
GLOBAL TRENDS ON THE RIGHT TO INFORMATION: A SURVEY OF SOUTH ASIA

ARTICLE 19

CENTRE FOR POLICY ALTERNATIVES

COMMONWEALTH HUMAN RIGHTS INITIATIVE

HUMAN RIGHTS COMMISSION OF PAKISTAN

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Introduction

There is an exciting global trend towards recognition of the right to information by States, intergovernmental organisations, civil society and the people. There is a growing body of authoritative statements supporting the right to information, made in the context of official human rights mechanisms, including at the United Nations, the Commonwealth, the Organisation of American States and the Council of Europe. Numerous laws giving effect to this right have, in the last few years, been adopted in all regions of the world. Many intergovernmental organisations now have in place information disclosure systems which are reviewed and updated on a regular basis.

The right to information has been recognised as a fundamental human right, intimately linked to respect for the inherent dignity of all human beings. The right to information is also a crucial underpinning of participatory democracy – ARTICLE 19 has described information as "the oxygen of democracy"ⁱⁱ – for without information citizens cannot possibly make informed electoral choices or participate in decision-making processes. The right to information is also essential to accountability and good governance; secrecy is a breeding-

ground for corruption, abuse of power and mismanagement. No government can now seriously deny that the public has a right to information or that fundamental principles of democracy and accountability demand that public bodies operate in a transparent fashion.

Despite this global recognition of the fundamental right to information, to date no State in South Asia has a national freedom of information law giving practical effect to this right. Instead, most countries in the region maintain colonial era Official Secrets Acts, as well as other secrecy legislation; laws which actively undermine information disclosure. The impact of these repressive laws is exacerbated by a pervasive culture of secrecy, and even arrogance, in the public sector. As this survey shows, many public officials in South Asia rely on and perpetuate this culture in order to engage in personal enrichment; a right to information guaranteed in law is therefore essential to bring about change so they act, instead, to serve the public good.

The media's role in society includes acting as a watchdog of government, and enhancing the free flow of information to the public. In South Asia, their ability to undertake this key function is undermined not only by government secrecy, which denies the media access to information on matters of public interest, but also by laws which unduly restrict freedom of expression. The legal framework differs from country to country but examples of repressive laws and practices include licensing of the print media, criminal defamation laws used to silence critical voices, and even prior censorship regimes. Furthermore, government control over the publicly funded media, particularly national broadcasters, often prevents these media from serving the public interest and reporting in a fair and balanced manner.

However, change is now very much on the agenda. Superior courts in some countries in South Asia have recognised the right to information as part of the constitutional guarantee of freedom of expression or thought. Civil society groups in all countries in the region are demanding that governments respect the right to information, and pass legislation giving effect to it. These groups have the support of global civil society, as well as of many intergovernmental organisations and the international community generally. They are also deriving increasing support from the people, who are no longer prepared to tolerate corrupt, undemocratic, secretive government.

This survey is part of the work being done by civil society to promote the right to information. Specifically, it is part of a regional project, *Promoting a Right to Freedom of Information in South Asia*, which is being undertaken jointly by four organisations, ARTICLE 19, Global Campaign for Free Expression, based in London, the Centre for Policy Alternatives (CPA), based in Colombo, the Commonwealth Human Rights Initiative (CHRI), based in New Delhi, and the Human Rights Commission of Pakistan (HRCP), based in Lahore. This project is, in turn, part of a global movement in support of the right to information, bringing together civil society, individual activists, the private sector, intergovernmental organisations and a number of progressive governments.

Governments in South Asia have started to respond to these pressures, and take on board the global recognition of the right to information. The Freedom of Information Act, 2000 is now before the Indian Parliament and several Indian States have already adopted freedom of information laws or orders. In Pakistan, a Freedom of Information Ordinance was introduced in 1997, but allowed to lapse shortly thereafter. A similar Ordinance was circulated in 2000, but failed to become law. In both Nepal and Sri Lanka, there has been some official acceptance of the need for legislation and it is hoped that developments currently underway will lead to the adoption of freedom of information laws.

