

The Impact and Effectiveness of Accountability and Transparency Initiatives: Freedom of Information

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Initiatives: Freedom of Information

Analysis of the impact and effectiveness of Freedom of Information (FOI) legislation has been hampered by lack of systematic evidence and conceptual confusion about what kind of right it represents. This article discusses some of the main conceptual parameters of FOI theory, before reviewing the available evidence from a range of studies. It presents cases studies of civil society activism on FOI in India and South Africa to illustrate the extent to which access to information is having an impact, in particular on socio-economic conditions. After reviewing the range of approaches used to researching impact, it concludes that the academic community and the FOI community of practice need to come together to devise robust and rigorous methodologies for impact assessment.

Key words:

1 Introduction

The global Freedom of Information (FOI) community has recently begun a process of substantial self-reflection in order to assess whether their initiatives are having a measurable impact. Events such as a trilogy of Carter Centre conferences have sought to examine the 'state of the art', looking both backwards at the gains that have been made over the past 10-15 years, and forwards, at the big challenges that continue to obstruct further progress.¹ The conferences noted the need for more scholarship and a more thorough examination of the impact of greater transparency/FOI. A meeting of FOI and transparency advocates in late October 2009 concluded that in order to make and win the case for FOI, it was now necessary to extend the scope of the enquiry beyond the 'means' to the 'ends,' even though this would be both challenging and potentially perilous in terms of what might be proven or provable.

¹<http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf>

Part of the analysis has involved a revision of the approach to impact. Hitherto, FOI advocates have been hesitant to look beyond greater transparency, as measured by access to disclosed information, towards questions of the impact that this transparency may have on a range of socio-economic matters. This prudent approach to impact measurement has not been matched by the at times extravagant rhetoric that has accompanied some of the activism. The FOI community can tell a hundred stories; there is rich portfolio of anecdotes about how FOI has improved the lives of an individual or a community that reveal the human dimension, but the empirical data is patchy and poorly marshalled. Darch and Underwood (2010) are the most recent sceptics to add a scholarly note of caution to the debate about the potential of FOI to benefit the poor.

Part of the 'immaturity' of the analysis of transparency and FOI in the literature is the ambivalence about what sort of right FOI is. There are profound conceptual uncertainties and confusions. Thus, this paper begins with a brief consideration of the literature on the philosophical and conceptual underpinnings of FOI, before turning to the main enquiry that is concerned with the impact and effectiveness of FOI. Because systematically-produced evidence of impact is so sparse in the FOI arena, we have focused on a case-study approach, using the experience of two organisations – the Open Democracy Advice Centre (ODAC) in South Africa, and *Mazdoor Kisan Shakti Sangathan* (MKSS, Association for the Empowerment of Workers and Farmers) in India – to shed some light on the relationship between FOI and socio-economic change.

2 Freedom of Information Theory and Conceptual Parameters

It is clear that FOI lacks a firm theoretical basis or, at least, that there is more than one theory of FOI, leading to a bi-focalism in the efforts of both thinkers and practitioners. While it is not appropriate or necessary to entertain a massive philosophical excursion, it is important to consider the question of purpose and legitimate expectation before embarking on an examination of the literature and data on impact. In other words, before looking at impact it is necessary to be reasonably clear about what impact one is looking for: what exactly is the social and economic change that it is reasonable to think that FOI might promote or deliver?

In addition, a further pre-occupation concerns the limits of the law. While there have been substantial gains in terms of the passage of FOI laws around the world, it has become very clear that both the implementation and enforcement of FOI legislation is

enormously challenging (Calland and Neuman, 2007). In countries with weak rule of law and/or poorly capacitated institutions of governance, the question is being asked whether a comprehensive FOI law will do more harm than good by raising expectations that cannot be met. Hence, while there is a general disinclination to retreat from the idea that FOI rights should be given a statutory basis, there is also recognition that governance innovations – such as the idea of installing an information disclosure regime through a voluntary, sectoral transparency multi-stakeholder process like the Extractive Industries Transparency Initiative² – may be needed. The final part of this paper therefore looks briefly at the emergence of such processes.

The worldwide increase in Access to Information (ATI) laws and regimes reflects an emerging concern with participation and accountability in the political and economic development sphere. It is beyond question that the most basic 'lever' that citizens have in holding their state to account in terms of the use of the public purse, and policies pertaining to rights and development, is the power to demand information about how decisions are made. Interest in and support for FOI legislation has accelerated remarkably in the last two decades. In 1990, just 12 countries had ATI laws (Access Info Europe, 2006), while today there are nearly 80 such pieces of legislation. While interest in FOI and ATI as a right is therefore growing, there is considerable debate about what constitutes this right and indeed what purpose it serves. As Snell and Sebina describe it:

The problems of access to information are not new nor are they uncatalogued. Yet our tools in identifying the problems, understanding their causes and devising solutions whether short term or long term seem deficient. With a few exceptions, we have approached access regimes – their performance, evaluation and reform – with a heavy concentration on the legislative architecture and have often accepted that the failures or problems are isolated instances or exceptions to the norm. We need to find a theoretical framework that accepts that the access to information process is a complex system, one that necessitates a mixture of approaches by administrators and users (Snell and Sebina, 2007: 62).

