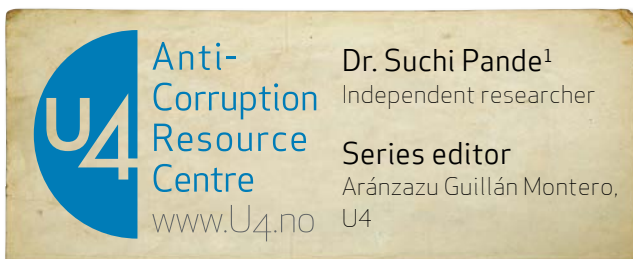


Dying for information: Right to information and whistleblower protection in India



India's Right to Information Act is one of the most powerful in the world, but the increasing attacks on users of the law suggest a need for further measures. The results of an analysis of newspaper reports indicates the need of a greater focus on how right to information laws are used and increasing awareness of reprisals against users. Donors can engage, through evidence-based dialogue and support, with the issue of reprisals without over-reaching their mandates. Civil society action can help to challenge the impunity of attackers and to build an international coalition to protect whistleblowers.



Right to information users – the new whistleblowers

India's Right to Information (RTI) Act requires public officials to provide information and public documents to any citizen who demands them, at a nominal charge and

within 30 working days.² The act has strong sanctions for non-compliance, including fines for public officials who fail to provide information on time. The Indian law has allowed civil society groups to positively impact policy and to expose corrupt practices at all state levels. As well, it has allowed individuals to redress grievances against the government and to access public services without paying bribes (Jenkins and Goetz 1999; Pande 2008, 2014; Singh 2011; Peisakhin and Pinto 2010).

India's law is hailed as a success story, but struggles over implementation remain.³ Eighteen years ago the National Campaign for People's Right to Information's (NCPRI) widely used slogan "the right to know, the right to live" framed the struggle for RTI as a struggle for the life and

TABLE 1. NATURE OF REPRISALS AND ISSUE AT A GLANCE (2007–2014)

Nature of reprisal	Issue category					Total
	Land/natural resources	Development/welfare programmes	Bureaucratic/administrative matters	Delivery of public services	Others	
Death	18	16	7	5	4	50
Assault	29	26	11	9	9	84
Harassment	27	32	24	5	13	101
Total	74	74	42	19	26	235

livelihood of the poor (Pande 2014, 13). Today this slogan has acquired a curious twist, as RTI users are being attacked for seeking information, especially when it involves corruption (Roy and Pande 2010). While government employees are at risk when they expose corruption, as laws require prior sanctions from concerned authorities to prosecute serving public officials,⁴ the recent attacks illustrate the vulnerability of private citizens. Citizens are vulnerable to reprisals when a RTI request threatens to expose individuals or organisations engaging in corrupt practices. This brief draws attention to RTI users as a new kind of whistleblower. It discusses the threats they face, how they can be protected, and the need to ensure that there is no impunity for those who attack them.

Dying for information

No official mechanism assesses how many citizens have been threatened, injured, or killed for seeking information in India (Nayak 2013; ACHR 2011). This brief attempts to quantify this occurrence. Starting with a list of media reports compiled by the NCPRI,⁵ the author analysed 438 newspaper reports (235 reported cases) on RTI related deaths, assaults, and harassment to understand which issues are most likely to provoke attacks and who is being attacked. Since not all RTI related reprisals are reported in the media, the data analysed and presented here is incomplete.⁶

The last seven years have seen 50 reported cases of RTI related deaths (including three suicides), 84 reported cases of assault, and 101 reported cases of harassment.⁷ Assault occurred when RTI users were physically beaten in public, were abducted and tortured, were shot at, or were purposefully hit by a moving vehicle. Harassment included receiving abusive replies to requests for information, receiving threats to life and/or property, having private property ransacked or destroyed, suspension from employment, having false criminal and defamation cases registered against oneself, and being ostracised. In few cases of assault and harassment, friends and family became targets as well. (*)

The majority of RTI users who were threatened, injured, or died were regular citizens. For example, 42 of the 47 individuals who died were unaffiliated to civil society organisations or political parties.

Table 1 illustrates the kinds of RTI requests that prompted reprisals. Victims of RTI related reprisals were seeking information related to corruption in four main categories: land and natural resources, development and welfare programmes, bureaucratic and administrative matters, and delivery of public services. Approximately one third of the reprisals involved land and natural resources, such as attempts to expose corruption in the illegal sale of land for mining and in illegal construction and land scams. Another third involved attempts to expose corruption in implementing development and welfare programmes, such as non-payment of minimum wages under the national right to work programme (MGNREGA), misappropriation of public funds meant for pensions to rural poor, and diversion of subsidised food grains meant for poor households. A large number of reprisals also related to anomalies in bureaucratic or administrative matters, such as appointment and promotion, misuse of public office, public expenditures for travel expenses of elected officials, employment contracts, and public salaries.

