

Annex 3

Freedom of information

Review of impact and effectiveness
of transparency and accountability initiatives

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Introduction

Methodology and approach

In approaching this subject area within the parameters of this project, the approach that was adopted focused on drawing on the key literature in this area, and so the primary methodology was a desktop survey and summary of the current state of the sector. This is supplemented with an account of some theoretical considerations of Freedom of Information (FOI), both in terms of their rationale, and the nature of the right that they generate. As the author and the senior researcher for this paper are both scholars and advocates for FOI, they drew on their own experience in the field and the case studies and grey literature being generated by civil society colleagues and partners from both India and South Africa to support the academic literature and the theoretical approach so as to better understand the current status of FOI in relation to other transparency and accountability initiatives. 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 in South Africa, and MKSS in India – to shed some light on the relationship between FOI and socio-economic change.

Genealogy and key actors and trends

This study is timely. The FOI¹ community has begun a process of much more substantial self-reflection over the past year. Events such as the trilogy of Carter Center conferences (international, in Atlanta, in 2008;² Latin America Region in Lima in 2009; and, latterly, African Region, in Accra in February 2010) 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. All three conference declarations noted the need for more scholarship and a more thorough examination of the impact of greater transparency/FOI.

Part of the forward-looking analysis has, second, 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 may have on a range of socio-economic matters (although 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 that reveal the human dimension – about how FOI has improved the lives of an individual or a community. 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.

A meeting of FOI and transparency advocates in late October 2009, again convened by the Carter Center, concluded that in order to make and win the case for FOI it was now necessary to extend the scope of the inquiry 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). In order to adopt a bolder approach to examining the relationship between FOI and socio-economic outcome/impact, it was readily acknowledged that such an exercise would require a far more rigorous approach to the evidence and a sound research methodology.

Part of the 'immaturity' of the transparency/FOI analysis and literature generally is the ambivalence about what sort of right FOI is. There are profound conceptual uncertainties and confusions. Thus, this paper considers briefly the literature on the philosophical and conceptual underpinnings of FOI. 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 you are 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 & 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 a recognition that governance innovations maybe be needed – such as the idea of installing an information disclosure regime through a voluntary transparency multi-stakeholder process such as the Extractive Industries Transparency Initiative (EITI). The final part of this paper looks briefly, therefore, at the emergence of the phenomenon of such processes.

¹ 'Freedom of Information' is no longer the terminology of choice for many activists, advocates and scholars working in this field; instead, 'the right of access to information' (ATI) has gained some kind of ascendancy in recent years, a shift that for many captures the new approach to the right that is discussed in this paper. Therefore, 'ATI' is used interchangeably with 'FOI' at times.

² For the 2008 international conference declaration, see: <http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf>

Transparency, accountability and participation: basic conceptual linkages

The increase in ATI laws and regimes globally 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 the policies pertaining to rights and development, is the power to demand information about how decisions are made. Furthermore, this arena reflects an accelerating concern with participatory forms of democracy, which require the state to impart information to citizens, and create consultative opportunities for citizens to inform their policy and practice. This imperative is additionally pressing in democracies in the developing world, where resources are often scarce, and vested interests often brutally effective in protecting their entrenchment. How well a state communicates with its citizens and imparts information about government spending and policy formation has a major impact on the sustainability of both development projects, as well as of democratic forms of engagement, as it serves to curtail some of the frustration which citizens may feel when confronted with unequal access to the provision of socio-economic goods and services such as housing, medical care and education. The foundational proposition that underlies the approach of most FOI practitioners is the rather simple proposition that in order for citizens to hold those in power to account, and to be able to engage meaningfully with state institutions if and when they do explain and justify their decision-making, they need to know what is going on; they need to have sufficient grasp of the information matrix to be able to understand and thereby interrogate effectively.

What are the expected impacts and assumptions underlying ATIs in this sector?

Theorising FOI: FOI as a right – what is it for?

The right to freedom of information has a fairly long history,³ but its contemporary incarnation – as a leverage right with relevance to both civil and political freedoms and social and economic rights, is an emerging conception. Furthermore, interest in and support for FOI legislation has accelerated remarkably in the last 2 decades. In 1990, just 12 countries had ATI laws (AIE, 2006), while today there are nearly 80 such pieces of legislation. Interest in FOI and ATI as a right is therefore growing, but there is considerable debate about what constitutes this right and indeed what purpose it serves. As Snell describes 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, 2007: 62).

Snell goes 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 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, 2007: 63). And this then 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 (see Neuman cited in Snell, 2007: 67; and 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 a greater access to better quality information allows citizens to engage more meaningfully and fully with their government and thereby hold them to account (Snell, 2007: 67). And it is this understanding that relates to the theoretical rights-based model of FOI as a power that is outlined below. FOI as a right matters because of the potential it has to invert the power relationship between state and citizen. Snell describes this as the problem of ‘information asymmetry in the public sector’ (crediting the term information asymmetry to Nobel Laureate Joseph Stiglitz). The problem he is referring to is ‘where there is an information disparity between those that govern and the governed, leading to flawed agency relationships’ (Snell, 2007: 64).

Hohfeld’s power

This section seeks to propose a theoretical understanding of the right of access to information by making use of Wesley Newcomb Hohfeld’s classic exposition of the four so-called ‘incidents’ of rights: Claims, liberties, powers and immunities. It is suggested that the discourse on rights suggests that they are 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).

The language and practice of human rights are very much products of context. It scarcely needs repeating for this audience that the evolution of the language and practice of human rights underwent its greatest acceleration in the second half of the 20th Century, and the Constitutional jurisprudence that we debate so fiercely today is very much a product of that accelerated evolution. Part of the perceived binary between claim-rights and liberty-rights is as a result of this evolution, and so it is therefore not surprising that in our constitutional jurisprudence we tend to emphasise these types of rights more than any other.

Before the holocaust and the Cold War, and before the wave of decolonisation of the developing world,⁴ Hohfeld, published a pair of articles in the Yale Law Journal, which later were published together in 1919, a year after his death, as the seminal *Fundamental Legal Conceptions*, which endures today as the clearest possible exposition of the different forms that rights can take, and the correlative duties or obligations that they generate. This chapter argues that by revisiting Hohfeld, and using one of his ‘jural relations’ – that of a power – we can successfully shed some light on the right of access to information, and what it entails in our current context.