This survey looks at significant developments at the international level recognising the right to information, as well as the standard-setting work which has helped to elaborate the precise content of that right. The international section is followed by chapters on India, Pakistan and Sri Lanka. These surveys provide an in-depth analysis of the need for information from the perspective of the relevant country, setting out the existing information regime – including constitutional jurisprudence and positive measures, as well as restrictive laws and practices – advocacy initiatives and any official moves to adopt freedom of information legislation. The survey concludes with a set of recommendations – to governments, civil society, the business community and the international community – which, if followed, would guarantee in law and ensure respect in practice for the right to information and would promote the free flow of information to the public.

ENDNOTE

i. *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: ARTICLE 19, 1999), preface. Online at www.article19.org/docimages/512.htm

CHAPTER 1

FREEDOM OF INFORMATION: AN INTERNATIONALLY PROTECTED HUMAN RIGHT

1.1 Introduction

Freedom of information, including the right to access information held by public bodies, has long been recognized not only as crucial to democracy, accountability and effective participation, but also as a fundamental human right, protected under international and constitutional law. Authoritative statements and interpretations at a number of international bodies, including the UN, United Nations (UN), the Commonwealth, the Organization of

American States (OAS) and the Council of Europe (CoE), as well as national developments in countries around the world, amply demonstrate this.

The right to access information held by the State has been recognised in Swedish law for more than two hundred years, but it is only in the last quarter of a century that it has gained widespread recognition, both nationally and in international organisations. In this time period national governments, intergovernmental organisations and international financial institutions have adopted laws and policies which provide for a right of access to information held by public bodies.

The primary human rights or constitutional source of the right to information is the fundamental right to freedom of expression, which includes the right to seek, receive and impart information and ideas – although some constitutions also provide separate, specific protection for the right to freedom of information. access information held by the State. In a more general sense, it can also be derived from the recognition that democracy, and indeed the whole system for protection of human rights, cannot function properly without freedom of information. In that sense, it is a foundational human right, upon which other rights depend.

It is now clear that the right to freedom of information can only be effective if it is guaranteed by law, and if the modalities by which it is to be exercised are set out clearly in legislation or, for international governing bodies, in binding policy statements. Over time, authoritative statements, court decisions and national practices have elaborated certain minimum standards which such laws and policies must meet. These include, among other things:

- a strong presumption in favour of disclosure (the principle of maximum disclosure);
- broad definitions of information and public bodies;
- positive obligations to publish key categories of information;
- clear and narrowly drawn exceptions, subject to a strong harm test and a public interest override; and
- effective oversight of the right by an independent administrative body.

The first section of this survey looks at the increasing recognition of the right to information, first at the international level, including in relation to specific areas such as the environment and information about human rights. It then goes on to look at recognition at the national level, both as an explicit constitutional guarantee and through judicial interpretation. The constitutional analysis is followed by an overview of the adoption of legislation in countries around the world, as well as by intergovernmental bodies. Finally, this section looks at the content of the right to information, as derived from these various developments.

1.2 International Standards

A number of international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental and legal nature of the right to freedom of information, as well as the need for effective legislation to secure respect for that right in practice. These include the UN, the Commonwealth, the OAS and the CoE. Collectively, this amounts to a clear international recognition of the right.

1.2.1 The United Nations

Within the UN, freedom of information was recognized early on as a fundamental right. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1) which stated:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.¹

In ensuing international human rights instruments, freedom of information was not set out separately but as part of the fundamental right of freedom of expression, which includes the right to seek, receive and impart information. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR).² Article 19, guaranteeing which guarantees freedom of opinion and expression as follows: expression, states:

Everyone has the right to freedom of opinion and expression; *this right includes freedom to hold opinions without interference and to seek, receive and impart information* and ideas through any media and regardless of frontiers. [Emphasis added]

The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966.³ The corresponding provision in this treaty, Article 19, guarantees the right to freedom of opinion and expression in very similar terms:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For respect of the rights or reputation of others;
 - b. For the protection of national security or of public order (*ordre public*), or of public health or morals.