Snell and Sebina go on to explain that the understanding of FOI as a right stems from the understanding that citizens own the information that the state gathers and hold on their

² www.eiti.org

behalf. FOI is traditionally understood therefore as a civil and political right, although it has great implications for the enforcement of social and economic rights, as is illustrated below. Furthermore, as the discourse on FOI evolves, it “becomes a problematic minefield of competing and often contradictory expectations” (Snell and Sebina, 2007: 63). This highlights the source of the confusion about what kind of right FOI is, as it is understood to have different rationales. Most elaborately, FOI is credited with the teleological expectation that it is a source of good governance, and thereby combats corruption and enhances the investment climate in any given country (Neuman, 2002; Snell, 2008). It is these rather lofty expectations that underlie the multi-stakeholder voluntary disclosure regimes also discussed below.

The other outcome that FOI is credited with delivering is more deliberative and participatory democracy, as greater access to better quality information allows citizens to engage more meaningfully and fully with their government and thereby hold them to account (Snell and Sebina, 2007: 67). It is this understanding that relates to the theoretical rights-based model of FOI as a power.³ FOI as a right matters because of the potential it has to invert the power relationship between state and citizen. Snell and Sebina describe this as the problem of “information asymmetry in the public sector”, crediting the term information asymmetry to Nobel Laureate Joseph Stiglitz. The problem Stiglitz is referring to is “where there is an information disparity between those that govern and the governed, leading to flawed agency relationships” (Snell and Sebina, 2007: 64).

3 Evidence of Effectiveness and Impact

There is very little evidence of the effectiveness of FOI generally or transnationally, no systematic assessment of the impact of FOI on social change, and only limited assessment of its impact on institutional change. At best there is a small group of studies that examine the performance of the FOI regime, and compliance, which responds to a different analytical

³ The understanding of a right as a power is one ‘incident’ in Wesley Newcomb Hohfeld’s classic exposition of the four so-called ‘jural relations’ constituted by rights: claims, liberties, powers and immunities (Hohfeld, 1919). It is suggested that rights are usually understood exclusively as claims and liberties, the former applying to social and economic rights, and the latter to civil and political rights. However access to information is a different species of right. It has as its object (the thing which it is a right *to*) neither a concrete thing (such as healthcare or housing) nor the duty of forbearance on the part of the state and others (the hallmark of classic rights as freedoms). Rather it changes the relationship between the parties – it empowers the right holder (the subject of the right) to demand information from the duty-bearer (in this case the state) about how the right in question is being delivered. By empowering the right holders in this way, it creates a *liability* on the part of the duty-bearer. It changes the balance of power between them such that the right holder can hold them to account as to *how* they are delivering on their other obligations (relevant to other rights).

consideration. Many of the available studies focus on India, which makes the Indian case a necessary focus for the section below. In 2009 alone, there were seven assessments of the RTI Act (RTIA) in India, adding to two carried out in 2007 and 2008 (Roberts, 2010). Indeed, in so far as "India has become a vast laboratory for inventing and testing innovations in RTIA administration" (Roberts, 2010), it is without question that the Indian case offers one of the best examples of FOI compliance and grassroots participation.

Beyond India, a study of the impact of FOI on the UK government, conducted by the Constitution Unit at University College London (UCL), claims to be the first ever in-depth, systematic study of the objectives, benefits and consequences of FOI (Hazell and Worthy, 2009). On the basis of an online survey of FOI users and interviews with 56 officials in eight UK government departments, it asserts that FOI increased transparency and accountability, but that there was little evidence that it had improved government decision-making, public understanding of decision-making, or public participation; neither, notably, had it increased trust. This lack of what one might call 'meta-level' impact contrasts with the case study evidence from South Africa and India (discussed later) where there is some evidence of direct impact on the quality of participation and, thereby, the ability to demand rights and hold those in power to account. What the UK study suggests, however, is that FOI has neither realised the more ambitious objectives of its supporters, nor the worst fears of its opponents (Hazell and Worthy, 2009).

The most prominent enquiry into compliance with FOI laws is a fourteen-country study conducted in 2006 by the Open Society Justice Initiative (OSJI). In each of the countries surveyed, "civil society organisations (CSOs) committed to freedom of information worked together with the Justice Initiative to carry out the project" (OSJI, 2006: 24). This highlights the leading role played by civil society in promoting and enforcing the right of FOI. At the time of the study, of the 14 countries surveyed, Armenia, Bulgaria, France, Mexico, Peru, Romania and South Africa had dedicated FOI, while Argentina, Chile and Spain had partial legal recognition of the right, and Ghana, Kenya, Macedonia and Nigeria had no FOI laws⁴ (OSJI, 2006: 24). Mozambique and Senegal also formed part of the survey, but data capture problems prevented their results from being included in the report.

⁴ Macedonia has since adopted full FOI legislation, and Ghana has draft legislation in place.

The basis of the study was nearly 2000 requests for information in the 14 countries surveyed, consisting of a set of 70 questions, each submitted twice, to 18 public institutions. The requestors were a combination of non-governmental organisations (NGOs), journalists, businesspeople and representatives of identifiable vulnerable minority groups. The study therefore reflects on how public institutions in different countries respond based on their perception of the standing of the person or body making the request. The requests made were, as far as possible, for the kind of information that one would expect public bodies to hold, and the objective was therefore not to measure the competence of these bodies in providing information, but rather their willingness to do so (OSJI, 2006: 11-12).