³ The Swedish Freedom of the Press Act is the oldest of its kind, passed in 1766.

⁴ Events that contributed to shaping and accelerating the development of the language of rights in the 20th Century.

Hohfeld's analysis of rights, while being a description of four different types of 'jural relation' or legal rights, is nevertheless useful to the analysis of moral and human rights too, as it indicates the protean forms which even this fairly narrowly defined category of rights can assume, and thus 'remains a highly enlightening account of how the single term 'right' may be used to describe quite different sorts of jural relation' (Jones, 1994: 12). The rights enshrined in the South African Constitution are of course both moral and legal rights, and in the case of the right of access to information, the legal status of this right is buttressed by supporting legislation in the form of PAIA. Recall that according to Hohfeld, there are four alternative jural relations that all fall into the broader category of legal rights: claim-rights; liberties; powers; and immunities; and each of these is distinct in character because of the 'correlatives' and 'opposites' which they generate correspondingly (Jones, 1994: 12-13).

Firstly, claim-rights, which Hohfeld considered to be 'rights in the strict sense' are constituted by one party having a claim on another which then generates the duty to honour that claim. Consequently, the correlative of a claim-right is a duty, and the opposite is 'no-right' in the sense of no right to demand the performance of the correlative duty (Jones, 1994: 12-14). Although Hohfeld considered claim-rights exclusively to merit the status of rights on a strict interpretation of the term, a more generous interpretation would allow the inclusion of the other three classes of rights identified, which would correspond more accurately with the other ordinary uses of the term.

The second form for rights identified by Hohfeld is liberties. These are the things that one is entitled to do in the absence of any rules or constraints to the contrary (Jones, 1994: 12). So for example, one has a liberty to choose what kind of toothpaste to use, but one also has important liberties to think and say what one believes or chooses. Rights in this sense include not only the typical civil and political liberties which are usually considered to fall into this category, but also the protection and enjoyment of one's property (Jones, 1994: 18).

The third form for rights identified by Hohfeld are powers, which are 'usually defined as the legal ability to change a legal relation' (Jones, 1994: 22) such as one does when one makes a will, or casts a vote. There is an overlap with claim-rights, as in the case of rights as legal powers, there is a duty on the part of others not to prevent one from exercising that power. However, the defining feature of such rights is that they 'empower' the right-holder to do something which they would otherwise have no enforceable right to do in the absence of the relevant provision (Jones, 1994: 12-13). The opposite of such a right is thus a disability, and the correlative of rights as powers in Hohfeld's scheme are 'liabilities', but not necessarily in the pejorative sense: 'A power may be used to the disadvantage of another, but it

may also be used to someone's advantage, as for example when a person uses his power to alienate his property to make a gift. Thus I may be 'liable' to the conferral' (Jones, 1994: 24). It is a right in this sense that may be useful for understanding the precise nature of the right of access to information, as will be explored below.⁵

There are a number of features of the right of access to information understood in this way. Firstly, it is not a right to any specific concrete thing. As will be illustrated in the section below, a number of recent access to information cases have recently dealt with socio-economic rights, in particular housing cases, but the right to information does not guarantee that the thing to which the right in question relates (the object of the right) will materialise. 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. This is significant to the delivery of social and economic rights, but the important point to note here is that 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). And this is, politically, an enormously significant shift. In the Indian and South African case studies outlined in the following section the point is made repeatedly that in the communities where these access to information requests were made, a tangible sense of empowerment has resulted, and people gain confidence in dealing with the state in upholding their rights and demanding information. This is relevant to the point made above about one of the rationales for FOI being deliberative and participatory forms of governance and development.

⁵ The fourth and final type of right identified by Hohfeld are those constituted by immunities. These rights are constituted by the sorts of things that one is immune from having done to one because there is no legal provision made in this regard. For example, in a jurisdiction which makes no provision for divorce, an individual would be immune from being divorced by their spouse (Jones, 1994: 13). Immunities as rights therefore consist in the absence of power on the part of others, and consequently the correlative of an immunity right is a

disability, in the sense of a disability on the part of others to violate the object of the right, and their opposite is liability. The most important area of rights constituted in this way are those which are generated through constitutionally entrenched rights. One's right to freedom of speech in this sense does not only consist in the liberty to say what one pleases, but is further protected by the constitutional disability of the state to make laws which may alter this right (Jones, 1994: 24-25).

What evidence is there of impact and effectiveness of accountability and transparency initiatives in this sector?

There is very little evidence of the effectiveness of FOI generally or transnationally; it is clear that while there is no systematic assessment of the impact of FOI on social change (and only limited amount related to institutional change). At best there is a small group of studies that examine the performance of the FOI regime, and compliance, which is a very different animal. Hence, this section examines two case studies – from South Africa and India – to see what evidence can be found of impact, in particular of causal linkage between FOI and socio-economic rights (in the context of the theoretical proposition offered in section 1). More recently, a study conducted by the Constitution Unit at University College London claims to be ‘the first in-depth, systematic study of the objectives, benefits and consequences of FOI, anywhere in the world’ (Hazell & Worthy, 2009). It contains some interesting observations about the impact on Whitehall in particular. On the basis of an online survey of FOI users and interviews with 56 officials in eight UK government departments, it asserts that FOI has increased transparency and accountability, ‘though not to the same extent’.

The UCL UK study found that there was little evidence of what one might call ‘meta-level’ impact – that FOI had improved government decision-making, public understanding of decision-making or enhanced public participation, or, notably, increased trust. This contrasts with the case-study evidence from South Africa and India, 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 while ‘FOI has not realised its proponents’ more ambitious objectives, neither has it realised its opponents’ worst fears’, in that it appears not to have undermined public service decision-making nor provoked a ‘chilling effect’ (Hazell & Worthy, 2009: 6).

The final part of this section describes a set of new projects that have been initiated with funding from DFID’s Governance and Transparency Fund (GTF) and which, in overt terms, seek to use FOI as a governance mechanism to leverage socio-economic change. As that section points out, it is too soon to see any evidence of impact; however, what is interesting is the extent to which the theory of FOI as a tool for social change is being tested by these projects, which will, in due course, provide an important new opportunity for systematic assessment of the causal logic.