In 1993, the UN Commission on Human Rights⁴ established the office of the UN Special Rapporteur on Freedom of Opinion and Expression, and appointed Abid Hussain to the post.⁵ Part of the Special Rapporteur's

mandate is to clarify the precise content of the right to freedom of opinion and expression. As early as 1995, the Special Rapporteur noted:

The right to seek or have access to information is one of the most essential elements of freedom of speech and expression.⁶

He returned to this theme in 1997, and since that year has included commentary on the right to freedom of information in each of his annual reports to the Commission. In 1997, he stated: "The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large through such measures as censorship is to be strongly checked."⁷ His commentary on this subject was welcomed by the Commission, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."⁸

In his 1998 Annual Report, the Special Rapporteur declared that freedom of information includes the right to access information held by the State: "[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. ..."⁹ Once again, his views were welcomed by the Commission.¹⁰

In November 1999, the three special mandates on freedom of expression, expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Expression – came together for the first time under the auspices of ARTICLE 19. They adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.¹¹

The UN Special Rapporteur further developed his commentary on freedom of information in his 2000 Annual Report to the Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and realisation of the right to development.¹² He also reiterated his "concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs".¹³

In his 2000 Annual Report, the UN Special Rapporteur elaborated in detail on the specific content of the right to information. After noting the fundamental importance of freedom of information as a human right, the Special Rapporteur made the following observations:

44. On that basis, the Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:

- Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
- Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
- As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
- The law should establish a presumption that all meetings of governing bodies are open to the public;
- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;
- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.¹⁴

The UN has also recognised the fundamental right to access information held by the State through its administration of the territory of Bosnia and Herzegovina. In 1999, the High Representative to Bosnia and Herzegovina¹⁵ required the adoption of freedom of information legislation in accordance with the highest international standards, in order to provide practical protection for the right to freedom of expression:

Although the Constitution of Bosnia and Herzegovina ... provides for full recognition of Freedom of Expression as a fundamental human right ... protected in accordance with ... relevant international instruments, the numerous exhortations contained in Peace Implementation Council documents ... concerning the freedom of the media are a clear signal of the continuing lack of clarity in the approach of the legal system of Bosnia and Herzegovina to vital matters, such as ... the public's rights to know.

Considering the urgent need to uphold the constitutionally recognized Freedom of Expression, to ensure genuine media freedom, and to uphold the public's right to know about the activities of elected government bodies...

I ... require that the state of Bosnia and Herzegovina and Entity governments and parliaments prepare and adopt Freedom of Information legislation, and amend existing legislation as necessary, which upholds the citizen's right to information except for narrowly defined categories.¹⁶

1.2.2 The Commonwealth

The Commonwealth, a voluntary association of 54 countries based on historical links, common institutional and legislative frameworks and shared values, has taken concrete steps during the last decade to recognise human rights and democracy as part of its fundamental political values. In 1991, it adopted the Harare Commonwealth Declaration which enshrined its fundamental political values. These include fundamental human rights and the individual's inalienable right to participate by means of free and democratic processes in framing his or her society.¹⁷

The importance of freedom of information, including the right to access information held by the State, has been recognised by the Commonwealth for more than two decades. In 1980, the Law Ministers of the Commonwealth, meeting in Barbados, stated that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."¹⁸ More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right.