As an exercise in monitoring the impact of FOI worldwide the study stands out as a unique example and a rich source of information. Although the OSJI study does not constitute a study of the impact of FOI, the study does have a valuable diagnostic dimension. The findings provide a useful baseline from which to assess the state of access to information in the countries surveyed, as well as to offer some quantitative means to assess the impact of FOI laws in the countries in the study. It also highlights the point that FOI remains a 'professionalised' environment, quite heavily reliant on expert civil society intervention and activism in order for it to be realised.

3.1 *Civil Society Case Studies: examples from India and South Africa*

Given the general weakness of the data, and methodology, it is necessary to look for appropriate case studies to illustrate the extent to which ATI is having an impact, especially in relation to socio-economic conditions. We have chosen case studies from India and South Africa, focusing on two CSOs, the MKSS and ODAC, as these seem to us to offer complementary and illustrative examples of how the practice of ATI is emerging in developing countries. As already noted above, India has emerged a significant testing ground for innovative approaches to the use of ATI (Roberts, 2010). A number of recent assessments of the RTIA in India and the case studies show that many citizens have used the Act in innovative ways, disproving the perception that only RTI activists use the Act (RAAG/NCPRI, 2009: 14). Since the Act was designed to respond to people's needs, it has been branching out continually as more and more people use it. For example, some people use the Act to assert their right to food by making ration-related ATI requests. Others have used it to address environmental concerns such as closing down a polluting factory. There are also some encouraging RTIA success stories of individuals or groups that often struggle to implement their rights, such as women and people with disabilities. Examples include the

use of ATI to get school admissions for children, a visually-challenged person using ATI to question his *panchayat* (village administration) to uncover the fate of disability benefits owing to him, a ninety-year-old woman to get her passport, and supposed beneficiaries of the *Indira Awas Yojna* (a housing scheme) to enforce their rights.

The work of the ODAC in South Africa represents an attempt emulate the work of MKSS in Rajasthan, India, in seeking to link ATI with the socio-economic interests and campaigns of communities throughout South Africa. The case study sheds light on the plausibility of such a strategy and also on the extent to which this paradigm is dependent on a well-organised and well-resourced civil society.

These two case studies come with the disclaimer that they are not intended to provide comprehensive information about either FOI or civil society globally, but rather provide illustrative vignettes of successful examples that are beginning to emerge in this environment. The two CSOs that are described are not presented as the only successful examples of their kind, but rather their stories are illustrative of a broader set of trends and challenges that are emerging in the FOI area of activism and law.

3.1.1 Fighting Corruption in India: the MKSS example

Rob Jenkins (2007) has traced the emergence of the MKSS, a rural, grassroots civil society movement in India, whose strategy has been to focus on access to information held by public officials in order to highlight, and ultimately combat, corruption in the use of public funds for service delivery. MKSS is not a formal or professional NGO. It consists of a mix of local residents of Rajsamand district in Rajasthan, and activists from other parts of the country. Its work on the right of access to information began in the late 1980s, but its work began to gain impetus from about 1995. Shehkar Singh points out that it was under his leadership and that of activists Aruna Roy and Nikhil Dey, that the movement was formally founded in 1990, and that its initial strategy was to organise hunger strikes to demand the statutory minimum wages. It was this first campaign that led the group to realise the significance of the right to information, and incorporate this into their strategy (Singh, 2007).

Thus MKSS's focus was on the failure of the enforcement of minimum wage laws, and the failure of the state Public Distribution System (PDS) to make available subsidised food and other essential commodities. It was this focus on wages and prices that led MKSS

to begin to look at the corruption of public officials as its central concern. Jenkins and Goetz (1999) give a description of how the information that MKSS was able unearth on public accounts was used to expose the corrupt practises of local authorities in both the payment of minimum wages on a public work project, as well as in the PDS, and that it was these initial activities that led MKSS “to the conclusion that such malfeasance could not be traced without access to official documentation” (1999: 605). However, at this early stage of the campaign, India did not have FOI laws in place to facilitate such access, and campaigning for this legislation became another prong in MKSS’s strategy.

MKSS devised an innovative participatory method in the form of the *jan sunwais* (public meetings) where available information from official expenditure records is read out to villagers, and local people are then invited to give testimony relating to discrepancies in this official information and actual payments received. “Through this direct form of 'social audit', many people discovered that they had been listed as beneficiaries of anti-poverty schemes, though they had never received payment. Others were astonished to learn of large payments to local building contractors for works that were never performed” (Jenkins and Goetz, 1999: 606).

There are two remarkable features of this method. The first is that it allows direct participation on the part of community members, to whom sometimes relatively small sums of money can be enormously significant. This direct process of accounting also has the result of putting the power to hold public officials and beneficiaries of public funds into the hands of those who have been deprived of their entitlements, in a way that more formal means of restitution, such as court action, would deny them. In communities where most people are known to one another, a 'name and shame' exercise such as this can have a powerful social impact.

