

GLOBAL TRANSPARENCY INITIATIVES WITH REFERENCE TO THE INDIAN RTI ACT 2005

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Abstract

In the era of privatization and globalization, where the mobility of the people is not bound by limitations vis-à-vis countries, nationality, language or religion, we find that there is a larger scope of interaction on accounts of education, employment, business and tourism etc. With such increased interface with governments and their administration, there is a continual need for transparency and accountability. Very important component of all the models devised by the countries for creating transparency is the Right to Information Act that each country enacts so as to ensure minimal conflict between citizens of all countries and the administration. The basic tenant that each person has a right to know forms the basis of all transparency laws which endeavour to ensure clean governments that are creative to all people wishing to engage with these countries at micro, macro and meso levels. Therefore people have a right to seek information that is clear and true as regards governments' functioning irrespective of defined territories of their nations. Keeping in view with the global transparency initiatives, the government of India has enacted the RTI Act, 2005 as proactive initiative towards achieving administrative transparency. But after due analysis of the Act what comes to the fore is that it suffers from some inherent shortcomings. The implementation of the Act also raises doubts as to whether India is genuinely committed to achieving the global objective of good governance or is it a plain rhetoric. In this background, this paper makes an attempt to assess the status of ten years of RTI Act's implementation in India. It also examines whether the Act has carried the reflection of best international norms on right to information. The study also suggests corrections whereby the RTI Act can be made more efficacious to the continually evolving societies.

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Introduction

In the era of privatization and globalization, mobility of the people is not bound by limitations vis-à-vis countries, nationality, language and religion. The people often travel country to country, in context of their education, employment, business and as tourists and therefore should have a right to seek information that is clear and true as regards governments functioning irrespective of defined territories of their nations. Besides, the problems like environmental pollution, communicable diseases,¹ crimes,² terrorism and corruption having being trans-boundary dimensions have also necessitated disclosure of information. What steps and measures governments around the world have undertaken to tackle these universal problems, people must know regardless of a nation's boundaries. At international level, plethora of initiatives, in form of declarations, conventions, treaties and individual rapporteurs has been put in place to guide member states to enact right to information laws to ensure transparency. After taking inspiration from international human rights instruments, a number of countries have passed right to information laws. The government of India has also enacted the RTI Act, 2005 as proactive initiative towards achieving administrative transparency. The Act has been described as the best law in the world for having several valuable provisions to encourage transparency in public administration. But after due analysis of the Act what comes to the fore is that it suffers from some inherent shortcomings. The sluggish implementation of the Act, also raises doubts as to whether India is genuinely committed to achieving the global objective of good governance or is it a plain rhetoric.

This paper makes an attempt to assess the status of ten years of RTI Act's implementation in India. It also examines whether the Act has carried the reflection of best international norms on right to information. The study also suggests corrections whereby the RTI Act can be made more efficacious to the continually evolving societies. The present study is doctrinal in nature. It is based on secondary data gathered from various sources such as books, journals, newspapers, and law reports etc.

Transparency Initiatives: The Global Perspective

i) International Human Rights Instruments

Transparency and openness in public administration has become a global need. This is the reason that public's right to information has been recognized a significant right in recent times. Various international and regional human rights instruments have provided ample guidance to members state of United Nations (in short UN) to take steps in their respective countries to ensure disclosure of information in public interest. The international transparency initiatives emphasize that public officials should not work in secrecy and citizens shall have a right to access information held by them. Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966 and the Convention on Rights of Children, 1989, all recognizes and guarantees the right to freedom of speech and expression.³ The countries that have ratified these documents are under obligation to make sure that individuals shall not be deprived from accessing information held by public officers. The information shall be easily available to all irrespective of any distinctions of race, religion, caste, sex and place of birth. The Convention on Elimination of All Forms of Discrimination against Women, 1979⁴ also obligates state parties to take appropriate actions to eliminate discrimination against women. It is worthy to mention here that women across the world are subject to different forms of discrimination owing to lack of information about the welfare schemes and programmes meant for them. One should not forget that the information and knowledge are pre-requisites to empower women. Therefore the elimination of discrimination against women is possible only when they shall be well informed. Under Harare Commonwealth Declaration of 1991, the Commonwealth⁵ also aims to work to promote good governance. One of the principles of this declaration aims to strengthen the capacity of the commonwealth, to promote the practices of democracy, accountable administration and the rule of law.⁶