In March 1999, a Commonwealth Expert Group Meeting in London adopted a document setting out a number of principles and guidelines on the right to know and freedom of information as a human right, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.¹⁹

These principles and guidelines were adopted by the Commonwealth Law Ministers at their May 1999 Meeting.²⁰ The Communiqué from the Law Ministers Meeting was forwarded to the Commonwealth Heads of Government Meeting in November 1999, where it was considered by the Committee of the Whole on Commonwealth Functional Co-operation. The Committee's Report, which was approved by the Heads of Government,²¹ stated:

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.²²

1.2.3 Organization of American States

In 1948, the Organization of American States (OAS) adopted a seminal human rights declaration, the American Declaration of the Rights and Duties of Man.²³ Article IV guarantees freedom of investigation, opinion and expression. This was followed in 1969 by the adoption of a legally binding international treaty, the American Convention on Human Rights (ACHR).²⁴ Article 13 states, in part:

1. Everyone has the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. Respect for the rights and reputations of others; or
 - b. The protection of national security, public order, or public health or morals.

The language of this guarantee closely resembles that of Article 19 of the UDHR, as well as Article 19 of the ICCPR. In a 1985 Advisory Opinion, the Inter-American Court of Human Rights, interpreting Article 13(1), recognised freedom of information as a fundamental human right, which is as important to a free society as freedom of expression. The Court explained:

Article 13 ... establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds.... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.²⁵

The Court also stated: "For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion", concluding that "a society that is not well-informed is not a society that is truly free."²⁶ At present there is a case pending before the Inter-American Commission on Human Rights which claims a right to access information held by a public authority under the guarantee of freedom of expression.²⁷

In 1994, the Inter-American Press Association, a regional non-governmental organisation (NGO), organised the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles on freedom of expression.²⁸ The principles explicitly recognise freedom of information as a fundamental right, which includes the right to access information held by public bodies:

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector....

Although the Declaration of Chapultepec originally had no formal legal status, as Dr Santiago Canton, the OAS Special Rapporteur for Freedom of Expression, has noted, it "is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression."²⁹ To date, the Heads of State or Governments of 21 countries in the Americas, as well as numerous other prominent persons, have signed the Declaration.³⁰

The Special Rapporteur, whose Office was established by the Inter-American Commission on Human Rights³¹ in 1997,³² has frequently recognised that freedom of information is a fundamental right, which includes the right to access information held by the State. In his 1999 Annual Report to the Commission, he stated:

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to

the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.³³

In October 2000, the Commission approved the Inter-American Declaration of Principles on Freedom of Expression,³⁴ which is the most comprehensive official document to date on freedom of information in the Inter-American system. The Preamble reaffirms with absolute clarity the aforementioned developments on freedom of information:

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; ...

REAFFIRMING Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication; ...

REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

The Principles unequivocally recognise freedom of information, including the right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

1. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
2. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

It is, therefore, clear that in the Inter-American system, freedom of information, including the right to access information held by the State, is a guaranteed human right.

1.2.4 Council of Europe

The Council of Europe (COE) is an intergovernmental organisation, composed of 43 Member States. It is devoted to promoting human rights, education and culture. One of its foundational documents is the European Convention on Human Rights (ECHR),³⁵ which guarantees freedom of expression and information as a fundamental human right at Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 differs from guarantees found in Articles 19 of the UDHR and ICCPR, and Article 13 of the ACHR, in that it protects only the right to "receive" and "impart", and not the right to "seek", information.

The European Court of Human Rights has considered claims for a right to receive information from public authorities in at least three key cases, *Leander v. Sweden*,³⁶ *Gaskin v. United Kingdom*³⁷ and *Guerra and Ors. v. Italy*.³⁸ In each case, the Court rejected the notion that the guarantee of freedom of expression under the ECHR included a right to access the information sought. The following interpretation of the scope of Article 10 from *Leander* features in similar form in all three cases:

[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.³⁹

By using the words, "in circumstances such as those of the present case", the Court has not ruled out the possibility of a limited right to access information held by the State under Article 10. However, given the specific nature of the requests which were rejected in these three cases (see details below), it would be a very limited right.

The European Court of Human Rights has not, however, denied redress in these cases. Rather, in all three cases, it found that to deny access to the information in question was a violation of the right to a private and family life under Article 8 of the Convention.