FOI compliance

The most prominent compliance study is the 2006 fourteen-country study conducted by the Open Society Justice Initiative (OSJI), which is, to date, the most comprehensive study of its kind reflecting on the impact of FOI laws around the world. In each of the countries surveyed in the study, ‘civil society organisations committed to freedom of information worked together with the Justice Initiative to carry out the project’ (OSJI, 2006: 24), and as is noted below, in South Africa, ODAC was the partner organisation in question. What this highlights, again, is the leading role played by civil society in promoting and enforcing the right of FOI. Of the 14 countries surveyed, Armenia, Bulgaria, France, Mexico, Peru, Romania and South Africa had dedicated FOI laws at the time of the study. Argentina, Chile and Spain had partial legal recognition of the right, and the remaining 4 countries – Ghana, Kenya, Macedonia and Nigeria – had no FOI laws at the time of the study⁶ (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.

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 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).

While the full results of this enormous study cannot be presented here owing to the constraints of length (indeed the full report is some 189 pages), as an exercise in monitoring the impact of FOI worldwide the study stands out as a unique example and a rich source of information. The report lists 9 main findings, which are briefly outlined here to give a sense of the kind of information that it contains. Firstly, the study found that, on the whole, having FOI laws increased responsiveness on the part of public officials, and the rapid increase in these laws in the past 15 years is therefore a development to be welcomed. However, the second general finding was that ‘mute refusals’ (a failure to respond either verbally or in writing) remained a problem, even in countries with FOI laws. Interestingly, the third main finding was that transitional democracies tended

⁶ Macedonia has since adopted full FOI legislation, and Ghana has draft legislation in place.

to be more responsive and provided more information than mature democracies, but, fourthly, that there were significant differences and variations in response between the regions surveyed (OSJI, 2006: 13).

The fifth finding is of great significance for the point emphasised above, which is that the involvement of civil society has a remarkable impact on the success of ATI requests and laws. The sixth finding also relates to a point noted already, which is that discrimination affects response rates. Where requestors are journalists or NGO representatives, the response tends to be more forthcoming than when the requestor is perceived as marginalised or powerless, and the report contains numerous examples to support this finding. Finding seven was that even in the most responsive countries, results were inconsistent even when the requests made were identical. Furthermore, finding eight was the non-compliance was variable, in the sense that the manner in which government bodies responded negatively to requests was variable (verbal, written or 'mute'). The final, ninth, finding was that refusals in writing were a rare exception ranging between 2% and 5% of responses, and most of these were based on legitimate grounds for refusal. Clearly government officials, whether there are FOI laws in place or not, are reluctant to put their refusals to provide information on record, but rather rely on the device of the 'mute refusal' to frustrate requestors' attempts to get information (OSJI, 2006: 13-14).

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 'professionalized' environment, quite heavily reliant on expert civil society intervention and activism in order for it to be realised.

Civil society case studies: examples from India and South Africa

In order to illustrate the impact and effectiveness of FOI regimes, in particular in developing countries, and also to outline the importance of the role of civil society as a champion of FOI, some case study examples from India and South Africa are presented here. These 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 civil society organisations that are described here are MKSS in India, and ODAC in South Africa. Again, these 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.

India – MKSS: fighting corruption

Rob Jenkins has traced the emergence of a rural, grassroots civil society movement in India called the Mazdoor Kisan Shakti Sangathan⁷ (MKSS), 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 in India, and activists from other parts of the country. Its work on the right of access to information began in the late 1980s, but it was from about 1995 onwards that its work began to gain impetus. Shekar 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: 24-25).

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. And it was this focus on wages and prices that led MKSS to begin to look at corruption of public officials as its central concern. Jenkins and Goetz give a description of how the information that MKSS was able to unearth on public accounts was able to expose the corrupt practices of local authorities in both the payment of minimum wages on public work project, as well as in the PDS (see Jenkins and Goetz, 1999); but it was these initial activities that led MKSS 'to the conclusion that such malfeasance could not be traced without access to official documentation' (Goetz and Jenkins, 1999: 605). However, at this early stage of the campaign, India did not have FOI laws in place to facilitate this 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' (Goetz and Jenkins, 1999: 606).

There are two remarkable features of this method. The first is that it allows direct participation on the part of members of communities, to whom sometimes relatively small sums of money can be enormously significant. And this direct process of accounting 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.

⁷ Association for the Empowerment of Workers and Farmers.

This approach depends upon a principle of collective and very local verification of official accounts, as it is only at the local level that the many small diversions of funds, which go unnoticed in massive formal audits, can be detected. These jan sunwais not only exposed the misdeeds of local politicians, government engineers, and private contractors – in a number of cases leading to voluntary restitution – but also demonstrated the potential for collective action among groups that tend to shun organised ‘political’ activity (Goetz and Jenkins, 1999: 606-607).

And 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, by way of example, 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 also 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).

However, owing to the lack of FOI legislation, from the late 1990s, MKSS encountered increasing resistance when trying to access government-held information. MKSS’s lobbying in this area led to the passing of a state-level Right to Information Act in Rajasthan in 2000. Singh also cites the successful campaign for FOI legislation (in Rajasthan at least) as a measurable impact of MKSS’s activism for FOI. This gave activists the official power to access information, but they did continue to encounter levels of bureaucratic resistance, which made this an ongoing struggle (Jenkins, 2007: 60).

From 2001 onwards, Jenkins identifies a ‘second wave of anticorruption activism’ in India, in contrast to the 1995-2000 period. This second wave he describes as ‘bridg[ing] divisions within the anticorruption movement itself, gaps that hampered its effectiveness’ (Jenkins, 2007: 62). In particular, there are four such ‘divides’ the bridging of which he outlines. Firstly, the relationship between the poor and middle class, was, according to Jenkins, being bridged during this second wave of activism, in contrast with the first wave where the middle class were often accused of being complicit in this corruption to their own benefit. However, post-2001, alliances between poor and middle class citizens began to emerge, which he argues have the effect of consolidating the gains of the earlier period (Jenkins, 2007: 62-3).

The second bridge that developed during the second period of activism was between the more formal NGO sector and people’s movements. This is significant in the Indian context, where NGOs and their employees are seen

as beneficiaries of foreign funding, and therefore agents of foreign ‘imperialism.’ So the 1990s grassroots movements sought to distance themselves from the NGO sector in order to bolster their credibility. These distinctions began to dissolve in the post-2001 era, with the strengths and elements of both types of organisation being drawn on to form new hybrid organisations: ‘The gradual evolution of several anti-corruption groups whose movement credentials are beyond reproach has made the bridging of the NGO-movement gap possible (Jenkins, 2007: 64).