This points to the second feature, which is the cumulative effect of this method. As noted, the sums involved in each case may be small, but over time and when all the cases are added up, “the cumulative diversion of resources intended specifically for the poor, or for local public goods more generally, is enormous” (Goetz and Jenkins, 1999: 607). In assessing the impact of India’s FOI activism, Singh is confident in asserting that “[t]he use of RTI to conduct social audits has acted as a deterrent to corrupt officials” (Singh, 2007: 29). In support of this contention, he points out that in 2004 most of the 6,000 million rupees allocated for drought relief in Rajasthan were in fact spent for this purpose. However, in

addition to this verifiable quantitative impact, he argues that “the RTI campaign has also had a profound impact on the nature of governance and the interface between the government and the people” (Singh, 2007: 29).

From the late 1990s however MKSS encountered increasing resistance when trying to access government-held information due to the lack of FOI legislation. MKSS’s lobbying in this area contributed to the passage of a state-level RTIA in Rajasthan in 2000. Singh cites the successful campaign for state-level FOI legislation as a measurable impact of MKSS’s activism for FOI. The Rajasthan RTIA gave activists the official power to access information, but they continued to encounter levels of bureaucratic resistance, which made this an ongoing struggle (Jenkins, 2007: 60). The landscape evolved further with the passage of India’s national RTIA in 2005, labelled by Lord Desai as "a great and revolutionary act" (Roberts, 2010).

As Roberts remarks, it is too early to measure the impact of the RTIA in India, and whether it will indeed prove to be the revolutionary instrument that it was hailed as, because "four years is a very short time in which to effect change in India’s public sector" (2010: 926). Roberts therefore concludes by advocating that:

Further investment in India's venture in transparency would certainly be justified. It is the most exciting experiment with FOIA-style laws in the world today -- not only because of the number of people whose well-being could be improved, but also because it is being conducted under much more difficult circumstances than those prevailing in the early-adopter nations. If, through persistence and innovation, the RTIA can be made to work effectively, then India will become a model for dozens of other countries in developing world. In critical respects, the first world has something to learn from India as well (2010: 932)

There is however emerging evidence of impact and compliance⁵, focused on the Central Information Commission (CIC), which was established under the 2005 RTIA to deal with complaints about information demands. This evidence is compiled both from the

⁵ Our thanks to Vikas Jha of PRIA, who kindly made available a number of documents detailing this emerging body of evidence.

'supply' (Commissioner) side, and the 'demand' (citizen) side. On the supply side, a sub-committee of the CIC publishes on its website⁶ an evaluation of each Commissioner's individual performance, grading them on how many cases they dealt with; how many of those cases resulted in an order for disclosure, which was then complied with; their 'deterrence impact' in terms of imposing penalties and issuing arrest warrants; and a measure of 'public satisfaction' with their work.

On the demand side, in 2008 the Society for Participatory Research in Asia (PRIA) compiled a report gauging the experience of 420 citizens in ten states who accessed information under the RTIA over a set period, all of whom were asked the same questions (PRIA, 2008). The study therefore represents a 'dipstick' sample, rather than a longitudinal study, but it is telling nonetheless. Studies by Pricewaterhouse Coopers (PwC, 2009) and the Right to Information Assessment and Analysis Group and National Campaign for People's Right to Information (RAAG/NCPRI, 2009) polled some 5,000 and 19,000 participants respectively. According to RAAG/NCPRI, there were some 2 million ATI requests between 2005 and 2008, and PwC estimates that there were 850,000 in 2008 alone.

From the millions of individual cases, some general trends are beginning to emerge. Firstly, demographics and inequality are an impediment to the use of ATI. The RAAG/NCPRI study shows that there are huge differences between the rural and urban profiles of information requestors, and their age, occupation and education level. Worryingly, those who are classified as either 'tribal', 'scheduled castes' or 'other backward castes' account for a minority of applicants in urban settings in particular, but in rural settings too. Furthermore, gender inequality plays a role in deterring women from making ATI requests, with 90% of rural applicants and 85% of urban applicants in the RAAG/NCPRI study being male (RAAG/NCPRI, 2009: 8).

The RAAG/NCPRI study also makes an attempt to profile applicants in terms of the type of information that they are seeking. The four categories of information – state, town/village, personal and other issues – are not refined enough to allow for a detailed assessment of *why* people request this information, bearing in mind that they cannot be asked this directly. The results however do point again to a difference between rural and urban applicants in the ranking of these categories. Urban applicants prioritised town/village information (35% of requests), followed by personal information (30%) and other issues

⁶ cic.gov.in

(20%), with state information being the least sought after (15%). For rural applicants, 65% of requests were for personal information, 30% for town/village and 3.5% for other issues, while just 1.5% related to information about the state. However, Roberts makes the point that across these categories, ATI requests "are often filed with the aim of redressing grievances about the failure to deliver public services or complete public works" which given the "expansive role [of the Indian state] in the provision of services" means that "the variety of complaints is broad" (Roberts, 2010: 927). So examples from the education sector cited are the use of the RTIA to compel state authorities to provide scholarships and school uniforms, and to take disciplinary action against delinquent teachers.