Similarly, in order to obliterate globally prevalent problem of corruption, the UN has also acknowledged the power of information as a tool to facilitate an accountable and honest administration. The UN has adopted the Convention against Corruption in 2003⁷ which laid emphasis on how

to prevent and combat corruption more effectively and promote, facilitate and support international concern and technical assistance to counter it.⁸ The Convention states that ratifying State parties have to ensure at appropriate level the system of public reporting about their public administration. The practice of reporting on public performances will encourage transparency and process efficiency orientated administration. The Convention also speaks about prevention of corruption in judiciary and prosecution services and accordingly prescribes measures.⁹ Realizing the repercussions of corruption, State parties have also been mandated to take useful actions to achieve transparency in the working of several private organizations.¹⁰ In addition, the Convention also criminalizes giving and taking of bribery. Again, the Organization for Security and Co-operation of Europe is a UN Special Rapporteur on right to information. It also states that right to access information possessed by public authorities is a fundamental human right of citizens and hence cannot be denied to them. The office of the Special Rapporteur on Freedom of Expression of the Organization of American States¹¹ established by the Inter-American Commission on Human Rights in 1997 also imposes obligation on member states' to comply with the American Convention on Human Rights in the area of freedom of speech and expression.

ii) Regional Human Rights Instruments

There are regional human rights instruments which persuaded several national governments to enact right to information laws to bring transparency and accountability in administrative systems and processes. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950¹² recognizes the right of freedom to hold opinions and to receive and impart information and ideas without interference of public authorities and irrespective of a nation's boundaries.¹³ This Convention expects from the Public authorities to take steps to encourage free flow of information. The Convention clearly favours an individual's right to access information held by public authorities. The American Convention on Human Rights, 1969¹⁴ also guarantees a right to seek information to citizens of ratifying nations. Likewise, Inter-American Convention against Corruption, 1996¹⁵ aims to eradicate corruption from administrative and governments

functioning. The members' states of this convention are under obligation to strengthen mechanism necessary to detect, punish and obliterate corruption¹⁶ in their respective countries. The member states shall also take effective steps to end corruption. Thus this Convention focuses on disclosure of information to prevent corruption and promote transparency. Equally, Aarhus Convention on Access to Information, Denmark, 1998¹⁷ directs public servants not to conceal information of public interest. The Convention obligates State parties to disclose all information suo motu on official websites. This presumed disclosure of information by public functionaries of governments will make working of public authorities more transparent and will help to reduce number of applications made before RTI authorities in writing to seek information. However, the Convention favours that there should have a provision in the RTI Acts of all countries to seek information through written requests and the public authorities in reply to a request, for information have to make such information available through efficacious legislations.¹⁸

The Convention also stresses on the need to collect and disseminate environmental information. It obligates public officers of each state party possessing environmental information to update it¹⁹ in order to make such information easily accessible to public.²⁰ It is pertinent to mention here that disclosure of environmental information is essential for all governments of the world to prepare effective strategies to control global environmental issues like climate change, global warming and emission of green house gases. Also, the Inter-American Declaration of Principles on Freedom of Expression, 2000 proclaims, the right of every person to access information and information possessed by the State.²¹ Similar right has also been given to Africans under the African Declaration of Principles on Freedom of Expression, 2002.²² The Declaration provides that public bodies hold information not for themselves but as custodians of public. The African Union Convention on Preventing and Combating Corruption, 2003 also binds the African States parties to respect the basic tenants of good governance like accountability, popular participation and the rule of law.²³ The Council of Europe Convention on Access to Official Documents, 2009 also favours greater access of public to official documents.²⁴

