

ACCOUNTABILITY THROUGH PUBLIC OPINION

FROM INERTIA TO PUBLIC ACTION

SINA ODUGBEMI AND TAEKU LEE

Editors



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Embedding the Right to Information: The Uses of Sector-Specific Transparency Regimes

Rob Jenkins

Advocates of enhanced citizen access to publicly held information often overstate the potentially positive impacts of legislative and regulatory reforms designed to enhance government transparency. Claims that access to information will drive home a revolution in governance border on zealotry. This is not to deny that, under the right circumstances, official information regimes, accessible by right, can transform certain dimensions of governance. There are, for instance, the many Indians who have in recent years been able to obtain full and clear title to their land—and therefore the ability to exploit its financial power—because of property records being placed in a central electronic repository. In terms of accountability, this is vastly preferable to the dispersed land registers maintained by village record keepers. These moldering books, still found throughout rural India, are notoriously open to fraud perpetrated by officials in league with influential local leaders. Transparency, however, has not transformed the essential nature of India's land bureaucracy, which still controls a vast collection of veto points relating to property transfer, sale, inheritance, usage, or taxation.

The eternally optimistic are balanced, however, by the equally inflated ranks of right-to-information skeptics, who argue that the costs of making information accessible frequently outweigh the benefits. These costs include the time and energy required to establish a regime of information access (passing legislation, framing administrative procedures, and establishing oversight mechanisms). This is in addition to the costs of operating such a system effectively. More worrying, potentially, is the tendency of accountability extremists to micromanage transparency to the point where it stifles

initiative among midranking public-sector employees. This is predictable when officials fear minute scrutiny of their every action, in close to real time as well as *ex post*, by external assessors with little understanding of the context in which policy options were debated, consensus was generated, or complex deals (involving numerous tradeoffs) were concluded. This critique is exaggerated, especially by those with an interest in maintaining high barriers to information access—but it contains a substantial degree of truth. Several things fuel suspicion of access to information (ATI) as a tool of improved pro-poor governance. First, it is difficult, if not impossible, to obtain convincing statistical evidence to demonstrate that the right to information (RTI) has improved developmental outcomes for poor and marginalized people. Second, too many other factors influence governance institutions to attribute either positive or negative outcomes to increased ATI. Third, moreover, many countries have experienced rapid poverty reduction amid highly opaque public-sector bureaucracies. China and Vietnam are the most striking examples.

Even if such criticisms have a degree of validity, they do not constitute sufficient grounds for halting progress toward enhanced access to publicly held information—whether in India or anywhere else. Indeed, the burden of proof must fall to opponents of greater openness. In other words, where is the evidence that China or Vietnam would not have reduced poverty as quickly had their governments improved the regime governing the public's access to government-held information?

The benefits of ATI for social and economic rights can be portrayed in various ways, but it is perhaps best to think of ATI as an element in the strengthening of accountability institutions so that they better support human development (understood as the progressive acquisition of freedoms and the capacities to exercise them). A *lack* of accountability—the failure of oversight and enforcement institutions of various kinds—is a crucial reason why people fail to experience as a concrete reality the national and international rights protections that their governments ostensibly provide them.

Examining transparency in the context of accountability institutions makes sense because accountability, by definition, contains an information-access component. Accountability exists where one party possesses the right to require answers of another, who potentially faces sanction if unforthcoming or unconvincing. The entire process, both the asking for and the rendering of “accounts,” involves actors acquiring, shaping, and strategically revealing and concealing information. To exercise surveillance over someone you are holding accountable requires the party under scrutiny to part with information relevant to his or her performance. When in possession of sufficient data (whether qualitative or quantitative), oversight agencies can engage in informed deliberation with officials to whom power has been delegated. The mere possession of a robust ATI regime is useless on its own. Without such a system, however, accountability institutions are rendered meaningless. In the absence of functioning accountability institutions, social and economic rights tend not to be realized.

With information central to all accountability mechanisms, and accountability a crucial element of democratic governance, a strong associative link connects the roots of democracy with efforts to improve transparency.

This chapter examines two case studies from India that indicate the great variety in terms of transparency that can exist even under a national legislative framework guaranteeing the public's right to information. Each of the two case studies represents a type of government initiative—one related to the productive economy, the other to issues of redistribution. Significantly, both promise to create jobs—a key challenge for India as it attempts to achieve “inclusive growth.”