In the first case, *Leander*, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had

provided the basis for his dismissal. The Court held that the storage and release of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security.⁴⁰

The problem with the Court's reasoning in the *Leander* case was that it essentially accepted at face value the government's claim of a risk to national security. The problem with this was highlighted. That this was a problem became abundantly clear in 1997, more than ten years after the decision, when the plaintiff's lawyer was finally granted access to the relevant files, which and found that showed the government's claims to be false. The government subsequently admitted that "there were no grounds in 1979 or today, to label Mr. Leander a security risk, and that it was wrong to dismiss him from the museum," and paid him 400,000 Swedish Kronor (US\$4,000) in compensation.⁴¹

The *Leander* ruling was followed by *Gaskin*, where the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to case records about him held by the State. The final case was *Guerra*, where the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident.

In both *Gaskin* and *Guerra*, the Court held that there was no State *interference* with the right to respect for private and family life, but that Article 8 imposes a *positive obligation* on the State to *ensure respect* for such rights:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.⁴²

In *Gaskin*, the Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of third parties who contributed information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access is to be granted if a third party contributor is not available or withholds consent. Since it had not done so, the applicant's rights had been breached.⁴³

In *Guerra*, the Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, and thereby interfere with their right to private and family life. As a result, the Italian authorities had a positive obligation to provide the applicants with the information necessary to assess the risks of living in a town near a high risk

chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights.⁴⁴

Although the European Court has recognized a right to access information held by the State, the decisions are problematic. First, the Court has proceeded cautiously, making it clear that its ruling was restricted to the facts of each case and should not be taken as establishing a general principle. In *Gaskin*, for example, the Court stated:

The records contained in the file undoubtedly do relate to Mr. Gaskin's "private and family" life in such a way that the question of his access thereto falls within the ambit of Article 8.

This finding is reached without expressing any opinion on whether general rights of access to personal data and information may be derived from Article 8(1) of the Convention. The Court is not called upon to decide *in abstracto* on questions of general principle in this field but rather has to deal with the concrete case of Mr. Gaskin's application.⁴⁵

The second, and more serious problem, is that relying on the right to respect for private and family life places serious limitations on the scope of the right to access information held by the State. This is clear from the *Guerra* case, where it was a considerable leap to find, as the Court did, that severe environmental problems would affect the applicants' right to respect for their private and family life. *Guerra* is representative of a class of situations where justice and democracy clearly demand a right to information, but where this is hard to justify under the right to respect for private and family life. In effect, the Court has backed itself into a corner.

While it is positive, and significant, that the European Court has recognised that individuals have a right to access information held by the State, it would have been far more logical and coherent if it had recognised it as part of the right to freedom of expression, rather than as part of the right to respect for private and family life.

The political bodies of the Council of Europe have made important moves towards recognising the right to access information held by the State as a fundamental right. As early as 1970, the Consultative Assembly, the forerunner of the Parliamentary Assembly, passed a Resolution stating: "There shall be a corresponding duty [to the right to freedom of expression] for the public authorities to make available information on matters of public interest within reasonable limits. ..."⁴⁶

In 1979, the Parliamentary Assembly recommended that the Committee of Ministers, the political decision-making body of the Council of Europe (composed of the Ministers of Foreign Affairs from each Member State), "invite member states which have not yet done so to introduce a system of freedom of information, i.e. access to government files ..."⁴⁷ The Committee of Ministers responded two years later by adopting Recommendation No.

R(81)19 on the Access to Information Held by Public Authorities, which stated:

I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities. ...

V. The foregoing principles shall apply subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests (such as national security, public safety, public order, the economic well-being of the country, the prevention of crime, or for preventing the disclosure of information received in confidence), and for the protection of privacy and other legitimate private interests, having, however, due regard to the specific interest of an individual in information held by the public authorities which concerns him personally.⁴⁸

In 1994, the 4th European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers instruct its Steering Committee on the Mass Media to consider "preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities."⁴⁹ This was followed by a study for the Steering Committee on the Mass Media, which noted the need for a binding legal instrument on public access to official information.