Thirdly, this second wave of activism began to bridge was that between the state and civil society. The introduction of FOI laws of course makes the state, officially at least, a partner in the FOI movement, but Jenkins notes the emergence of greater levels of state-civic engagement in India during this period. While not entirely successful, this is a relationship that is in the process of being forged (Jenkins, 2007: 65-66).

The fourth and final gap, which has also not been entirely eliminated, is that between what Jenkins labels ‘the activist and partisan domains of anti-corruption politics’ (Jenkins, 2007: 66). The anti-corruption civil society movement spearheaded by MKSS had originally cast itself as free of party political affiliation, but as this movement matured, it became clear that opposition party politicians in particular could usefully be deployed to provide expertise and ask questions in the relevant official fora. While this is a problem which has not been resolved, it is clear that the realms of formal politics and anti-corruption activism are in some instances drawing closer together and finding ways to collaborate (Jenkins, 2007: 67).

Over and above these grassroots successes, it is important to note that as the campaign for FOI in India gains momentum, its impact has spilled over into the environment movement, where a number of successful cases have been prosecuted. At the political level, development projects, electoral procedures, and urban municipal government have all been affected by the movement for greater transparency and FOI (Singh, 2007). The culmination of this was a national Right to Information Act in 2002, which was amended and made more effective in 2005. What sets India apart in terms of its FOI law and implementation is that it is overseen by an Information Commissioner, rather than enforcement being a matter for the courts (Singh, 2007: 43-45).⁸ This places it in contrast with the South African case, which is outlined below, where a model of judicial enforcement of ATI claims continues to be relied upon. It is also important to note that ODAC, the South African NGO described in the following section, drew lessons from MKSS in India, and indeed ODAC’s shift in strategy from 2003 onwards to a more community-based approach came about as a result of their interaction with MKSS activists.

⁸ There are some doubts expressed about the impartiality of these Commissioners however, as most of them are serving or retired civil servants. Of the one central and 27 state Chief Information Commissioners initially appointed, 23 were retired Indian Administrative Service (IAS) officers, 3 were retired judges, 1 was a retired Indian Police Service (IPS) officer, and

1 was a former member of Parliament. This information was drawn from *Safeguarding the Right to Information: Report of the People’s RTI Assessment 2008*, RTI Assessment and Analysis Group (RaaG) and National Campaign for People’s Right to Information (NCPRI): 2009.

South Africa - ODAC: an evolving methodology

Civil society in South Africa has taken a leading role in implementing the right of access to information, and this raises the question of how accessible the supporting FOI legislation can be made in its operation, as if it requires specialist intervention in order to yield any results for ordinary citizens, then perhaps its usefulness can be questioned. This section outlines the work of the Open Democracy Advice Centre (ODAC) over the past 10 years, reflecting on how their methodology in pursuing cases under 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. The section is concluded with a description of an illustrative example of an FOI request that ODAC facilitated that yielded a tangible result as far as service delivery is concerned.

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, ODAC 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. In addition ODAC focuses on the Protected Disclosure Act (PDA) relating to the protection of 'whistleblowers' which clearly supplements the general thrust of ODAC's 'Right to Know, Right to Live' programme. Secondly, ODAC has come to occupy something of a niche in pursuing access to information cases that relate to socio-economic rights cases, and so the work of ODAC, more than any other actor in this area, is of most relevance to this chapter. 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 ODAC has undergone periodic reviews during the past decade, all of which have been documented, and which point to 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 3 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 in the late 1990s who were campaigning for enabling legislation to give effect to the right of access to information included in the Constitution. As ODAC's 2006 report, *Evaluation of ODAC's Right to Know, Right to Live Outreach Strategy – 2001 to 2005* summarises this process:

Even before the trilogy of Bills became laws, [ODAC] was conceptualised as a mechanism to make conceptual and practical links between these Bills. Focusing on the two pieces of 'transparency legislation' (PDA and PAIA), ODAC was designed to play an active role in fostering a culture of accountability and transparency. It aimed to do this by assisting citizens and institutions (public and private) to understand and use the laws to leverage a menu of rights available to them? ODAC, 2006: 1-2.

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.

There are roughly two periods covered by ODAC's review processes – the period from 2000-2005, when ODAC undertook a 5-year review, and the period since then to date.¹⁰ The first 2 years inevitably involved the setting up of 'appropriate operational and governance structures' and '[d]uring this period ODAC assumed that training paralegals and NGOs on how to use these ATI laws would automatically translate into them using the laws to assist disadvantaged groups and communities to identify problems and make specific requests' (ODAC, 2006: 2). However, by 2003 it became apparent that this assumption would need to be questioned, as a five country study showed that despite its suite of openness laws, South Africa had one of the worst FOI compliance rates of the countries surveyed.¹¹ Furthermore, the study found that South Africa's scores in terms of political will and compliance were the lowest, pointing to the difficulty with implementing FOI laws, however impressive they may be. Furthermore, ODAC was concerned with the low number of FOI requests that were being received, and so it was apparent that both on the 'supply' side, as well as the 'demand' side, the flow of information was poor. The following section of this chapter returns to this question of the difficulty of implementation, and some new developments which may assist in cracking open the information environment, but this realisation on the part of ODAC led to a rethink of their strategies and tactics from 2003 onwards.

The major change that took place was that rather than playing the role of information provider, with supportive training to NGOs, ODAC would now have more interaction with the communities themselves who were to be on the receiving end of the information requests. As the 2006 report describes this shift in methodology,

As opposed to teaching people in a formalistic way about the ATI law, [they] would spend more time on facilitating a community-based meeting at which local people [would] identify the issues they want to take action around; clarify how the access to information can take them closer to their development goals; and, having done that, ODAC sends off requests for information on behalf of the community. This part of the process involved filling in the necessary forms, taking responsibility for follow up communication, and supporting advocacy processes arising out of the request ODAC, 2006: 15.

This change of approach rapidly yielded results, with the number of PAIA requests increasing remarkably during 2003 and 2004, and steadily continuing to rise in 2005. In looking at the requests that developed from the communities where ODAC did its work (9 in 2004 and 12 in 2005), the requests related to socio-economic rights to healthcare,

⁹ The report notes further that ODAC was originally designed as a collaborative project of IDASA, the Black Sash and the Department of Public Law at UCT.