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Geographically, the data suggests that economically advanced states experienced more reprisals related to land and natural resources: Maharashtra was highest in this area (with 21 reprisals), followed by Gujarat (11). The “economically backward” states experienced more reprisals related to corruption in welfare programmes: Bihar was highest in this area (11), followed by Uttar Pradesh (9).

RTI in India is widely used to advance social justice and human rights, including exposing corruption. This challenges powerful individuals and institutions, who are often able to exact reprisals with impunity. Accordingly, RTI users are a new kind of whistleblower in need of protection.

Protecting whistleblowers: Assessing the response of relevant stakeholders

The government's overall response to reprisals against RTI users has been poor. While the issue of RTI related deaths was raised in the Indian parliament in 2010, the minister of state in the Ministry of Personnel, Public Grievances and Pensions shirked responsibility for any further action on existing laws – the Indian Penal Code and the Code of Criminal Procedure (Lok Sabha 2010). He also informed the house that chief ministers in all states had been instructed to inquire into such cases; however, the author found no evidence of any such inquiries occurring.

Police reports (first information reports, or FIRs) were registered in 106 reported cases of reprisals. FIRs are not an ideal measure of state action, however, since they lead to few arrests. In many cases the police attributed “past enmity, rivalry, vested interests” as probable causes. In one case the police even called a murder an “accident” in contradiction to the post-mortem report.

Although an FIR is an important first step for a criminal investigation, following up on a police inquiry and pursuing judicial action or litigation largely depends on the victim's social and economic background (that is, caste and class). Victims who belong to wealthy or middle class families may be able to afford to privately litigate, and legal action was reported in 16 cases. However, this too has been a slow and languishing path to justice as cases drag on for many years.

Government responses

Three agencies – the Ministry of Rural Development (MoRD), the Central Information Commission (CIC), and the National Human Rights Commission (NHRC) – have taken positive, though limited, steps to deal with RTI related reprisals.

In May 2013, in response to three RTI related deaths in Bihar, the MoRD issued a memorandum to inquire into complaints related to MGNREGA and other schemes as well as to ensure the safety of whistleblowers (Hindustan Times 2013). The memorandum stated that in instances of “use of force, intimidation and other similar action coming to light against complainants/whistleblowers,” state governments should “ensure . . . prompt initiation of criminal proceedings” and provide “adequate security” (Bhushan 2013). While the government has not publicised this protocol, it is the first directive of its kind aimed toward protecting whistleblowers. Civil society groups should make use of it.

The CIC is the chief appellate body that hears RTI related disputes. Its mandate is limited to facilitating access to information that is either intentionally denied or withheld without reasonable cause. It lacks power to inquire, investigate,

or prosecute offenders in cases where it is aware of violence against RTI users. However, in 2011, the CIC resolved that “if it receives a complaint regarding assault or murder of an information seeker, it will examine the pending RTI applications of the victim and order the concerned Department(s) to publish the requested information suo motu [proactively] on their website as per the provisions of law” (CIC 2011). Consequently, in a murder case from Maharashtra, on the order of the chief information commissioner, the

concerned department published on its website the information the victim requested (interview of former chief information commissioner, 30 June 2014). This approach could reduce the likelihood of violence and intimidation being used to prevent information from becoming public.

The NHRC's mandate is to protect the human rights of all persons guaranteed under the constitution and embodied in international covenants. The NHRC has acknowledged RTI related reprisals and recognized RTI users as human rights defenders (see UNGA 2011). It has started

a helpline and reached out to state governments and police departments to inquire into cases of reprisals (Nayak 2013). In 2011, the NHRC took proactively wrote to the Bihar superintendent of police to inquire about an RTI related murder (interview with Commonwealth Human Rights Initiative representative, 4 July 2014). While its powers are limited, the NHRC can play a significant role in highlighting issues, summoning government officials, and ensuring compensation.

Role of civil society

While use of the RTI Act has given new meaning to the concept of whistleblowing, it does not provide any safeguards to protect users. Engagement of RTI activists with elected representatives during the last four years resulted in enactment of the Whistleblower Protection Act of 2011 (WBPA) (Brics Post 2014). This new law protects against victimisation and could be an avenue for RTI users to file complaints.⁸ However, the WBPA has yet to be implemented.

The NCPRI is in the process of submitting model rules for implementing the WBPA. It is also developing a “Whistleblowers' Protocol” that will serve as a guide for legislative and other means of redress and protection. As part of this, the NCPRI is also communicating with the NHRC to develop a mechanism for investigating future reprisals. This Whistleblowers' Protocol will help facilitate civil society in raising awareness about reprisals and challenging attacker impunity.

Judicial action or litigation largely depends on the victim's social and economic background.