At the sectoral level, many peoples' movements, citizens' groups, and NGOs now rely on the RTIA, using it for broader societal purposes. In other words, RTI activism does not stand in isolation, but is being used as a potent instrument to improve governance and transparency across a variety of issues, including the PDS, municipalities, elections, trade unions, genetically modified foods, dams, and the National Rural Employment Guarantee Act.

An interesting point to note is groups that are *not* using (or 'abusing', as was the fear) the RTIA as expected. These are disgruntled state employees attempting to settle personal scores, and the media, using the RTIA for investigative journalistic purposes. As Roberts remarks:

there is no evidence to support officials' apprehension that aggrieved government employees would rely heavily on the law as a tool for dealing with internal personnel matters. More surprising is RAAG's finding that the media is not using the RTIA extensively as a tool for investigative journalism. The Indian media has given extensive coverage to the RTIA, but stories have focussed primarily on the use of the law by other groups. 'The press sees the RTIA primarily as a boon for citizens, rather than itself,' the RAAG report concludes (Roberts, 2010: 927).

The lessons that have begun to emerge from the Indian case are twofold. Firstly, the implementation of the RTIA is inconsistent, varying from state to state, and indeed from

Commissioner to Commissioner. The process of tracking this implementation has yielded important gaps in practice and delivery. As ATI emerges as a right for citizens on the ground, gaining momentum through the spread of the implementation of the RTIA, it can be expected that the machinery and mechanisms to enforce this right will improve, although they may never be perfect.

The second lesson stems from the first and is a reflection on methodology. In identifying best practices in facilitating access to the work of the CIC, and making best use of scarce resources in spreading access to information as widely as possible, some innovative methods making use of technology have been experimented with in the Indian case. These include the availability of a National RTI helpline, the use of video conferencing for CIC hearings where some of the parties are in remote places and the option for appellants and complainants to file appeals and complaints online. These points are revisited later, but they are sketched here as they present a contrast with the South African case, which relies on a model of judicial enforcement, offering some points of consideration as to how innovative methods may result in greater impact in South Africa. As already noted, ATI activists in South Africa have taken the Indian case as their inspiration, and the specific case example that we refer to here – that of ODAC – has drawn significantly from the work of the MKSS.

3.1.2 South Africa's Open Democracy Advice Centre: an evolving methodology

Civil society in South Africa has taken a leading role in implementing the right of ATI. This raises the question of how accessible the supporting FOI legislation can be made in its operation, because if it requires specialist intervention to yield results for ordinary citizens, then perhaps its usefulness can be questioned. This section outlines the work of the ODAC over the past 10 years, reflecting on how their methodology in pursuing cases under the Promotion of Access to Information Act (PAIA) has evolved during this time, and focusing in particular on how ODAC has applied itself to issues relating to FOI and socio-economic rights. It concludes by describing an illustrative example of an FOI request facilitated by ODAC which yielded a tangible result for service delivery.

Section 32 of the 1996 South African Constitution makes specific provision for access to state-held information and (very unusually) information held by private persons (juristic and non-juristic) if required for the protection or exercise of another right. The

Constitutional provision is given life by the Act Two of the 2000 PAIA.⁷ Like the Constitution, the PAIA applies to all state bodies, bodies performing public functions, and private bodies holding information required for the enforcement of any right.

As noted, South Africa's FOI legislation is remarkable in the sense that it explicitly permits access to records held by private as well as public bodies, although the 'test' for information from private bodies to be made accessible is more stringent than for public ones. Rather than a separate Information Commission, the primary body charged with overseeing PAIA is the South African Human Rights Commission (SAHRC), which is supposed to offer citizens a simple, easily understandable guide to the law and how to use it. In 2010, the SAHRC had a change of commissioners, and regrettably the current incumbents have not followed this up with the same focus as their predecessors, with the guide no longer being available on their website. This is somewhat ironic, as the SAHRC's PAIA Unit is responsible for ensuring that the Commission itself complies with PAIA. It must be noted here that the SAHRC, along with South Africa's other Chapter 9 Institutions,⁸ has been disappointing at best. Without wanting to digress from this discussion, this highlights one of the main shortcomings of ATI enforcement in South Africa – the absence of an independent and dedicated Information Commissioner. It also leads to a discussion of the second major feature of ATI enforcement in South Africa, which is the pivotal and leading role played by civil society.

While this section focuses specifically on the work of the ODAC, it is acknowledged that there are other civil society bodies that make access to information their business. There are two reasons for emphasising the work of ODAC. Firstly, it is unique in that it was specifically established to pursue research, training and litigation on access to information in terms of PAIA and the Promotion of Administrative Justice Act of 2000, although it also focuses on the Protected Disclosure Act relating to the protection of 'whistleblowers', which clearly supplements the general thrust of its 'Right to Know, Right to Live' programme. Secondly, it has come to occupy something of a niche in pursuing access to information cases that relate to socio-economic rights cases, and so its work, more than any other actor

⁷ Promotion of Access to Information Act, 2000, Preamble, available at: <http://www.info.gov.za/view/DownloadFileAction?id=68186>

⁸ The Chapter 9s – so called as they are established under Chapter 9 of the Constitution – include the SAHRC and the Commission on Gender Equality (CGE); as well as 4 other bodies all of which are established to support Constitutional Democracy. In 2009, these bodies underwent a stinging review under the leadership of ANC stalwart and former Minister of Education Kader Asmal, who recommended that they be significantly restructured.

in this area, is of most relevance to this article. A further reason why the work of ODAC commends itself to use as an example of civil society's work in this area is that it has undergone periodic reviews during the past decade, which document an evolving methodology for access to information and its importance for socio-economic rights.