On the redistributive side, India's National Rural Employment Guarantee Act of 2005 (NREGA), the flagship antipoverty initiative of Prime Minister Manmohan Singh, contains an interlocking set of transparency provisions. These allow, for instance, laborers who take part in this job-creation program to access official records indicating the hours of work, the payment of wages, the fulfilling of supply orders, and the sanctioning of works projects.

The second case study concerns India's policy on special economic zones (SEZs), an effort to stimulate the productive economy. India's SEZ policy is characterized by opacity. The idea of creating enclaves of intensive productive activity in which firms reap the benefits of sectoral clustering has yielded significant successes in several countries. The means of pursuing such a strategy, however, can vary enormously, and India's methods have been markedly lacking in transparency, which has contributed to weak accountability. The government of India, as well as some of the state governments involved in attracting these private-sector SEZs to their jurisdictions, furnish some basic SEZ data—for instance, concerning the location, size, and prospective uses of an SEZ. Beyond this, however, lie huge obstacles to discovering further details about the qualitative nature of the land parcels concerned, how decisions were made to develop a given SEZ site, who in the bureaucracy was involved in making them, why specific SEZ norms have been changed since the introduction of the act, and how fulfillment of the conditions attached to land-use permissions is monitored.

These two policy domains—the productive and the redistributive—provide a window onto questions about the utility of sector-specific transparency provisions. They suggest that even where generic information-access legislation is in place, there are significant advantages to establishing suitable transparency mechanisms within sector-specific legislation.

The National Rural Employment Guarantee Act

Let us begin with the redistributive case. In India, successive governments have proclaimed that the losers from economic liberalization are to be cushioned, to the degree possible, from dislocations created by the globalization of the Indian economy. Yet, for nearly 15 years following the opening up of the Indian

economy in 1991, few concrete measures were taken on a national scale. That changed in 2005, less than a year after the swearing in of Prime Minister Manmohan Singh (of the Congress Party) at the head of the United Progressive Alliance coalition government.

The NREGA is a New Deal-style program that creates unskilled labor opportunities for rural people suffering unemployment and chronic underemployment. The NREGA extends this concept radically by “guaranteeing” employment for each rural household that demands it. The “right” to employment is of limited proportions, providing a maximum of 100 days of labor per rural household. Anyone can ask for employment; one need not be poor to apply. In practice, the work is hard enough that the scheme is self-targeting: Only those seriously in need would endure the work conditions. However, the mere existence of an untargeted benefit creates a risk that corrupt officials will use the names of nonparticipating people to inflate employment lists. The wages of these “ghost workers” can be divided among colluding officials and, in some cases, the “worker” in question. In addition, local officials skim off part of the wages of the genuine workers—those who actually do perform labor. Underpayment of wages is rife in rural India. The abundant avenues for fraud and abuse by the elites who administer government schemes are reason enough for some people to dislike the NREGA, regardless of its impacts. Others consider corruption something people—individually and collectively—should struggle against, not capitulate to.

With precisely this in mind, the framers of the NREGA included specific provisions to enable workers—who might otherwise lose part of their wages—to monitor the actions of project administrators. The legislation guarantees ATI about project work sites, number of workers employed, hours billed, quantities (and price) of building material delivered, and so forth. All this information must, under the statute and the regulations framed to operationalize it, be provided without hindrance and under threat of penalty to officials who fail to produce such information.

Direct citizen engagement in the accountability process—using an information regime designed into a welfare program—represents a new channel, or axis, of accountability, which combines features of the two standard channels: vertical and horizontal accountability. In *vertical* accountability institutions, states are held to account by citizens, jointly and severally, whether through elections and other *formal* processes, or through lobbying or mass mobilization, both of which rely on the existence of a set of *informal* institutions (such as the press and social networks). This is the most direct form of accountability but faces huge challenges (such as clientelism). *Horizontal* accountability institutions are those in which state entities demand answers from (and sometimes possess the power to sanction) other state entities. Auditors-general, anticorruption commissions, bureaucratic oversight boards, parliamentary committees and commissions—these and other bodies stand in for citizens

who generally lack the time, expertise, and collective-action resources to monitor the detailed work of their public representatives.