¹⁰ The staff at ODAC have very kindly made their internal documents available to the authors of this chapter, and these are drawn on here.

¹¹ The 2003 pilot of 5 countries was conducted by the Open Society Justice Institute (OSJI) and was followed in 2004 by the 14 country study outlined in section 4 above.

water, housing, and electricity. A range of other related issues were also included in these access to information requests, but it is salient to note that the communities in question prioritised development and access to resources, as well as information about how local government funds were being spent. At this local level then, FOI requests are most pressing concerned with these 'bread and butter' issues, rather than the security or procedural questions that form the subject of some of the more high profile FOI cases.

The other important point about the community-based FOI requests processed by ODAC during this period is that most of them did not reach the point of litigation – of the 12 community-linked requests in progress in 2005, 5 had a satisfactory result by mid-year, and just 3 had potential court action looming (ODAC, 2006: 21). Once ODAC had made their initial intervention, even when these yielded only partial results, the communities felt empowered to take over the process, as the footing on which they dealt with the government had shifted. The other important constituency that ODAC continued to work with during this time was specialised and grassroots NGOs, with the majority of FOI requests emanating from these partnerships – 159 in 2004 alone.

However these successes need to be seen against the backdrop of an overall challenge with accessing information in South Africa. In 2004, the 2003 OSI 5 country pilot study to monitor FOI legislation and compliance was extended to a 14 country study (referred to in section 4 above), and once again South Africa's results were disappointing. In this study, ODAC took a leading role, making 100 out of a total of 140 requests on behalf of NGOs, the media and individuals 'to elicit and test the use and supply of FOI legislation.' These requests were made to all 3 tiers of government, and of the requests to 18 public bodies, 63% were met with 'mute refusal' (i.e. they were ignored) and just 13% were responded to within 30 days. The upshot of the study was that South Africa's compliance with FOI requests had actually declined from 2003 to 2004.

And this then raises the key question identified in section 4 – 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 2 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. Until ODAC switched to a model of direct community involvement and activism, 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 matter. 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, and 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).

A second important development in ODAC's current work is that of the 11 new FOI requests lodged by them in 2009, 8 of them have a housing component to them, and all of them 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, 6 have been referred to ODAC's litigation unit – as 'as officials tend to give requests the necessary level of attention only when they receive an official letter of demand from our attorneys' as the report wryly notes! (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' 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). And 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).

ODAC also lists 11 institutions which have consistently scored a zero (0%) in their 'Golden Key Index' which measures their FOI compliance. Disturbingly, of the 11, 4 are the Office of the Premier of one of South Africa's 9 provinces¹² while the remaining 8 are district municipalities.¹³

ODAC's findings then raise two important points about the implementation of FOI laws in South Africa. The first is the need for some kind of commissioner or information

¹² Western Cape, North West, Northern Cape and Mpumalanga.

¹³ The 11 institutions were all eligible for ODAC's 'Rusty Padlock Award' with the Bophirima District Municipality eventually being drawn for this dubious distinction.

regulator¹⁴ to provide a cost effective and accessible means for ordinary citizens to press the levers which enforce their rights of access to information. In the face of many government bodies' 'mute refusal' to comply with FOI regulations, such a regulatory body could meaningfully give teeth to the power that PAIA confers on citizens. The second point is the extension of jurisdiction over PAIA to magistrate's courts in South Africa. While even these courts are likely to remain beyond the reach of most ordinary citizens, this opens a space for a wider range of civil society bodies to articulate communities' FOI claims through these courts, without having to have recourse to either the intervention of bodies like ODAC, or the lengthy and costly court battles of previous cases.

One example relates to the right of access to water, and is reported by ODAC as one of its successful interventions, and furthermore 'demonstrates how socio-economic rights can be realised through the the use freedom of information and public pressure *rather than through litigation*' (Dimba, 2008: 4). This case clearly arose through ODAC's strategy of community engagement as noted above.

Access to water in rural areas in South Africa is not a resource that can be taken for granted. Nor is this an issue without gendered implications. The rural areas of South Africa reflect a population demographic that is skewed in favour of older women, and the young. Access to clean water is therefore not only an issue of basic health and safety, but is very much a women's issue in many areas. In many rural areas, in the absence of the infrastructure for piped water, local government delivers water in tankers, and deposits it into large communal drums for the community's use.

In 2004, ODAC took up cudgels on behalf of the residents of Emkhandlwini in rural KwaZulu-Natal. It was reported that the municipal tanker was delivering water to other villages in the area, but that for some reason, Emkhandlwini was excluded. The villagers were forced to rely on a stream, which their livestock also used, for water. The local government councillor for the area had been appealed to about this problem, but these appeals had proven fruitless. ODAC assisted the residents to use PAIA to request the minutes of the local government council meetings where the water provision programme had been decided. At the same time, they requested the integrated development plan (IDP) and budget.

For 6 months the community was kept waiting, and when the information was finally provided, it showed that there were indeed plans to provide water in the area, but that these had not been communicated to the residents. The pressure that this information allowed the residents to put on the municipality to account for their exclusion, along with the attention of the media to the case, finally yielded the result of the provision of fixed water tanks (drums) that are regularly replenished, along with a commitment to lay pipes for a permanent water supply.

This case demonstrates the theoretical construction of the right of access to information as a Hohfeldian power. By requiring the municipality to make public its plans to provide water, they were required to justify their decisions

to the community in question, and to make good on their commitments. As Dimba remarks:

Public pressure to influence resource allocation can only be effectively applied if there is sufficient transparency in the process of resource allocation. Freedom of information creates the conditions in which decisions about the allocation of resources can be challenged Dimba, 2008: 4.