iii) GTI Transparency Charter

The Global Transparency Initiative (in short GTI) is a network of civil society organizations. The GTI lays down guidelines for international financial institutions (in short IFIs) to follow transparency as a norm in their working. The IFIs such as World Bank, Asian Development Bank (ADB), International Monetary Fund (IMF), European Investment Bank and other regional development banks, all finance several poverty alleviation programmes and developmental projects across the world. These IFIs have been directed to adhere to the transparency initiatives of GTI. This civil society organization directs IFIs, to provide to individuals a freedom to access information. It strongly advocates individual's right to seek environmental information from public institutions especially when public at large get affected due to developmental projects. The project affected people should have an adequate and easy access to information about the ways public functionaries decides about the matters affecting them. It is significant to note here that developmental projects are putting adverse impacts on environment and also resulting into human rights violations of project affected people. The GTI believes that affected people should be informed and consulted in matters of framing developmental policies before initiating projects in their vicinity. Some of the key principles of GTI which IFIs are supposed to follow and insert in their information disclosure policies to promote transparency are; automatic disclosure of information which means that IFIs will also provide information to public without asking for it, the right to request information and procedure of the appeals in case information sought for is denied, protection to RTI users and regular review of access to information policies.²⁵

iv) International Financial Institutions on Disclosure of Information

The World Bank in its all revised disclosure of information policies²⁶ has favoured individual's right to information. A new World Bank Policy on Disclosure of Information, 2002 has several noteworthy principles such as the presumption of disclosure of information²⁷ held by public authorities and provision for establishment of Infoshop.²⁸ The WB Infoshop is a one stop for economic development literatures²⁹ which facilitates timely public access to Bank's information. It is a permanent place where

information on all current WB's project activities is available. The availability of information at one particular place through Infoshop is a very good idea because stakeholders, organizations and individuals can obtain information about bank's projects very easily. The Bank will also disclose information on its official websites. Various categories of documents are by default available on official websites such as project information documents,³⁰ providing a brief factual summary of main elements of an evolving project³¹ and information on the status of each lending operation under preparation for financing,³² project appraisal documents³³ and program documents.³⁴

In addition, a range of internal documents such as the articles of the agreements and bye laws, organizational charts and basic employment data³⁵ shall be made available on official websites of the Bank. Likewise, IMF has also adopted its own information disclosure policy.³⁶ It believes in power of information to uphold transparency in its own functioning. Any citizen, stakeholder and organizations of borrowing countries can obtain information about the projects funded by it from any part of the world. Akin to IMF, the vision of ADB is to achieve transparency and accountability in its own functioning. The ADB provides several financial grants and loans in Asian regions of the world to reduce poverty. The poverty reduction is its institutional goal. The Bank has adopted several strategies such as economic growth, human development, sound environmental management and improving the status of women to reduce poverty. Any Individual and in particular the recipient country and its citizens can obtain information about the anti poverty programmes and policies undertaken by ADB. The ADB Policy of 2011 also advocates for proactive disclosure of information and imposes obligations on its own officials to disclose information on websites.³⁷ Similarly, Access to Information Policy, 2010 of Inter-American Development Bank (in short IDB)³⁸ has a similar provision. The purpose of such automatic disclosure of information is to ensure direct access of individuals to the information. The European Bank for Reconstruction and Development (in short EBRD) also has in its policy³⁹ favours maximum disclosure of information in public interest. The Bank's Policy of 2014 believes in promoting transparency in its administration and also expects from the borrowing countries to take steps to provide to individuals a direct access to

information. The Policy clearly says that institutional information, information related to projects funded and its strategies and policies will be available to the public.⁴⁰ The Policy also believes in supplying information relating to environment and social impact assessments⁴¹ of any project. The African Development Bank Group's Policy on Disclosure of Information, 1997 revised in 2005 also provides that public's access to information on all Bank Group activities will be provided through the Public Information Centre (in short PIC), field offices and the Bank's website.⁴² The African Development Bank Group suo motu post all information on its official websites for the public.

The preceding discussion makes it amply clear that there are several international norms furnishing ample guidance for the governments across the world to take steps to ensure transparency and good governance in their respective countries. Several principles are common in all international human rights instruments such as maximum disclosure of information, obligation of public bodies to publish key information, practice to promote open government, easy process to receive and respond requests for information, precedence to disclosure of information over practice of concealing information and protection for whistle blowers etc.⁴³ The members' states can make transparency oriented legislations in line with these principles.

