Right to Information

RECENT SPREAD OF RTI LEGISLATION

By Toby Mendel
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Executive summary

In the last 20 years, there has been a massive growth in the number of national laws giving individuals the right to access information held by public bodies (right to information or RTI laws). The number of countries with such laws has grown from 19 mostly Western democracies in 1995, to some 100 today from all regions of the world. Furthermore, the strength of these laws, as measured by the extent to which they reflect international standards, has increased significantly during this period. Over approximately the same period, RTI has come to be recognized as a human right under international law, a significant normative development.

The main global drivers for these changes include the accessibility of the idea behind RTI, namely that governments hold information not for themselves but on behalf of the wider public, growing demands for participation, globalization and changing relations with information wrought by new information technologies. At the national level, political dynamics also play an important role, along with international pressure and strong civil society campaigns.

Despite these positive developments, challenges remain, including the over one-half of the world’s countries that do not have RTI laws and significant policy-practice or implementation gaps in many countries with such laws.

Introduction

Laws giving individuals a right to access information held by public bodies, commonly referred to as the right to information (RTI), are now in force in nearly 100 countries globally. This paper discusses the recent dramatic growth in the number of these laws, and presents some theories to explain this development. Originally often referred to as freedom of information laws (Australia, Norway, United States) or access to information or documents laws (Canada, Colombia, Denmark), a more recent trend (starting with India in 2005) has been to use the title RTI laws, reflecting the recognition of RTI as a human right. RTI is a key part of the overall global trend towards more open government, which includes other elements such as protection of whistleblowers, providing access to databases in open formats (open data) and requiring senior officials to make asset declarations.
Historical Trajectory

Sweden was the first country in the world to adopt a law giving individuals the right to access information held by public bodies, in 1766. It took nearly two centuries before the next law was adopted in Finland in 1951. By 1995, only 19 countries around the world had adopted what have come to be known as RTI laws. The 15 years from 1980 to 1995 witnessed new RTI laws being adopted at an average rate of less than one per year. However, in the wake of the revolutions in Central and Eastern Europe in the 1990s and democratization processes in other regions, the rate more than quintupled for the next 15 years and appears set to keep that pace as 2015 approaches (see Figure 1). Furthermore, while all but four of the first 19 countries were Western democracies, the next 79 have been distributed over every region of the world (see Table 1 and Figure 2).

In terms of geographic spread of RTI laws, in 1995, the vast majority (nearly 80 percent) had been adopted by Western democracies. Eastern Europe led the way over the next decade, with 20 countries adopting RTI laws, representing nearly one-half of all of the new laws adopted during this period. Six more Western countries also adopted laws so that, by 2005, only a few countries in Europe were still without RTI laws. Between 1995 and 2005, Asia and the Americas each added about 10 new laws. Progress in Africa was somewhat more modest, with just four new RTI laws over this period. The first law in the Middle East and North Africa came in 2007 (Jordan), and the region now boasts three RTI laws. Progress has continued more or less apace in Asia and the Americas since 2005 (seven and eight new laws, respectively, in eight years), while Africa appears to be picking up steam, with eight new laws in that period (see Figure 2 for a graphic representation of the growth of laws broken down by region).1

The quality of RTI laws has generally been improving over time, as measured by the RTI Rating, a methodology for assessing the strength of the legal framework for RTI.2 The Rating is based on 61 indicators spread over seven main categories and drawn from established international standards and better national practice. There has been a fairly steady and marked increase in the quality of RTI laws over time (see Figure 3). The average law adopted by 1995 scored only 76 out of a possible total of 150 points on the Rating, increasing to an average

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1 Source: RTI Rating by the Centre for Law and Democracy and Access Info Europe.
score of nearly 94 points for laws adopted between 2005 and 2010, albeit dropping back a bit after that. The reasons for this overall increase have not been carefully studied, but it seems likely that a combination of factors have contributed, including better understanding and experience of what makes a good law, increasingly strong normative standards for these laws, and a growing movement of organizations and individuals promoting this right.