Stretching the frontiers – FOI and the Governance and transparency fund projects

Of the eight DFID GTF projects identified as being relevant to FOI, we were able to access documents for seven of them. All of these projects effectively began in 2009, and almost all of them note in their first (2009) annual report that it is too early to measure impact, as this first reporting period was an inception phase. They are grouped here according to their primary focus area or aim for ease of comparison, and clarity of objective. Of the 7, 3 have a direct focus on the role of the media in 1 or more countries, 2 are concerned with using information to combat corruption, and 2 are concerned with education, although in vastly different ways. These 3 broad categories therefore highlight 3 important strands to advocacy for ATI. Firstly, as it is traditionally understood, a free and independent press is a key ingredient in an accountable, open and democratic society, and thus RTK projects necessarily assume, and sometimes must begin, with a focus on the media. The second strand is the instrumental value of FOI, in this case in combating corruption. It is noted elsewhere in this report that this strategy has been highly successfully deployed by MKSS in India, and the projects reported on here are no doubt inspired by this example. Thirdly, over and above its instrumental value in the capacity to expose state corruption, access to information provides important leverage for accessing other rights, in the case of one of the projects referred to here, the right to education. And this links to the more generic aim of human rights education and the right to information about one's rights, as an important tool of empowerment

Media

Journalists for Human Rights (JHR) began a project entitled 'Good Governance through Strengthened Media in Liberia' in late 2008 or early 2009, for which as yet only the inception report is available, and it is thus difficult to assess its impact yet. The project is a partnership between Canadian JHR and the Liberia Media Centre. The project is planned over 5 years (until 2013) and aims to contribute to accountability and good governance by encouraging effective reporting on human rights issues, and in particular to focus on the dissemination of information about human rights to 'disadvantaged and vulnerable groups.' It notes with approval the (as yet incomplete) passage of legislation to establish a free press and an independent broadcasting regulator as well as a Truth and Reconciliation Commission, but laments the failure to establish an independent National Commission on Human Rights, which are no doubt

¹⁴ It was noted above that India's FOI laws are enforced by means of such a Commission.

areas which the project will continue to monitor in 2010.

The BBC World Service Trust began a 5-year project in late 2008 entitled 'A National Conversation' with activities in Angola, Sierra Leone and Tanzania. In each of these three countries, a national broadcasting network is listed as a partner, but as only Angola is as yet reported to have a project country director in place, it appears as if the project is yet to get up and running. The project aims to promote interactive media and opportunities for citizens to engage government officials, thereby promoting participation and transparency in governance, but as yet its impact cannot be assessed.

The Ma'an Network in Palestine began a 3-year project in late 2008 – 'Empowering Transparency through Effective Secular Media' which aims to train journalists to build up their capacity to report in a way that increases the public demand for accountability. While the report notes the training of 53 journalists, and a scoping exercise (called a media survey) in 2009, it also remarks that they are yet to see a clear impact on governance and transparency from their work 'mainly because we have been in the pre-production phase during the period covered.'

Anti-corruption

The US-Based Partnership for Transparency Fund (PTF) has a project, 'Citizens against Corruption' which consists of some 90 small projects in 11 developing countries¹⁵ which PTF supports from their DFID grant and provides with technical support. Their partners in these countries are local CSOs, and PTF focuses on those that are using innovative methods to promote government accountability and thereby reduce corruption. PTF reports on a number of tangible impacts stemming from their project in various countries, most of which focus on government expenditure and highlighting this information as a source of corruption. While there are some projects which focus on other areas, such as the monitoring of elections with a view to preventing electoral fraud (Ghana), it seems that the MKSS model of focusing on small scale government accounts, procurements and tenders in construction and land allocation, and individual institutions, to expose graft is the primary methodology. In Sierra Leone, PTF is supporting their local CSO partner in drafting a FOI Bill, which is intended to allow access to information for the express purpose of fighting corruption and combating poor governance.

German-based Transparency International's (TI) project 'Anti-Corruption: Delivering Change Programme' (called the ACDC) functions in 26 countries through local branches (called National Chapters) of TI. Their main objective is to develop cooperative relationships with governments where possible, and to use these to advocate for policies that quell corruption. This is supplemented by gathering information on specific instances of corruption to bolster their advocacy for change in any given setting. TI reports on the establishment of 11 Advocacy and Legal Advice Centres (ALACs) which are open to the public and encourage the reporting of complaints about corruption, which TI then takes up. This has had a number of results – some of them mixed. In Zimbabwe, reporting on 312 complaints of corruption in the justice and law enforcement sectors has 'enraged' the Attorney General of that country.

Other governments are reported to be welcoming of the establishment of the ALAC and have yielded positive results. For example, in Pakistan, contact between TI and the Supreme Court have led to instructions from the Chief Justice for complaint cells in the Supreme and High courts to be opened to process corruption complaints levelled at the justice system. In Montenegro, the advocacy of the ALAC resulted in the adoption of an improved draft of a law on Conflict of Interest. The 2009 annual report remarks: 'The ACDC programme has only been running for ten months and the results achieved are significant ... Once all sixteen of the planned ALACs are open and the research completed on themes as diverse as conflict of interest and political finance, the expected impact is even higher.'

Education

The African Democracy Institute, IDASA, has a 7-country project called 'The Right to Know, the Right to Education' which is a core project of its Economic Governance Programme (EGP). The project is referred to in section 4.3 below, but it is worth noting here as its expected impact is highly relevant to the instrumental value of FOI, in this case the ability of citizens to demand information about budgeting at national and local level in terms of its allocation to the servicing of socio-economic rights, in this case basic education. The countries that the project operates in are Camareoon, Ghana, Malawi, Swaziland, Tanzania, Uganda and Zambia, with local civil society partners in each country. The project is as yet nascent, as its first year (2009, to which the available report pertains) was largely taken up with assembling the project team, a process necessarily complicated by the geographical spread of the incumbents. The project cannot as yet therefore claim any significant impacts. The project has however produced a useful baseline report on the Legal Framework Supporting the Rights to Information and Basic Education in each of the countries included in the project.

Amnesty International's (AI) Africa Rights Education Project focuses on general human rights education and dissemination of information for the purposes of leveraging rights. The project includes 10 countries – Benin, Burkina Faso, Cote d'Ivoire, Ghana, Kenya, Mali, Senegal, Sierra Leone, Togo and Uganda – and 20 local CSO partners. The project aims to work through these local partners to train and mobilise community level Human Rights Education Workers (150 in total), and to support them with ongoing training, support and advice from AI. The intention is that this will empower people to identify human rights issues that pertain to them and utilise the relevant human rights instruments in place to protect and enforce their rights. At the time of the current annual report (2009), the report remarks:

It is too early to report on the project's impact on governance and transparency as the first six months of project implementation have centred on building project infrastructure and partnerships. Works towards outputs relating to positive changes in human rights behaviour, attitudes and practices will commence in project year two [2010] when human rights education micro-projects are implemented at the country level.