Where Does Indian RTI Act, 2005 Stand For?

The RTI Act is in force since the last ten years. It had come into being in 2005 to counter the practice of confidentiality in administrative working which was the norm hitherto. Keeping in view international mandates, the govt. of India enacted the RTI Act to ensure transparency and accountability. However, the Act is not only flawed but is also poorly implemented. The governments and their instrumentalities do not seem comfortable with this law. The bureaucrats are reluctant to put it into practice in letter and spirit due to which many promises stay unfulfilled. The major drawbacks in the Act and its subsequent implementation are as follows.

i) Executive's Dominance

Under RTI Act 2005, Central Information Commission (CIC) and State Information Commissions (SICs) are empowered to hear complaints and appeals, in case, of denial of information. These statutory bodies are presided over by the retired bureaucrats and officers. Under such circumstances, their possibility to get biased in matter of disposing complaints and appeals, especially against their brother officers cannot be ruled out. The officers sitting as judges in CIC and SICs may not hear and decide complaints and appeals in impartial manner against first appellate authority (FAA), Public Information Officers (PIOs) and Assistant Public Information Officers (APIOs) who all are themselves public servants. However in order to rule out possibility of official biasness, the RTI Act provides that CIC and SICs will be multi- member bodies having ten commissioners which would belong from different fields including judiciary, but since enactment of the RTI Act, various State governments⁴⁴ across the country continue to do with retired IAS officers as the single-member Information Commission.

The Act also gives extensive powers and responsibilities to RTI authorities like FAA, PIOs and APIOs regarding supplying and denying of information. But the procedure of seeking information very often is obstructed by these officials using arbitrary and irrational grounds. The studies have pointed out that the public is facing stiff resistance from the bureaucrats and these RTI authorities in matters of supplying information.⁴⁵ At number of occasions, the functionaries have been seen of making all sorts of excuses to deny or delay information. Further, it is not expected from these RTI authorities to act fairly being part of the executive itself, specially, in case, where information demanded pertains to public functionaries. Also, the officers sitting and acting as FAA, PIOs and APIOs in government's departments owing to non-legal background are not able to interpret RTI provisions, handle and answer RTI applications etc. Likewise, most of the information commissioners, in the office of CIC and SICs do not possess adequate legal knowledge. There has been a trend of appointing bureaucrats rather than judicial personnel as commissioners. The Information Commissioners in absence of legal background cannot interpret several pivotal terms like 'public authority, 'information' and 'record' etc as used in the RTI law in a broad and more

liberal manner. A sure testimony of this fact has been many negative judgments⁴⁶ passed by FAA, CIC and SICs wherein they failed to interpret the RTI law as per its mandate.

The RTI Act prescribes a procedure to fine erring PIOs and APIOs for denying information but this provision rarely has been used. The Individual study⁴⁷ also indicates that many public authorities are asking applicants to explain reasons for seeking information. Surprisingly, this stance of public authorities was also substantiated by Madras High Court, when in a case; it issued order that RTI applicants must give reasons for seeking information. However, very soon, the Court realized its mistake and did a suo motu review of the judgment in which it reversed its order.⁴⁸ To ask RTI applicants to furnish reasons for seeking information by authorities acts as a serious blow to transparency regime in the country.

There is another provision in the RTI Act which can be used to exempt information disclosure. The Act is silent as to what kind of information can be withheld by the government in name of exempted information. It is unclear in the Act and gives ample scope to RTI authorities to deny information on whimsical and irrational grounds. For example, the foreign relations and the matters of public interest may be interpreted in such a manner that government can withhold information for quite a large number of reasons. Therefore, for the desired success of the Act, this vague provision either should be properly reframed or need to be removed at the earliest.

ii) Limited Application of the Act

The Central RTI Act, 2005 does not apply to State of J& K. This means that the officers of Central government's departments working in the state's jurisdictions are not responsible under RTI Act to supply information. However, in order to include all officers either of central govt. or state govt., RTI Act, 2009 was passed by J&K govt. But the Public Authorities of Central govt.'s departments often resist supplying information under the J&K RTI Act. Such a situation has created problems for information seekers in the State. Likewise, agencies like RAW, IB and BSF deployed in state of J & K are neither covered under the Central RTI Act nor under J&K

RTI Act. Under such circumstances how information pertaining to human rights violations can be sought from them. This is not clear in the Act. Further, under Central RTI Act, information which is of sensitive nature, such as 'security and scientific' related issues will not be provided. But these expressions are vague and not elaborated in the RTI Act. By using these expressions, the bureaucrats and public officials, can be seen of concealing information on unconvincing grounds.