More recently, a third category has emerged, thanks to increased efforts by citizens to engage directly in government processes once reserved for state agencies (Goetz and Jenkins 2005). This category concerns the direct engagement of ordinary people with service providers and state budgeting, auditing, and other oversight processes that have traditionally been the arena of state actors alone. Combining elements of vertical and horizontal accountability, experiments in direct citizen engagement amount to hybrid forms of accountability, located somewhere in between (Goetz and Jenkins 2001). In this sense, they can be thought of as representing a “diagonal” channel of accountability.

Efforts to reinvent accountability systems to increase popular participation in expenditure tracking, public-hearing-style group audits of written accounts, and so forth are sometimes referred to as “direct,” “social,” or “demand-side” accountability processes. They possess three main characteristics: They bypass the formal institutional intermediaries that delay or subvert accountability systems, they focus on obtaining answers *ex ante* from policy makers as opposed to the conventional—solely *ex post*—approach (such as participatory budgeting), and they prioritize the fairness of outcomes, not just procedural correctness.

An important aspect of the NREGA's ATI provisions is how they promote precisely this type of direct accountability seeking. The transparency measures stretch from the beginning to the end of the project cycle: the issuing of job cards to workers, the identification of a work project and site, the payment of wages—all the way to the auditing of physical assets created under the scheme and the accounts submitted in connection with their completion. Because of the thoroughness of its designers, the NREGA has, in effect, created a full-fledged “information regime,” in which specific actions trigger the release and (in some cases) dissemination of financial records, employment registers, and project-completion reports.

All of this is underwritten by a purpose-built information technology platform devised for the NREGA's implementation. The NREGA's information technology (IT) system tracks each work project (the laying of a road foundation, the repair of minor irrigation works) and each individual worker/applicant in ways that severely reduce the scope for officials (and their accomplices in local politics) to falsify records and thereby illegally obtain a share of the worker's wages. The full implementation of the IT system has been delayed by, among other factors, the incomplete reach of the government's national data network. According to officials in India's Planning Commission, the problem is being addressed, and by 2012, more than 90 percent of village councils (*gram panchayats*) should—if all goes to plan—be connected.

The IT system allows various levels of access, permitting both individuals and local activists working with them to obtain financial records, which can

then be cross-checked against information provided by local workers/citizens. This process of collective verification is itself built into the NREGA, which stipulates that works projects must be subjected to “social audit” in the relevant local government forum (in this case, the village assembly). The rules for conducting such an audit are set forth in detail. Such regulations are not alien to states such as Rajasthan, which in 2000 passed progressive amendments to the state’s local government legislation requiring local councils to meet as full village assemblies (*gram sabhas*) to certify the accounts rendered by the village secretary. This requirement is circumvented for the most part in rural Rajasthan, happening “only on paper.”

Over the past 15 years, one of the most inspirational examples of using information to advance socioeconomic rights involved precisely the verification of information provided in government-employment programs. The Indian social-activist group the Mazdoor Kisan Shakti Sangathan (MKSS), or Worker and Farmer Power Organization, pioneered these social audit procedures in nonofficial hearings in various parts of Rajasthan throughout the late 1990s. After successfully lobbying the Rajasthan government to pass a state-level RTI Act, MKSS found itself, in the early years of the current decade, in the midst of a campaign demanding that the Rajasthan government adopt an employment guarantee act along the lines of what had existed in the western state of Maharashtra since the early 1970s. The MKSS activists and like-minded advocates in civil society ended up, by late 2004, convincing the lame-duck chief minister of Rajasthan as well as the leader of the national Congress Party, Sonia Gandhi. Mrs. Gandhi became a strong believer that a nationwide Employment Guarantee Scheme would help to demonstrate that the incoming (Congress-led) United Progressive Alliance government was, unlike its Bharatiya Janata Party–led predecessor, concerned about those left behind in India’s rush toward prosperity. MKSS-linked activists joined the National Advisory Council (NAC), which Mrs. Gandhi led as a kind of semiofficial think tank. It was via the NAC that RTI campaigners fashioned the NREGA into the progressive piece of legislation it became.