ODAC's founding in 2000 coincided with the passing of the three pieces of legislation upon which its work is focused. It grew out of the Open Democracy Campaign Group, a coalition of a number of CSOs formed in the late 1990s to campaign for enabling legislation to give effect to the right of ATI included in the Constitution. ODAC has a decade of experience in campaigning for the right to know, and its experience and self-reflection on its tactics therefore make it a valuable case study in understanding the relationship between access to information and the enforcement of socio-economic rights in South Africa.

A key question which ODAC's activities raise is: in the absence of specialised and dedicated civil society bodies like ODAC and their partners, what potential is there for ordinary citizens to exercise the powers that PAIA gives them? The first two years of ODAC's existence and their experiences seem to suggest that even in an environment where training, information and support are offered, uptake of FOI is low. As a result, ODAC later switched to a model of direct community involvement and activism, but the number of ATI requests processed remained disappointing. However, ODAC itself is quick to point out that it is quality of results rather than quantity of requests that matters. In the conclusion to the 2006 report, ODAC remarks:

The litmus test for having arrived at a more just, open and democratic society is not going to be measured by quantifying numbers of requests lodged using ATI legislation. While these and others measures remain important, the real test is going to be the extent to which South Africa has an active and empowered citizenry with capacity to access rights, act responsibly, and ensure that resources are equitably distributed to all South African citizens (ODAC, 2006: 46).

In its most recent report (2010) ODAC notes some important developments on this theme. The first of these is the rise in service delivery protests, which ODAC directly attributes to an inability to hold local government to account. They go on to point out that while these protests are ostensibly as a result of poor service delivery, "initial studies around service delivery protests indicate that the lack of information about service delivery, rather

than service delivery itself, is a key component in causing the protests” (ODAC, 2010: 1). This view is echoed by the Public Service Commission (PSC), who remark: “Some citizens have found alternative ways to draw attention to the need for public participation through service delivery protests and rising activism. This development should come as a signal to government that *effective communication and public participation* must remain a fundamental priority” (PSC, 2008, cited in ODAC, 2010: 1-2, emphasis added).

A second important development in ODAC’s current work is that of the 11 new FOI requests lodged by them in 2009, eight have a housing component to them, and all relate to socio-economic rights in some respect (the other issues arising being healthcare, water and food parcels from the Department of Social Development). Furthermore, of these 11 cases, six have been referred to ODAC’s litigation unit because, as the report wryly notes, “officials tend to give requests the necessary level of attention only when they receive an official letter of demand from our attorneys” (ODAC, 2010: 5).

ODAC is also at pains to point out in its 2010 report that what may appear to be “a decline in our ability to secure disclosure of information on behalf of our clients” (ODAC, 2010: 5) is in fact a result of a shift in emphasis. ODAC has previously assisted poor communities in urban areas “in seeking information from well-resourced metropolitan municipalities” but its current suite of project mainly focus on “assisting the rural poor who wanted to access information held by smaller rural and less endowed local or district municipalities” (ODAC, 2010: 5). This is in keeping with the conclusion of its 2006 report, as it points to strategic qualitative choice on ODAC’s part in terms of its community outreach interventions. It also links up with the theoretical points made in the previous section, about how FOI is intended to confer powers on citizens, but that citizens in rural areas may be most constrained in exercising these. Referring to the Peddie Women’s Support Centre’s request to the Ngqushwa Local Municipality, ODAC notes: “the power imbalance between the officials and the community was quite evident in our interventions there. We saw a pervasive attitude on the part of the officials wherein they regarded service delivery as a favour that they do for the citizens” (ODAC, 2010: 5).

Whereas in India, the initial activism – essentially, the MKSS in Rajasthan – spawned a wider movement in India, and inspired aspirational attempts to emulate their impact elsewhere, in South Africa civil society’s capacity was comparatively limited and its scale and scope far narrower. As Mukelani Dimba, the deputy CEO of ODAC, has observed: “The

inability to maintain the cross-sectoral and politically diverse and influential open democracy campaign group once the law was passed has weakened civil society's efforts to claim the right of access to information in South Africa"⁹. While ODAC has, as briefly catalogued above, sought to adjust its strategic thrust to recognise the need to be a 'companion' to communities and other community-based organisations in their use of the FOI Act, they have not been able to muster the political impetus and weight of the Indian campaigns and RTI movement. From both – in India, in the positive; in South Africa, from the negative, mirror-analysis – it is possible to conclude: citizen engagement in the use of the law is essential.

4 Factors that Contribute to Impact

Given that there has been so little systematic evidence-gathering of the impact of FOI, it is all but impossible to answer the question 'which methods are used to assess and evince impact?' On the compliance front, which is a critical piece of the overall jigsaw of FOI *effectiveness*, but which is not directed towards the more demanding issue of social change *impact* (broadly defined), the most useful method has been to test compliance by testing performance. In other words, to make requests for information from institutions holding information to see if they respond and, if they do not, to diagnose the reasons for the failure to comply with their legal obligation. The OSJI Silence and Transparency study (2006) is the best example of this.