Further, under Indian RTI Act, foreigners are not entitled to seek information. It has been stated in the preceding discussion that people are visiting to countries in several context which has necessitated information disclosure to ensure transparency and accountability in administrative process. The RTI Act is silent on this issue and does not give this right to foreigners. The law thus seems anti-thesis of the rule of law.

iii) Low Awareness of the Act

The individual studies have been indicative that information receivers and information providers are not aware about the RTI Act. It impedes effective implementation of the Act. The governments do not incur adequate expenditure to publicize and propagate the law among the public officials and common men. As per reports of CIC⁴⁹ during 2011-2012 and in subsequent years, the Commission could not utilize even 25% of the total budget allotted for purpose of preparation of publicity material on right to information. Similarly, the citizens have not been seen aware of the officers before whom they have to file the RTI application⁵⁰ or the authority before whom they can approach, in case their application is denied and inadequately replied.⁵¹ The problem further becomes worse when PIOs, APIOs and appellate authorities are themselves not aware about the RTI Act. The government's role has been disappointing on issue⁵² of dissemination of information in public interest. Besides, absence of proper record-keeping systems, is posing problem in providing information in time bound manner to the public. The quality of information provided to the applicants is also very poor. It is either incomplete or inaccurate. According to a study more than 75% of the citizens are dissatisfied with the quality of information being provided.⁵³ In order to overcome from this situation, it is recommended to kick off

programmes for computerization and digitalization of records so that people can easily access information without any bureaucratic hurdles.

It has also been noticed that governments and their departments have framed different rules and regulations for charging fee to seek information. The framing of multiple rules rather than easing the process of seeking information has made the procedure more complicated. In order to bring uniformity in matter of charging RTI fee, the Parliament of India notified RTI (Fees and Cost) Rules, 2012. But state governments have failed to draft rules in line with central rules. Having different rules means that governments have responsibility to put more efforts to make individual aware about rules and RTI Act but governments have failed to do so.

iv) Suo motu disclosure of Information

Section 4 of the RTI Act mandates public authorities to post information on official websites to make information easily accessible to all. However, it is unfortunate that public offices are not posting all the necessary information on their official web sites⁵⁴ and whatever information is loaded that is also incomplete. The callous attitude of such irresponsible public functionaries has been rarely punished. The State governments have also failed to take steps to ensure compliance of section 4 in their respective states. The non-compliance of the principle of automatic disclosure of information means that individuals shall have no option except to file applications to seek information under RTI Act. Filing applications under this Act means that the information seekers shall have to depend completely on public authorities for information. They give all types of excuses to evade supplying of information. Even to seek general information, individuals shall have to take the routine recourse of RTI Act. Thus failure of loading information on websites keeps intact the culture of secrecy in governments' functioning and entire purpose of the RTI, Act would get defeated.

Likewise, the RTI Act imposes duties on public authorities to submit RTI returns to CIC and SICs, in order to enable these bodies to prepare action plan for effective implementation of the Act. But the status of submission of RTI returns has also been very disappointing. As per annual report of CIC during 2012-13, there were 469 authorities who have not submitted

RTI returns, which in subsequent year i.e. during 2013-14 raised up-to 625. The sharp increase in number of authorities not submitting RTI returns raises question mark on government's intention to implement the Act effectively.