While one must always be careful in projecting present trends into the future, it is reasonable to assume that the growth in the number of laws will continue at least in the near term. A number of countries are either close to adopting a law or have longstanding campaigns for the adoption of one, and at least some of these ongoing initiatives are likely to come to fruition over the next few years. There is certainly room for growth. The Middle East and North Africa and Sub-Saharan Africa are the two regions of the world with the lowest density of laws, at around 14 and 20 percent, respectively. Asia has achieved around a 50 percent rate of coverage, and there are still some important gaps in Latin America. There is also a relative paucity of laws among smaller island States in the Caribbean and Pacific, which is no doubt due at least in part to capacity constraints.
Normative and Legal Developments

Roughly coinciding with the growth in laws has been recognition of the right to access information held by public bodies as a human right. The original guarantees of freedom of expression found in the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) refer not only to the right to ‘impart’ information and ideas, that is, to speak, but also to the right to ‘seek’ and ‘receive’ information. The regional counterparts of these global instruments—namely the European Convention on Human Rights (ECHR), the African Charter on Human and Peoples’ Rights (ACHPR) and the American Convention on Human Rights (ACHR)—employ similar terms.³

Although these instruments were not originally intended to embrace the right to information,⁴ in recent times they have come to be understood as having a wider meaning. One of the earliest authoritative statements to this effect is found in the 1998 annual report of the UN Special Rapporteur on Freedom of Opinion and Expression to the United Nations Commission on Human Rights, in which he stated: “[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems....”⁵

Since then, RTI has been given formal international legal recognition, first by the Inter-American Court of Human Rights in the 2006 case of Claude Reyes and Others v. Chile⁶ and then, in 2009, by the European Court of Human Rights.⁷ Finally, the UN Human Rights Committee clearly recognized the right to information in its 2011 General Comment on Article 19 of the ICCPR.⁸

It is significant that while the early authoritative statements, for example by the UN Special Rapporteur, coincided almost exactly with the beginning of the strong growth in adoption of national RTI laws, formal legal recognition came only in 2006, after some 66 national laws had already been adopted. The leadership role of the Inter-American Court is also significant, particularly in light of the fact that, in a series of cases dating back to 1987,⁹ the European Court had refused to recognize the right to information as part of the right to freedom of expression. This is indicative of a wider trend whereby what is often viewed as simply a governance reform in Western countries has gained more profound recognition as a human right in other parts of the world.¹₀

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 FIGURE 3: Average Score of RTI Laws by Year

Source: RTI Rating by the Centre for Law and Democracy and Access Info Europe.
Key General Drivers for Right to Information

It is useful to consider what may be the key dynamics or drivers behind these remarkable developments. The first is the intuitive nature of the premise. The core idea behind RTI reform, namely that governments hold information not for themselves but on behalf of the general public, who should then have a right to access that information, is broadly perceived as natural and is also strongly aligned with democratic norms of accountability. While one can debate the scope of exceptions, there are almost no persuasive philosophical arguments against the core idea of government openness, at least if one accepts democracy as the basis of government. This is reflected in the fact that advocates have always found it relatively easy to kick start broad-based campaigns for RTI as compared to other human rights campaigns.

Two of the key benefits of RTI legislation are enabling greater government accountability and facilitating participation, and both have been drivers for RTI law reform. Although many countries around the world have had formal democratic institutions for some time, anecdotal evidence suggests that expectations around participation have increased significantly in recent decades. Whereas 30 years ago most citizens were largely content to vote periodically in elections, most now expect to be consulted on a much wider array of social developments, such as schooling, urban development and social services. This has led to a profound change in relations between citizens and government, and it has been accompanied by demands for greater access to information, so that citizens have the information they need to participate. It is no coincidence that a rough correlation can be found between the presence of RTI laws and more robust democracies, and that during rapid processes of democratic transition early demands almost always include the adoption of an RTI law.

Closely intertwined with this increase in social empowerment has been the technological information revolution, centered on digital technologies and the Internet. In general, information flows much more rapidly and easily in the modern world, and expectations in terms of accessing information from different sources have grown along with this. These expectations naturally extend to the large store of important information held by government.

Also closely intertwined with the spread of RTI has been the pace of globalization. RTI laws provide important public benefits. With globalization, and a wider democratization of access to information via the Internet, it is relatively easy for citizens of all but the most repressive countries to learn about the benefits of RTI, and to demand them for themselves.