Attempts to measure performance extend to the indices used by ODAC as part of its annual Golden Key awards, and the Bulgarian Access to Information Programme. Beyond these, a new initiative led by the Carter Centre's Laura Neuman is directed towards what she calls the 'plumbing' of FOI – the system of implementation and its accompanying procedural matrix. There are other important new initiatives under way, that are helping to sustain the momentum behind the global access to information movement, such as the Open Government Partnership¹⁰ that was launched with President Obama's sponsorship in September 2011, and the establishment of the International School for Transparency¹¹, which offers programmes for senior public servants. In addition, as various multistakeholder transparency initiatives mature or conclude their pilots, so new lessons are learned about

⁹ Presentation at the International School of Transparency Open Governance Leadership programme: West Africa Region – 2 June 2011.

¹⁰ <http://www.opengovpartnership.org/>

¹¹ <http://www.istinfo.net>

how voluntary access to information regimes can contribute to new standards of conduct by both government and the private sector in areas of great significance for the poor and for socio-economic development such as revenue from oil and gas, and access to safe, affordable medicine (ScanTeam 2011; Oller 2010).

In terms of impact, the UCL UK study went some way towards developing a methodology for measuring impact, but it was limited by both its scope (who was interviewed and how) and by its conceptual rationale. Its enquiry was directed towards what it saw to be the objectives of the UK law, which were clearly different from, say, the laws in South Africa and India, where the socio-economic dimension has emerged as a far more compelling imperative and narrative.

As already noted, the enormous RAAG/NCPRI study (2009) attempted to address the question of impact. It covered some 17,000 information holders (mostly public officials) who were interviewed; 630 focus groups, engaging 19,000 people, were convened; 800 FOI applications were made and 25,000 were analysed. A total of 35,000 people were interviewed. Styled as the 'Peoples' Assessment', the study also focused on procedural and governance issues, and the visibility of the Act and public awareness, but it also asked an important question of interviewees: 'Did getting the information asked for meet with the intended objective?' The 'intended objective' was constituted by the following list: preventing corruption; ensuring open information is actually open; exposing corruption; curtailing wasteful public expenditure; exposing misuse of power and influence; accessing justice; accessing entitlements; redressing grievances; supporting good officials; and empowerment of the public. Significantly, 40% of rural people and 60% of urban reported that their objectives were "fully met" (RAAG/NCPRI, 2009: 14).

4.1 Supply and Demand

Much of the answer to the question of which factors contribute to impact can be found in the experiences of FOI in India and South Africa already described. From those accounts, key variables can be discerned, primarily around the strategy and tactics of the 'demand side'. The literature suggests that there is a mutually reinforcing and interdependent need for both 'supply' and 'demand':

Whatever the underlying reason for establishing a transparency regime, after a decade of proliferation of access to information laws, with around seventy countries now enjoying a legislated right to information, it is clear that the

stimulus of both a supply of information and a demand for it is the key to meeting the policy objectives. This supply-demand intersection is a fundamental part of our hypothesis for effective implementation and use of the law [...] Notwithstanding the emphasis on the 'supply side', ensuring the success of an ATI law is a matter of co-responsibility. Not all the burden lies with government: citizens, civil society and community organisations, media, and the private sector must take responsibility for monitoring government efforts and using the law. Without an adequately developed demand side, the law is likely to wither on the vine. In other words, the demand and supply sides must match, and where they intersect will determine the quality of the transparency regime (Calland and Neuman, 2007: 3).

4.2 *Assessing the Impact of FOI Initiatives: the role of civil society*

The UK UCL study observes that the extent to which FOI can be used to increase accountability depends on a range of public actors, including the media (Hazell and Worthy, 2010). The difficulty in enforcing FOI rights must be noted, as requests for information inevitably come up against the almost natural instinct of the state to obscure its workings and retain its power. It is in light of this inherent resistance to FOI that organised civil society has carved out a role as the primary driver of information requests, and in many cases legislation to support this right.

It should also be noted that as far as the accessibility of FOI laws are concerned, it is preferable to keep cases out of court if possible. Once a case reaches the point of litigation, it effectively moves out of the hands of the citizen and into the hands of the professionals. While cases which affect large groups of people (public interest cases, usually brought by professional civil society) can have far-reaching implications stemming from their precedents, for the purposes of everyday FOI applications, it is clear that the courts are not the ideal forum for enforcing these requests. Furthermore, "going to law is expensive and often the most disadvantaged groups are the least likely to know about their rights or to have the means to pursue them through the courts" (UNDP/UNMC, 2009: 31) which is hardly appropriate to the needs of those whose socio-economic rights are under threat.