Recommendations

INDIAN GOVERNMENT INSTITUTIONS

In 2005, India signed the United Nations Convention against Corruption (2003), which recognises the importance of enacting strong whistleblower protection laws.⁹ Members of parliament reacted by passing a number of accountability laws, including the Whistleblower Protection Act. Passing laws is an important first step, but India must do more to effectively protect whistleblowers and build an institutional framework for fighting corruption. Recommendations for the government include the following:

1. Direct public authorities to make all information requested by victims of reprisals available proactively under section 4 of the RTI Act.
2. Require information commissions to include data collection on RTI related reprisals in annual reports.
3. Demonstrate commitment by requiring investigative action within a specified time period of a reported attack or harassment.
4. Adopt implementing rules for the WBPA through an open, inclusive, and participatory process.

INDIAN CIVIL SOCIETY

RTI advocates in India presently lack effective ways to respond to reprisals. They should do the following:

1. Engage with social justice and human rights organisations that have experience dealing with reprisals in other fields (e.g., against lower castes or women) to discuss possible solutions.
2. Undertake independent research, evidence collection, and investigation and build a network of mutual support with local journalists who could assist in awareness generation.
3. Build a national coalition to counter the culture of attacker impunity.
4. Work with international networks to understand threats against RTI users, facilitate universal recognition of RTI users as human rights defenders, and develop a global strategy for protecting users.
5. Encourage implementation of a comprehensive citizen-centric anti-corruption and accountability framework by persuading lawmakers to adopt rules to implement the WBPA and anti-corruption ombudsman laws, as well as to enact currently pending bills on judicial standards, accountability, and grievance redress.

DONORS AND INTERNATIONAL CIVIL SOCIETY

Reprisal is likely to be a problem in other countries with new RTI laws, and donors and international civil society organisations must be mindful of emerging issues in other contexts. Donor organisations have actively supported the enactment of transparency legislation. Although national governments have primary responsibility for protecting the lives of their citizens and ensuring justice, donors can engage regarding the issue of reprisals without overreaching their mandate.¹⁰ Specific recommendations for donors are as follows:

1. Begin an evidence-based dialogue and raise internal awareness about the importance of tracking cases of reprisals and retributions in projects donors fund or support.
2. Encourage grantees to monitor and evaluate responses to RTI requests.
3. Support stronger data collection and analyse RTI reprisal cases on different issues. Understanding how RTI is used to realise other rights could link RTI support to social justice and human rights agendas.
4. Undertake capacity building of existing accountability institutions to combat reprisals and provide support services to RTI users.
5. Support civil society groups to provide counselling to RTI users, victims of reprisals, and their families.

Specific recommendations for international civil society organisations include:

1. Begin an evidence-based dialogue with donors, governments, and local civil society groups on how to respond to attacks and harassment of RTI users.
2. Provide support in the drafting and implementation of RTI laws.
3. Campaign internationally to end impunity for those who attack RTI users.
4. Urge governments to implement definite measures to counter the culture of impunity.
5. Build a network of mutual support with the media (as journalists have also been attacked for seeking information) and with lawyers (to support legal advocacy and casework).

Conclusion

This brief highlights the unintended outcomes of RTI accountability processes. Three issues emerge: (i) the need for a citizen-centric approach to transparency and accountability; (ii) the possibility of greater alignment between transparency and accountability and human rights agendas; and (iii) the need for additional research and awareness regarding the use of RTI laws, reprisals against RTI users, and the impunity of attackers.

(* Note: At the time of publication two more RTI activists were reported killed for seeking information related to a road development project (in Maharashtra) and corruption in funds sanctioned for development of agriculture (in Orissa). This brings the total number of RTI-related deaths in the country to 52, with the highest number of reported deaths in the state of Maharashtra (11).

Endnotes

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² The RTI service portal is at <http://righttoinformation.gov.in/>

³ For example, Access Info Europe and the Centre for Law and Democracy have developed the RTI Rating tool to assess the strength of countries' legal frameworks for RTI. India scores third highest worldwide (behind only Serbia and Slovenia). See <http://www.rti-rating.org/index.php>

⁴ These include the Prevention of Corruption Act of 1988, the Prevention of Money Laundering Act of 2002, and the Benami Transactions (Prohibition) Act of 1988.

⁵ NCPRI has compiled these media reports since 2007. Thanks to Nachiket Udupa of NCPRI who collects these reports, as well as to Ankita Anand for excellent research assistance. Expansion of the database was made possible with support from Jonathan Fox (School of International Services, American University).

⁶ In addition to cases not reported in the media, there may be other cases that are reported in regional language media that is inaccessible due to language constraints.

⁷ The suicides resulted from pressure and harassment faced by the RTI users.

⁸ Provided an RTI user is not killed after requesting information, the user could use the information obtained to make a "disclosure" under the law and seek protection and anonymity.

⁹ See <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

¹⁰ Thanks to Simon O'Meally and Venkatesh Nayak for specific comments on this section.



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