The NREGA’s transparency provisions were put in place, it must be noted, despite the fact that India already had RTI legislation on the books and was passing a new and better RTI law at precisely the moment that the NREGA was being formulated and debated. The transparency provisions in the NREGA go beyond mere information provision or the compilation of data on program inputs and outputs. The NREGA provides disaggregated information, which allows engaged citizens to audit in detail the lower- and mid-level bureaucrats whose actions most directly affect their development prospects. These are, for instance, the “junior engineers” dispatched by subdistrict administrations everywhere in rural India to provide “technical sanction” for works projects. In addition, many layers of elected leaders are involved—at the village, block, district, and state levels—thanks to India’s multitiered system of democratic

local government known as *panchayati raj*. These and other actors have a pecuniary or political incentive to influence implementation of the NREGA, but their interests are often at odds with one another. Members of the state Legislative Assembly are elected from constituencies that overlap those of the elected block-level councils, leading to intense struggles for de facto control over the flow of federal funds, regardless of what is indicated de jure.

India’s Special Economic Zones

The second case study comes from India’s productive economy, involving both the private sector and an attempt by the Indian state to engage in what, in a different context, Wade (1990) called “governing the market.” The Special Economic Zone Act 2005 was passed by India’s parliament to allow the creation of Chinese-style export-processing zones, enclaves whose tax breaks and relaxed regulatory requirements are intended to attract foreign investment, spur the creation of world-class infrastructure, and create jobs. Since February 2006, when the SEZ Act came into force, India’s usually slow-moving bureaucracy has acted with unprecedented vigor, clearing proposals for more than 500 SEZs.

Although the SEZ Act was passed in the same year as both the NREGA and the RTI Act, its relationship to transparency is far more problematic than in the case of the NREGA. Significantly, the SEZ bill was introduced with little advanced consultation or even warning. It received almost no debate in parliament (at either the committee stage or on the floor of the house), let alone in the wider public arena. The bill was passed with few members of parliament in the chamber and a large proportion of the nation’s lawmakers (whether present or absent on that day) severely underinformed about its contents.

India’s adoption of the SEZ concept was, according to a former commerce minister, “inspired” by the success of China’s SEZs, which turned sleepy provincial backwaters such as Shenzhen into global manufacturing hubs in less than two decades. Even so, India’s approach to promoting SEZs is strikingly different from the Chinese policy. Tailoring foreign ideas to fit domestic circumstances is not necessarily a bad impulse. The design of India’s SEZ policy, however, and the manner in which it has been implemented, raises suspicions that the Chinese model was indigenized not so much to suit India’s national interest as to benefit elite interest groups. These include prominent industrial houses, real estate developers, and (last but by no means least) the politicians and bureaucrats who stand to gain (politically and personally) by acting as midwives at the birth of SEZs. By approving hundreds of small SEZs throughout India, the government has adapted the policy concept to India’s federal democratic context, where placating powerful interests at the provincial level cultivates broad-based support among India’s diverse elite. Allowing SEZs to be developed by the private sector—in China they were state-owned and

operated—was the crucial innovation, as was the involvement of India's state governments.

To implement the SEZ policy, the central government must rely on India's state governments to assist SEZ developers to acquire land, to obtain the necessary clearances from state-level agencies, and to shepherd SEZ applications through the approval process in New Delhi. States are pleased with the investment-promotion opportunities the new policy makes possible and have acted with remarkable alacrity to facilitate the process. State governments have thus demonstrated a high level of "buy-in" to the SEZ policy. Because state governments are ruled by a wide array of political parties, many of whom sit in opposition in the national parliament, their participation as enthusiastic implementers of the SEZ policy should, in theory, weaken the association of the policy with only the parties that make up the United Progressive Alliance coalition government in Delhi. This should, in theory, make the SEZ policy a much less partisan issue.

However, none of the state or nonstate actors involved in the SEZ policy have operated with anything like a sufficient degree of transparency. Where the NREGA made ATI a central pillar of its design, building transparency provisions and procedures for collective citizen auditing into the legislation itself, the SEZ Act 2005 tends toward the opaque.

This is true at almost every point of the SEZ cycle. There is, for instance, a great deal of ambiguity surrounding the minimum requirements for the establishment of a privately operated SEZ in various sectors—and such rules as exist have been subjected to almost constant revision. More problematic is the lack of documentary information on how state governments intend to monitor compliance with various provisions of their agreements with SEZ developers. SEZ developers often obtain state land in addition to buying private land, but state land frequently comes with various sorts of conditions attached, whether environmental or in terms of permitted usage.