¹⁵ 6 in Africa – Cameroon, DRC, Ghana, Liberia, Rwanda and Sierra Leone; and India, Indonesia, Latvia, Mongolia, and Trinidad and Tobago in the rest of the world.

Which methods are used to assess and evince 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 (*effectiveness* rather than *impact*), 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 is the best example of this.

The attempts to measure performance have also extended to the indexes used by ODAC with its annual Golden Key awards and the Bulgarian Access to Information Programme. Beyond these, a new initiative led by the Carter Center's Laura Neuman is directed towards what she calls the 'plumbing' of FOI – the system of implementation and its accompanying procedural matrix. The new International School of Transparency is conducting an assessment on the lessons that can be learnt, in terms of governance and impact, from the group of sectoral, voluntary multi-stakeholder initiatives (EITI *et al*), as well as conducting programmes for public servants and leading efforts to create a global academic research agenda. So, there are important new initiatives under way.

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: it directed its inquiry 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.

So far as India is concerned, two studies were conducted to assess the progress of the Indian FOI law. One was government led and, funded by DFID, conducted by PWC (PWC 2009). The methodology was a survey approach – 2000 information-seekers, 200 information-holders, and 5000 ordinary citizens were interviewed. But the study ignored the

question of impact totally. It engaged, instead, on issues of governance on the supply side – the usability of the act, and records' management, for example – and, on the demand side, issues of citizen awareness (of lack thereof).

The PWC study was complimented by an 'unofficial' study conducted by organised civil society (RaaG 2009). In terms of scale, the scope of its survey methodology dwarfed the PWC study: 17,000 information holders (public officials etc) were interviewed; 630 focus groups, engaging 19,000 people, were convened; 800 FOI applications were made; 25,000 were analysed. The total of 35,000 people that the study claims were interviewed matches the scale of the MKSS campaign for FOI and its overall approach to FOI implementation, usage and enforcement. It is in a different league from anywhere else (although the Mexican Information Commissioner has made similar attempts to assess usage, focusing on the question 'who has used the FOI Act?').¹⁶ 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, Empowerment of the Public. Significantly, 40% of rural people and 60% of urban reported that their objectives were 'fully met' (RaaG 2009: 14).

In addition, there is also worth noting the emerging evidence of impact and compliance that is being compiled in the case of the Indian Information Commission stemming from the 2005 Act.¹⁷ While the details of this evidence cannot be included here owing to constraints of length (and the amount of detail contained in these voluminous reports), it is worth reflecting on the following lessons that have begun to emerge in the past five years from the Indian experience with an Information Commission. The evidence is compiled from the 'supply' (commissioner) side, and the 'demand' (citizen) side. To evaluate the former, a sub-committee of the Central Information Commission (CIC) publishes an evaluation of each commissioner's individual performance, grading them on how many cases they dealt with; how many of those cases resulted in and order for disclosure, which was then complied with; their 'deterrence

¹⁶ See: www.ifai.org.mx

¹⁷ Vikas Jha of the Society for Participatory Research in India (PRIA) kindly made available a number of documents detailing this emerging body of evidence, which are drawn on here.

These included *Accessing Information Under RTI: Citizens' Experience in Ten States*, PRIA, 2008; *Best Practices Report, and Facilitation Process Under RTI* – both reports of the Sub-Committee of the Central Information Commission; and the RaaG/NCPRI 2009 report referenced in the previous note.

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 PRIA compiled a report gauging the experience of citizens accessing information under RTI in 10 states. This was based on a sample size of 400 citizens who had used the RTI Act over a set period, who were all asked the same set of questions. The study therefore represents a 'dipstick' sample, rather than a longitudinal study, but it is telling nonetheless.

The lessons that have begun to emerge from this approach are twofold. Firstly, the implementation of the RTI Act is inconsistent, varying from state to state, and indeed from Commissioner to Commissioner. However, the process of tracking this implementation has yielded important gaps in practice and delivery, and these are useful in addressing these. As ATI emerges as a right for citizens on the ground, gaining momentum through the spread of its implementation, it can be expected that the machinery and mechanisms to enforce this rights 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 Information Commission, 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 National RTI helpline; the use of Video Conferencing for Central Information Commission hearings where some of the parties are in remote places; and an online filing system providing this option to appellants and complainants.

This body of information is shedding important light on the impact and strength of different enforcement bodies – something that South Africa and other juridical-based systems could learn from. It also points to the important body of information that such information commissioners and commissions have fast accrued and which should be collated and distilled. As noted in the conclusion below, it represents an interesting area for urgent further research before the data is lost.

Which factors contribute to impact?

Supply and demand

Much of the answer to the question of which factors contribute to impact can be found in section 2 that outlines the experience of FOI in India and South Africa. 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 organizations, 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 & Neuman, 2007

Assessing the impact of FOI Initiatives: the role of civil society

As the UK UCL study observes, '...the extent to which FOI can be used to increase accountability is dependent on whether other actors (the media, NGOs, etc) are willing and able to make use of it.' 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 their workings and retain their power. And 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. And 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 these requests to be enforced in. 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. And as was illustrated in the country case examples presented in section 2, 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 those communities 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 supply side

The diagnostic findings of the various studies on the effectiveness of certain FOI laws, have many common features (drawing on the PWC and RaaG Indian Studies, the assessment of ODAC, the UK UCL report, and, the OSJI study) and include: political will; infrastructural inadequacy; deficits in records' management; procedural defects that create barriers to responsiveness; institutional culture and traditions of secrecy. What is clear from the literature and the writer's 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 concerns¹⁸. 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,

¹⁸ Calland has in recent years advised the governments of Jamaica, South Africa, Mali, Nicaragua, Bolivia and Tanzania.

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; its inaugural programme will be held in October 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. Hence, the next section looks at the emerging phenomenon of voluntary, sectoral multi-stakeholder initiatives.