v) Protection to RTI users

The RTI users are very often assaulted and murdered for revealing scams and corruption.⁵⁵ According to a study conducted by CHRI since the last few years more than 250 activists have been murdered, attacked and harassed. The RTI Act does not have any provision for security and protection of the RTI users. In case of injuries to and death of the RTI users, the Act does not have any compensation provision. The government of India has passed the Whistle Blower Protection Act, 2014 to protect whistleblowers. However, this law is not free from imperfections. For example, the law does not impose criminal liability on those who physically attack the whistle blowers. Similarly enactment of the Whistleblower Protection Act, independent from the RTI Act, rather than easing compliance will create confusion. To avoid confusion, it is suggested to merge the Whistleblower Protection Act with the RTI Act. The merger will ease compliance, improve monitoring and avoid duplication of the laws.

vi) Decisions of Commissions

Under RTI Act, CIC and SICs have powers to make number of decisions. These statutory bodies can issue orders regarding refusal of information, fining PIOs or the heads of public bodies for obstructing and impeding access to information. Although decisions of CIC and SICs are formally binding but these statutory bodies have no means at their disposal to actually enforce them. The information commissioners lack contempt powers to enforce their decisions. They can also not penalize public authorities for disobeying orders and failing to supply information on time. The Information Commissioners rarely impose fines on erring public officers. Further, both of these statutory bodies have no means to monitor whether or not their directions have been implemented. It has been seen that the PIOs and APIOs do not bother much about the orders and directions of CIC and SICs.

Similarly the powers of civil courts given to commissioners are also limited. The commissioners do not have powers concerning execution of decrees and recovery of fine etc. Absence of such power further makes these bodies weak. Thus the Commissions have become merely recommendatory bodies and by and large their recommendations depend on attitude and co-operation of the governments. It is therefore suggested that commissions should be given ample and complete powers to enforce their decisions.

vii) Pendency of Complaints and Appeals

The RTI Act allows for the appointment of ten information commissioners and one chief information commissioner in the office of CIC. Same is the composition of SICs. However, the governments' have failed to appoint adequate number of commissioners in offices of CIC and SICs, as a result of which, pendency of cases increases. For example, in Himachal Pradesh, the office of information commission is structurally defective. Instead of having ten commissioners in the office, there is only one commissioner. Due to inadequate number of information commissioners, the arrears of cases have increased. The total number of complaints and appeals pending before H.P State Information Commission is showing increasing trends since 2006. In 2006-07, 13, 2007-08, 72 and in 2008-09, 40 and during 2009-10, 61 cases were pending before the commissioner. The number raised to 281 cases in 2011-12. Inadequate number of information commissioners in other states has also been one of the reasons for fluctuating and rising trend in number of complaints and appeals reported in the commissions. The office of the CIC also remained vacant from August 2014 to August 2015 due to which pendency of complaints and appeals increased in the office. A huge pendency of cases compels the information seekers to file appeal in Supreme Court which is already over burdened with different other sort of cases. The supporting staff is also not adequate in the office of CIC which acts as a major obstacle in the effective implementation of the RTI Act.

Conclusion

The right to information is a significant human right recognized in several international and regional human right instruments. This right has a great potential to ensure transparency. Numerous countries across the world enacted right to information laws to make their administration transparent, accountable and answerable to the public. The government of India has also enacted RTI Act, 2005 having several provisions to ensure transparency and good governance. Many of its provisions resemble with best international transparency laws and norms existing on right to information worldwide. This has been the reason to describe the Indian RTI Act as one of the best laws of the world on right to information. But during its journey of 10 years of implementation what comes to the fore is that it has been half heartedly implemented. Not only this, the Central government rather than strengthening the Act has attempted at several times to dilute the provisions of the Act to make it less effective. Despite of having clear cut mandate to provide information to the public, the public functionaries take all sorts of excuses to deny and delay information. The public officers still believe in concealing information from public and like to work in utmost secrecy in their day to day working. They seem to retain state's monopoly over information. The public officials have forgotten that they are the trustees holding information for the benefits of the public. But the public's right to seek information is facing strong confrontation due to indifferent and callous attitude of public servants in implementing the Act in letter and spirit. Section 4 of the RTI Act relating to suo motu disclosure of information on officials websites is rarely followed by public authorities that raises doubts about government's efforts to implement the Act with full force. Let's hope that governments will understand the power of information and knowledge to bring positive change in Indian democratic country and will implement the law with full force. The lacunas in the law will be addressed at the earliest to call Indian RTI Act as the best and revolutionary law in true sense.

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