to the nature of India's federal system of government. Notably, the interaction between State and Central access laws has been a point of conflict since the passage of the FOI Act 2002. After the passage of the Act, the Central Government appears to have taken the position that a Central law would override State laws, going so far as to distribute a circular to States requesting them to repeal their laws. However, since 2002, four States have actually passed right to information laws, with the President actually going so far as to specifically assent to the Maharashtra *Right to Information Act*, which was passed in 2003.

Confusing the matter further however, the new Central Government has done an about-face and drafted a law which does not cover States bodies at all. It appears that the Government is concerned at how such a law would be implemented at the state level in practice. Doubt has been expressed as to whether state public officials, which are not under the direction of the Central Government, can be required to release information collected and managed using State resources. This issue is further complicated in the case of states which already have laws in place. If there is a clash, opinions vary as to how the conflicting laws will be applied. Nonetheless, civil society activists maintain that, considering the precedent set by the previous Central Government in respect of the FOI Act 2002, the Government has – and should exercise – the power to legislate for the whole country.

The Bill has also been criticised for only applying to “citizens” of India, a holdover from the FOI Act 2002. This is a particularly problematic requirement in the Indian context for two reasons. Firstly, many Indians may find it hard to prove that they are citizens considering that India does not have a very effective national identification system, such that many people may not have the necessary paperwork needed to meet this test. If officials use this requirement as a pre-condition for applications it could disempower large sections of the population. Secondly, the requirement for citizenship excludes permanent residents of India, refugees for example, from using the law to protect their rights.

The exemptions categories also remain far too broad. Although the inclusion of a public interest override is a huge step forward, the fact that the exemptions only contain a low level harm test requiring that relevant interests are only “harmed” or “prejudicially affected” could be used to block a lot of applications at the initial stages. Even more problematically, the blanket exemption for 18 specified intelligence and security agencies – a list which can be extended by regulation – has the potential to seriously diminish the important oversight benefits which the right to information brings. It is not appropriate that key government law and order agencies are put fully outside the law’s ambit, particularly considering that the Bill allows for partial disclosure, which would allow sensitive information to be severed before information was released. It is also disappointing that the Government drafters did not even accept the compromise position suggested by the NAC,

namely that these agencies could be exempted except where the information requested relates to corruption or human rights violations.

While it is positive that the Bill has gone further than the FOI Act and included penalty provisions, the offences and sanctions included in the Bill fall very far short of even the minimum good practice standard evinced in the Maharashtra, Delhi and Karnataka right to information laws, which all include personal penalties for certain acts of non-compliance. The offence provisions are inadequate – with officials only being penalised for “persistently failing to provide information within the specified period”. Such a provision is an insufficient deterrent to corrupt public officials who will be resistant to being held accountable for their actions. Furthermore, no offences are included for unlawful destruction of records, deliberate provision of false/misleading information or obstruction of appeals. These are serious acts of non-compliance – the new Bill should ensure that officials cannot get away with such bad behaviour. Despite the precedents set in the Indian States of Maharashtra and Karnataka, there is also no penalty to be imposed for unreasonable delay in providing information. At the practical level, it is also problematic that it is not clear whether the appeals bodies can themselves impose penalties. The penalty provisions need to be substantially improved, At a minimum, they need to include a broader range of offences and give appeal bodies sufficient powers to punish officers who act against the law.

Where to from here?

Although the RTI Bill 2004 has major shortcomings, it is an improvement on the FOI Act 2002 and should be passed – with amendments addressing key deficiencies – as a matter of priority. The Bill has been tabled in Parliament but referred both to a Parliamentary Standing Committee and a Group of Ministers for further consideration. The Standing Committee met in February 2005, but their recommendations are yet to be published. It is not yet clear what the process will be with regard to consideration of the Bill by the Group of Ministers. At a minimum, it is essential that: (a) both bodies seriously consider the amendments suggested by civil society; (b) the provisions of the Bill are not diluted by either of these bodies; and (c) at the very least, they both complete their mandates promptly, so that the Bill does not languish in committee but instead is sent back to Parliament at the earliest possible stage.

Some reports indicate that the Bill may be considered in the current Budget Session of Parliament, which is scheduled to last until mid-May, but it remains to be seen whether the recommendations proposed by the two Committees will affect this timetable. If this opportunity is missed, the next opportunity for consideration of the Bill by Parliament will be in July – more than a year since the Common Minimum Programme pledged an improved law. It is to be hoped that Parliament will act promptly and effectively to pass this Bill, which will finally empower Indian's to effectively exercise their

constitutional right to information. Further updates will be provided throughout the year as developments occur.

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