The Steering Committee for Human Rights has set up a Group of Specialists on access to official information, which is expected to finalise a draft recommendation on access to information in September 2001. The draft will then be forwarded via the Steering Committee to the Committee of Ministers for adoption. The current draft includes the following provisions:

III

General principle

Member States should guarantee the right of everyone to have access on request, to official documents held by public authorities.

IV

Possible limitations

1. Member States may derogate from the right of access to official documents. Limitations or restrictions must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of providing protection on:

- i. national security, defence and international relations;
- ii. public safety;
- iii. prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision of public authorities;
- ix. economic, monetary and exchange rate policies of the state;
- x. confidentiality of deliberations within or between public authorities for an authority's internal preparation of a matter.

2. Access may be refused only if disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1 and if the interest in question overrides the public interest attached to disclosure. ...

IX

Review Procedure

1. An applicant whose request for a document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit set out in principle VI.3 shall have access to a review procedure before a Court of law or another independent and impartial body established by law.⁵⁰

1.3 Issue-specific information

1.3.1 Information on the Environment

During the last decade, there has been increasing recognition that access to information on the environment, including information held by public authorities, is key to sustainable development and effective public participation in environmental governance. The issue was first substantively addressed in the 1992 Rio Declaration on Environment and Development, in Principle 10:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁵¹

Agenda 21, the "Blueprint for Sustainable Development", the companion implementation document to the Rio Declaration, states:

[I]ndividuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information protection measures.⁵²

At the national level, several countries have laws which codify, at least in part, Article 10 of the Rio Declaration. In **Colombia**, for example, Law 99 of 1993, on public participation in environmental matters, includes provisions on the right to request information. Likewise, in the **Czech Republic**, there is a constitutional right to obtain information about the state of the environment, which has been implemented in a number of environmental protection laws.⁵³

There has also been progress at the regional level. In 1998, as a follow-up to the Rio Declaration and Agenda 21, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the legally binding Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [the Aarhus Convention].⁵⁴ The Preamble, which sets out the rationale for the Convention, states in part:

Recalling ... principle 10 of the Rio Declaration on Environment and Development ...

Recognizing ... that every person has the right to live in an environment adequate to his or her health and well-being ...

Considering that, to be able to assert this right and observe this right ... citizens must have access to information ...

Recognizing that, in the field of environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns ...

Aiming ... to further the accountability of and transparency in decision-making ...

Recognizing the desirability of transparency in all branches of government ...

Acknowledging that public authorities hold environmental information in the public interest. ...

The Convention, which is expected to come into force in 2001, will require State Parties to take legal measures to implement the Convention's provisions on access to environmental information.⁵⁵ Most of those provisions are set out in Article 4, which begins by stating in subsection (1):

Each Party shall ensure that ... public authorities, in response to a request for environmental information, make such information available to the public ...

- a. Without an interest having to be stated.

The Convention recognises access to information as part of the right to live in a healthy environment,⁵⁶ rather than as a free-standing right. However, it does impose a number of obligations on States Parties which are consistent with international standards relating to the first legally binding international instrument which sets out clear standards on the right to access information held by the State. For example, it requires States to adopt broad definitions of "environmental information" and "public authority",⁵⁸ exceptions must be subject to a public interest test,⁵⁹ and an independent body with the power to review refusals of request for information must be established.⁶⁰ As such, it represents a very positive development in terms of establishing the right to information.⁶¹

1.3.2 Information on Human Rights

There have been moves within the international community to recognise a special aspect of the right to freedom of information in relation to human rights. In 1998, the UN General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms [the Declaration on Human Rights Defenders].⁶² Article 6 specifically provides for access to information about human rights:

Everyone has the right, individually and in association with others:

- a. To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms

- are given effect in domestic legislative, judicial or administrative systems;
- b. As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

Article 6 recognises that the right to seek, obtain and receive information on human rights is fundamental to the effective promotion and protection of human rights.