Although India's RTI legislation makes it theoretically possible for citizens and their associations to obtain copies of SEZ applications submitted to the interministerial Board of Approvals (BoA), which (as the name implies) authorizes the creation of SEZs, the application documents received are not always complete. Even where it is possible for ordinary citizens to obtain all the documentation submitted by the SEZ's developer, the untransparent nature of the BoA deliberative process means that little or no information is provided about the legal basis on which decisions were taken. This has a close bearing on the nature of the information provided by private-sector applicants seeking approval for their SEZs, because the applications often make dubious (or in some cases outrageously inflated) claims about the benefits likely to result from the establishment of the project in question. The lack of a clear rationale justifying extreme claims in SEZ applications—and the failure of the BoA subsequently to explain its rationale for approving specific

projects—was the subject of a close analysis conducted by the Delhi-based Centre for Policy Research (Mukhopadhyay 2008).

Additional ATI considerations are involved in the process by which approved projects establish themselves on the ground. The acquisition of land for SEZs—which up until April 2007, when abuses became too obvious to ignore, was undertaken primarily by state governments on behalf of private promoters—is a very untransparent business. This has fueled suspicions of underhanded tactics, even in cases where transactions appear to have been handled in a relatively straightforward fashion. The lack of publicly available "socioeconomic impact assessment" studies (because these are not mandated by the SEZ Act) is the kind of information deficit that makes accountability institutions unable to perform the essential function of preventing abuses by the state in the process of industrialization.

The applicability of national laws *within* SEZs—which in this sense are perhaps best thought of as special *governance* zones—is also a matter of concern. At many of the larger sites, people will live as well as work in SEZs, and rely on hospitals, schools, and other facilities that emerge within a particular zone's master plan. SEZs are mandated to operate under a special set of governance institutions, in which a government-appointed Development Commissioner wields considerable authority.

Whether it will be possible to make effective use of the RTI under the conditions that will prevail in future SEZs is open to question. Some worry that the ostensibly private-sector nature of SEZs will permit developers to shield many activities behind a cloak of "commercial confidentiality." There is certainly anxiety among activists about the absence of dedicated ATI provisions within the SEZ Act. Without statutorily mandated procedures, requests for documentation on the running of an SEZ may prove ineffective. Whether the rights of SEZ inhabitants (as workers, residents, consumers of services, or just plain citizens) can be protected effectively under such circumstances—especially where the lines separating public authority and private business are blurred—remains to be seen.

Conclusion

These two concurrent policy experiments—one designed to harness the economic benefits of globalization, the other to mitigate its less salutary effects—demonstrate the paramount importance of designing legislation with transparency in mind. In many countries with severely overburdened civil services, national RTI legislation will be insufficient to improve government accountability.

Transparency provisions can be designed into sectoral legislation such that they stimulate collective action. The NREGA is built on a model of participatory planning, execution, and auditing. The reality does not always live up to

the ideal, but the efforts that have been unleashed in trying to achieve accountability to local people can significantly improve the governance environment if allowed time to mature.

By contrast, neither the SEZ Act nor the mandarin culture of India's economic bureaucracy invites much direct oversight. The very lack of transparency, however, has generated increased controversy surrounding what was already a highly conflict-ridden implementation process, with many SEZs running into surprisingly energetic resistance among partisan enemies, local landholders, and ideological opponents. During 2007–08, several approved SEZ projects in the state of Goa were halted thanks to a campaign that *did* manage to use RTI at certain points. Had greater transparency been incorporated into the SEZ Act itself, some of the more egregious SEZ projects might never have reached the point where opposition erupted. In cases where there genuinely is nothing to hide, enhanced ATI would nip unfounded rumors in the bud. Cultures of excessive official secrecy usually provide fertile ground for fear-mongering.

Clearly, transparency provisions designed for an antipoverty program would be ill-suited to the process of establishing an industrial township. The nature of the stakeholders is different as well, with the well-defined roles played by officials and beneficiaries under the NREGA far less in evidence in the less-clear-cut world of state-facilitated industrialization, where private-sector participation is voluntary, jurisdictions compete for inward investment, and an entirely new spatially delineated model of development is slowly emerging. If anything, these conditions argue for greater popular scrutiny and more direct public engagement in decisions that will affect not only those living and working in SEZs, but also people from neighboring areas whose natural resources will be affected, and who will suffer, in some cases literally, the downstream effects of poorly regulated economic activity.

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Section VIII Conclusion