Voluntary disclosure regimes: limits and possibilities¹⁹

Where the rule of law is weak or institutional capacity low, is a legal right the best way to go? Is there a place for a voluntary and/or sectoral approach? In recent years, the idea of 'multi-stakeholder governance' has received fresh attention (see, for example, Calland & Koechlin 2009). There is a deeper understanding of the value that a process-orientated approach to getting the 'right people around a table' (the key, most powerful stakeholders) may yield. In the transparency realm, a small cluster of transparency multi-stakeholder initiatives (MSIs) have provided a good source of information about how a voluntary, sectoral approach to information disclosure might support the right of access to information. The experience of the Extractive Industries Transparency Initiative (EITI) and its 'sequel' initiatives – the Medicines Transparency Alliance (MeTA) and the Construction Sector Transparency Initiative (CoST) – provide interesting counterparts to the statutory approach, although it is clear that they are not mutually exclusive (the 'voluntary' approach often requires, or benefits from, supporting complementary legislation).

The EITI has finally reached the critical phase of validation of compliance, including the disclosure of information. Voluntary, sectoral approaches may well be more appropriate and efficacious in certain situations and may yield better returns in the shorter term, allowing confidence and competence to grow. Moreover, where such an approach is supported by a multi-stakeholder process, a systematic platform for engagement, where new rules about transparency are agreed by powerful actors who might otherwise ignore a statutory regime with impunity or who would be beyond the scope of FOI law (because of their transnational character, for example, or because of their non-state status), can be built. There are dangers in this approach – elite capture, an overly-technical approach to the subject, problems with representation and legitimacy, to mention but a few – but there is also enormous potential for not only getting

information into the public domain that would otherwise have remained secret, but for establishing new standards of conduct and behaviour.

While the focus of the transparency MSIs remains the information disclosure, the unintended consequences of the processes – which were originally perceived as secondary or complimentary – such as the consensus-building potential, the standard-setting reforms that can emerge – are now the subject of far greater emphasis. At its best, an effective transparency MSI can create a new social contract about not just the rules for transparency but the accountability of the range of state and non-state actors. In other words, in some cases a voluntary, sectoral approach, based on a carefully constructed multi-stakeholder process, can make the link between the information disclosure (the transparency 'means') and the socio-economic change (the accountability 'ends') more quickly, more efficiently, and more persuasively than a statutory system. However, it would be a mistake to delineate the two worlds – voluntary and statutory – as black and white; they are not mutually exclusive: there are many shades of grey, in that the 'voluntary world' is not only now seeking to support the efforts that are being made with legal provisions, but in many cases already draws on the law to help enforce compliance.

Nonetheless, there are many interesting lessons to be learnt from the transparency MSIs. To apply and adapt them, in the service of good FOI practice around the world, further research is needed and new opportunities for information-sharing and cross-sector and cross-country analysis and peer-learning should be created. There are limits to what a voluntary, transparency system can deliver. But there are also significant, substantial possibilities for building fresh consensus among the most powerful information holders about what constitutes the public interest – in terms of both disclosure and conduct. And, there is some evidence available now to show how information disclosed through the EITI process has been used by communities in, for example, Ghana to strengthen advocacy in favour of the proceeds of extractive industries being used for direct community development projects (Calland 2010).

In 2010, EITI published its own assessment of the impact of EITI in Africa (EITI 2010). Liberia is just one of 2 countries that have achieved EITI validation to date (the other being Azerbaijan). Liberia's reports – both their Annual Reconciliation Reports (the second of which completed in February 2010) and the reports validating the reconciliation reports – are instructive examples of the kind of information that successful EITI compliance can yield over time. The Liberian EITI (LEITI) covers 4 sectors: Mining, oil, forestry and (for the first time in 2010) agriculture. Nearly 70 companies' revenues and payments; and 5 government agencies, including the National Oil Company; are listed in the 2010 report. As compliance with LEITI is also legally mandated under Liberian Law, companies that do not comply are fined, or face the threat of banning from their

¹⁹ This section summarizes a current piece of research by the writer, as yet unpublished and still in the final stages of completion: Multi-stakeholder initiatives & sectoral

transparency: limits & possibilities for the right of access to information: what lessons can be extracted? World Bank Institute paper – forthcoming, 2010.

areas of operation. Note also that the reports contain some discrepancies (0.02% and 0.04% of the total in 2009 and 2010 respectively) but that these are resolved and explained in the report, in keeping with the overall EITI goal of accountability.

The report also credits EITI with helping to address the roots of Liberia's protracted civil war, which had their genesis in competition over Liberia's resources. LEITI organises meetings in local communities with government and company representatives, where people are able to interrogate them about the contents of LEITI's reconciliation reports. As Negbalee Warner, LEITI's (former) National Coordinator and International EITI Board Member remarks:

Communities are also using this opportunity to raise questions about how the money is being allocated and used, and whether the communities are receiving a fair return for their resources. Prior to the existence of LEITI, there was no real forum where these kinds of discussions could take place. However now, through this process, suspicion and distrust are being reduced, helping to diffuse the tensions that led to conflict in the past.

The report also refers to Nigeria's NEITI, which is claims has been instrumental in empowering civil society to hold government to account in recovering revenue that is owing to it from oil revenues. Indeed NEITI's 2005 reconciliation report identified an estimated USD4.7 billion owed by the Nigerian National Petroleum Corporation (NNPC) for payments of domestic crude oil. 'NEITI Reports serve an invaluable function in helping all stakeholders, NEITI, the oil companies, the regulatory agencies, the National Assembly, and civil society, to develop strategies to address problems in the oil and gas sector.'

What gaps exist?

As noted at the outset, there are very serious and substantial gaps in knowledge derived, fundamentally, from the absence of a robust methodology to measure impact. There remains a lack of research on whether the supposed benefits of FOI have been forthcoming – for example, increased trust, improved involvement in decision making etc – and, equally, the 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 responsible for ensuring compliance with the law such as Information Commissioners, 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.

Building on the bare bones of the RaaG Indian survey that asked requesters if the information had helped them meet the intended objective, a more precise and detailed survey of requesters would be valuable. This should focus on what one might call the 'micro' objectives – as distinct from the claims of 'macro' change and impact that are often claimed of FOI (such as building trust or curbing corruption) but which are unlikely to be either evident or provable. Often requesters have more modest ambitions: they want to protect their immediate interests, whether to find out why the lighting

in their street is no longer working or to discover if the swimming coach to whom they entrust their child's safety is properly qualified. This is the arena where FOI may, on closer inquiry, prove to be a more effective tool in enabling people to extract higher levels of accountability from people who exercise power and authority over their daily lives.

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 GTF FOI projects, provides an excellent opportunity for systematic study of the impact of FOI, with ample material to assess.

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