Levers for Change at the National Level

Beyond these global trends, a number of specific factors can be identified as key levers of change for RTI at the national level. As noted above, calls for this right are commonplace during periods of rapid democratic transition. This is true of post-1990 Eastern and Central Europe, although only two countries in that region had adopted RTI laws by 1995, with 10 more being added in each of two following five-year periods. This may be partially explained by the fact that it takes time for laws to be adopted and partially because this was really the start of global acceleration of recognition of the importance of RTI. This phenomenon can also be seen in countries like South Africa (2000), Indonesia (2008), Tunisia (2011) and Egypt (yet to adopt a law but with a developed draft). Less radical—but still major—political shifts also
provided important impetus to the adoption of laws in countries like Thailand (in 1997, following economic collapse, political renewal and a new Constitution), Mexico (in 2002, following a change of government after 65 years of rule by the same party) and the United Kingdom (in 2000, following a change of government after 17 years of rule by the same party).

Pressure from other countries, and especially international actors, has also played an important role in the spread of RTI. This has played a particularly important role in Eastern and Central Europe, where strong pressure came from Western Europe in the form of the large carrot of joining the European Union. Pressure has also played a role in countries like Pakistan, Brazil and Tunisia, where international actors such as the Asian Development Bank, the Open Government Partnership (OGP) and the World Bank were involved in supporting the development and adoption of RTI legislation.

Active civil society campaigns, backed up by an increasingly influential global civil society movement for RTI, have also helped create strong pressure for reform. At the same time, there are a number of countries—such as Indonesia, Brazil and Nigeria—where it took a very long time to enact laws despite strong civil society advocacy. Longstanding campaigns in other countries—including Ghana, Malaysia and the Philippines—have yet to bear fruit. This suggests that at least some degree of support from local political elites is needed to get a law adopted, and that opposition should never be underestimated.

Key Challenges

It is reasonably easy to identify the two key challenges in terms of RTI. The first is the fact that although estimates suggest that over 75 percent of the world’s population lives in countries with RTI laws, less than one-half of the world’s countries have adopted such laws. There are ongoing campaigns for the adoption of laws in many countries, with formal drafts in advanced states of completion in some, alongside many other countries where there is still very little movement on this issue. In some cases, there is simply not enough political will to adopt a law, while smaller island States may lack the capacity to adopt one.

Second, there is undoubtedly a significant “policy-practice gap” in many countries with RTI laws, in the sense that these countries have failed to implement their laws effectively. This is to some extent inevitable, as it takes time and effort to implement these laws. To cite but two of the underlying barriers to effective implementation, information systems and archival practices may be antiquated and inefficient, and the opaque bureaucratic culture pervasive in many public sectors needs to be changed. Put simply, there are too many countries where either progress on adopting an RTI law is too slow or where too little effort is being exerted to implement the RTI law once adopted.

These challenges are the first two listed in FOIAnet’s 10-10-10 Statement: Achievements, Challenges and Goals on the 10th Anniversary of the Freedom of Information Advocates Network (FOIAnet). Other challenges listed there include a backlash against strong laws in some countries, maintaining momentum on RTI, the recent growth in attacks on RTI activists and openness among intergovernmental organizations.

It is, of course, far easier to list challenges than to solve them. Overcoming the two key challenges requires ongoing commitment and effort, including from the governments of the countries that have already enacted laws in terms of implementation measures, the
international community in terms of both diplomatic pressure and financing of programmatic interventions, and from civil society groups in terms of advocacy and expertise.

It is probably too optimistic to expect the next 20 years to witness the same exponential level of growth in RTI legislation as the last 20 years. Much of the “low hanging fruit” has been picked, and both domestic and international activists and the donor community are likely to find themselves working increasingly on the residual tough cases. Yet a threshold has clearly been crossed in which RTI legislation is no longer the preserve of a few Western democracies but has become a truly global phenomenon. For all of the normative and instrumental reasons discussed in this note, the RTI agenda will continue to be a priority on all continents. One can both hope and reasonably expect that in the future most global citizens will enjoy the right to access information held by their governments.

Notes

1. For purposes of these numbers, Israel and Central Asia are both counted as part of Asia, while Turkey is counted as part of Eastern Europe.
2. The RTI Rating was developed by the Centre for Law and Democracy and Access Info Europe.
8. General Comment No. 34, 12 September 2011, CCPR/C/GC/34, paragraph 18.
10. This can be seen in trends regarding constitutional recognition, with only five Western democracies among the approximately 60 countries which provide explicit constitutional protection for the right to information.
11. The Freedom of Information Advocates Network (FOIAnet), which brings together groups and individuals working on RTI from around the world, now boasts nearly 250 organizational members, and there are also regional networks in Africa, Latin America, the Middle East and North Africa, and South Asia.
12. Ninety-eight countries have adopted RTI laws, and there are about 193 UN member states and a number of other States that are not UN members.