In South Africa, the obligation to provide access to information extends to private bodies where that information is required for the exercise or protection of any right. Section 32 of the 1996 Constitution of South Africa provides:

1. Everyone has the right of access to – ...
 - a. any information that is held by another person and is required for the exercise or protection of any rights.

This is given effect in Section 50 of the Promotion of Access to Information Act.⁶³

These provisions effectively secure individual access to any information the State holds regarding human rights and human rights abuse. ARTICLE 19, however, has long argued that States are under a substantive positive obligation in this area, including to ensure the availability of information about human rights violations. We have, for example, argued that the right to freedom of expression, "long recognised as crucial in the promotion of democratic accountability and participation, also places an obligation upon governments to facilitate the uncovering of information about past human rights violations."⁶⁴ In other words, it is not enough for individuals simply to have access to whatever information the State already holds. The State must also ensure that information about past human rights violations is readily available, including by collecting, preserving and disseminating it, where necessary.

Case Study: Uncovering Corruption in the Thai School System

In July 1997, the worst economic crisis in decades hit Thailand. Public anger over corruption and the lack of transparency in government, which had contributed to the crisis, led to the adoption of a new Constitution in October 1997, with strong human rights protection clauses and checks on State power. Two months later, on 9 December 1997, a new freedom of information law, the

Official Information Act, came into effect.

The first major case under the Official Information Act revolved around the admissions process to Kasetsart Demonstration School (KDS), one of several highly-regarded, state-funded primary schools attached to state universities. The admissions process to the school included an entrance examination, but test scores and ranks were never made public, and the student body was largely composed of *dek sen* – children from elite, well-connected families. These factors created a widely held public perception that "tea money" or some other form of bribery played a role in the admissions process.

In early 1998, Sumalee Limpa-owart was informed that her daughter, Natthanit, had failed the entrance examination and was being refused admission to KDS. She met with the rector of Kasetsart University and asked to see her daughter's answer sheets and marks, but was refused. In the past, that had been the end of the road for aggrieved parents. However, Sumalee, a public prosecutor by profession, followed up on the matter. First, she sent a letter to the rector requesting to see the marks and answer sheets of her daughter and the 120 students who were admitted to KDS. Then, after waiting for two months for a reply, she filed a petition under the Official Information Act.

In November 1998, the Official Information Commission ruled that the answer sheets and marks of Natthanit and the 120 students who were admitted to KDS were public information and had to be disclosed. The decision produced an immediate backlash. Parents of 109 of the students filed a lawsuit against Sumalee, arguing that the information was private. The claim was rejected by the Civil Court in February 1999, but then a parent complained to the Office of the Attorney-General that Sumalee was abusing her position as a public prosecutor.

An investigatory committee was set up within her office but, following strong public protest, including rallies by human rights groups outside the office, no disciplinary action was taken. Sumalee was eventually allowed to see the answer sheets and marks in March 1998. By that time, KDS had already admitted that 38 students who had failed the examination had been admitted to the school because of payments made by their parents. Sumalee then filed a petition with the Council of State, a government legal advisory body with the power to issue legal rulings, arguing that the school's admission practices were discriminatory and violated the equality clauses of the new Constitution. In January 2000, the Council ruled in her favour and ordered KDS and all other state-funded demonstration schools to abolish such practices.

1.4 Global Trends

1.4.1 National Constitutional Developments

In a number of countries, freedom of information, including the right to access information held by the State, has been recognised at the constitutional level, either by courts which have interpreted general guarantees of freedom of expression as including it, or through specific constitutional provisions recognising it. The latter is a particular trend among newly democratic countries or those in transition to democracy.

In some countries, national courts have been reluctant to accept that the guarantee of freedom of expression includes the right to access information held by the State. In the **USA**, for example, the Supreme Court has held that the First Amendment of the Constitution, which guarantees freedom of speech and of the press, does not "[mandate] a right to access government information or sources of information within government's control."⁶⁵ However, this may be because the First Amendment is cast in exclusively negative terms, requiring Congress to refrain from adopting any law which abridges freedom of speech.⁶⁶ International, and most constitutional, protection for freedom of expression is more positive, recognising individual rights in relation to information.