It is important to stress that the role of civil society in the FOI arena is an indispensable, although not unproblematic one. As was illustrated in the Indian and South African cases it is, almost without exception, organised civil society that has driven these

processes forward towards successful outcomes. Their ability to become highly skilled at the management of the politics of FOI, and their capacity for providing what one might call 'specialist companionship' to communities that need to access information to create political space to engage those in power, is critical. It would seem that when that capacity exists, and there is sustained work with a community, roots can be planted to enable that community to adopt FOI over time as a more natural or even habitual tool for democratic engagement. So, in turn, it would appear that the capacity to do what ODAC and MKSS have done in South Africa and India is fundamental: to work in a sustained fashion at local community level, but with a sharp understanding of the macro political environment that may impact on the capacity of the information-holders to respond to demand for information.

The diagnostic findings of the various studies on the effectiveness of certain FOI laws, have many common features and include: political will; infrastructural inadequacy; deficits in records' management; procedural defects that create barriers to responsiveness; institutional culture and traditions of secrecy. All of these serve to limit or undermine the capacity and aptitude of the state to respond to demands for information with adequate levels of supply. What is clear from the literature and the writers' own direct knowledge of working with governments is that capacity for delivering a 'good service' is often either incomplete or obscured by competing political and institutional concerns¹². Moreover, there has been nowhere for public servants to go to learn from peers and to gather up best practice from elsewhere. Training has been erratic or uneven at best, often linked to the quality and presence, or otherwise, of a viable and competent intermediary enforcement mechanism such as an information commissioner. To help fill this gap, the International School for Transparency has been established, with its inaugural programme held in 2010.

As a result of the weaknesses in implementation and enforcement, especially in new democracies or developing countries with poor institutional capacity and insufficient political will, practitioners and advocates have begun to look at alternative ways of achieving the same transparency ends. Where the 'supply side' is lacking - for the reasons cited above, or because of the weakness of the 'demand side' - there is a growing appreciation of the need to look beyond the law to other mechanisms for achieving public information

¹² Calland has in recent years advised the governments of Jamaica, South Africa, Mali, Nicaragua, Bolivia and Tanzania.

disclosure. This is one reason for the emerging phenomenon of voluntary, sectoral multi-stakeholder initiatives (see Meija Acosta, this volume, for more analysis this phenomenon).

4 Conclusion

As noted at the outset, there are very serious and substantial gaps in knowledge because of the absence of a robust methodology to measure impact. There remains a lack of research on whether the supposed benefits of FOI – for example, increased trust and improved involvement in decision-making – have been forthcoming. Equally, assertions of potential harm from FOI – ranging from commercial loss to the undermining of law and order – still continue to be made, even after years of disclosure.

Moreover, the sector is losing knowledge - there are many individuals whose experience is not being captured. These include politicians and senior officials who were instrumental in bringing legislation into effect; practitioners such as Information Commissioners who are responsible for ensuring compliance with the law, and key players in seminal disputes over the release of information.

Systematic evidence of impact is in short supply; the relationship between the aims and aspirations of the world of practice and the results accomplished is, therefore, precarious. In turn, part of the deficit in knowledge and understanding emanates from a lack of theory or, at least, of a single theory of change. As noted, different practitioners approach FOI with very different expectations about the change that will result from greater access to information. The emerging 'theory' of greatest interest is the idea that FOI can create an enabling space for less powerful social actors to engage more powerful institutions and actors. On this front, there is a fast-growing population of anecdotal evidence but, again, no systematic assessment of the relationship between cause and effect.

The academic community has not kept pace with the rapid advances in FOI around the world – both the legislative and the accumulation of (piecemeal) evidence about its impact. So, one of the immediate steps that need to be taken is for the academic community to lend its capability to the task of devising the necessary methodology. Second, and related, the academic community needs to be linked with the community of practice so that, ideally, as a robust and rigorous methodology is developed with a keen eye to the impact assessment needs of that community (including the donor partners). Initial steps have been taken in this regard, but more support is needed to allow it to deepen. In addition, more

research is needed to help understand the potential value of alternative approaches to FOI, such as the multi-stakeholder, sectoral voluntary transparency schemes described above. The growth in number of such schemes, along with the potentially far-reaching set of FOI projects under the UK Department for International Development's Governance and Transparency Fund, provides an excellent opportunity for systematic study of the impact of FOI, with ample material to assess.

A further point to consider is the potential for assessments of ATI impact over time. Assessments of ATI are cumbersome, time consuming and costly, and it is therefore understandable that development partners are wary of committing to longitudinal surveys given that there is no guarantee that the results of these will be any more illuminating than 'snapshot' studies. However,

there may also be an issue of how often we should conduct assessments. What is a long enough time period of ATI implementation over which to be able to assess impact? Should assessments be conducted annually? Every five or ten years? Do some results, such as changing the 'culture of secrecy' in government bureaucracies, take decades of effort? (Horsley, 2008: 3).

There may be merit in the idea that the impact of ATI cannot be fully assessed in the absence of longitudinal measures, as contexts change (for better or worse). Particularly at the sectoral level, it would be helpful to have some ongoing measures of assessment of the outcomes of an ATI regime. This relates to the point that ATI laws and regulations on their own are insufficient, but need to be coupled with political will and leadership, as well as education about ATI among service providers. As the case studies in this paper have sought to illustrate, the role of organised civil society in driving forward the process of ATI enforcement, as well as generating the evidence of its impact, has proven critical in both the South African and Indian cases – cases in which the 'theory of change' has seen ATI being used as a lever to protect or claim socio-economic rights.

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