In other countries, senior courts have held that the right to access information held by the State is protected by a constitutional right to freedom of expression. For example, as early as 1969, the Supreme Court of **Japan** established in two high-profile cases the principle that *shiru kenri* (the "right to know") is protected by the guarantee of freedom of expression in Article 21 of the Constitution.⁶⁷

In 1982, the Supreme Court of **India** ruled that access to government information was an essential part of the fundamental right to freedom of speech and expression in Article 19 of the Constitution:

The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.⁶⁸

In **South Korea**, the Constitutional Court ruled in two seminal cases in 1989 and 1991 that there was a "right to know" inherent in the guarantee of freedom of expression in Article 21 of the Constitution, and that in certain circumstances the right may be violated when government officials refuse to disclose requested documents.⁶⁹

A case currently before the Supreme Court of **Zimbabwe** is raising the same issue. The applicants seek to compel the Government to release two official inquiries into 'incidents' in Matebeleland in the early 1980s, during which a

large number of people died at the hands of security forces or those working with them.⁷⁰

A number of countries specifically include the right to information among the constitutionally guaranteed human rights. **Sweden** is an interesting example, as the whole of its Freedom of the Press Act, which includes comprehensive provisions on freedom of information, has constitutional status.⁷¹

During the last decade, many countries which have recently adopted multi-party systems, or are otherwise in transition to democracy, have explicitly included the right to access information held by the State in their constitutions, either as an element of the right to freedom of expression or as a separate right. In **Thailand**, for example, which underwent a constitutional reform process following the removal of a military government in 1992, Section 58 of the 1997 Constitution states:

A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

Practical implementation of this provision is achieved through the Official Information Act, which came into effect in December 1997.

Elsewhere in Asia, political change in the early part of the decade in Nepal produced the 1990 Constitution, which protects the right to access and receive information. Article 16 states: "Every citizen shall have the right to demand and receive information on any matter of public importance. ..." And following the "People's Power Revolution" in the **Philippines** in 1986, which overthrew the Marcos dictatorship, a new Constitution was adopted in 1987 which guarantees the right to access information held by the State:

The right of the people to information on matters of public concern shall be recognized. Access to official records and documents, and papers pertaining to official acts, transactions, or decisions as well as to government research data used as basis for policy development, shall be afforded the citizen subject to such limitations as may be provided by law.⁷²

A number of African Constitutions specifically guarantee the right to access information held by the State. For example, Article 37 of the Constitution of **Malawi** states:

Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.⁷³

The 1996 Constitution of the **Republic of South Africa** is perhaps unique, not only in the breadth of its guarantee of freedom of information, but also in that it requires the adoption of national legislation to give effect to this right, within three years of its coming into force.⁷⁴ Section 32 provides:

1. Everyone has the right of access to – ...
 - a. any information held by the state; and
 - b. any information that is held by another person and is required for the exercise or protection of any rights.
1. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The enabling legislation, the Promotion of Access to Information Act, came into effect in March 2001.⁷⁵

In Latin America, constitutions have tended to focus on one important aspect of the right to information, namely the petition of *habeas data*. This is the right of anyone to access information about him or herself, whether held by public or private bodies and, where necessary, to update or correct it. For example, Article 43 of the Constitution of **Argentina** states:

Every person shall have the right to file a petition (of *habeas data*) to see any information that public or private data banks have on file with regard to him and how that information is being used to supply material for reports. If the information is false or discriminatory, he shall have the right to demand that it be removed, be kept confidential or updated, without violating the confidentiality of news sources.⁷⁶

The Constitution of **Peru** not only guarantees *habeas data*,⁷⁷ but also includes a more general guarantee of the right to access information held by public bodies. Article 2(4) states:

All persons have the right ... [t]o request, without providing a reason, information that one needs, and to receive that information from any public entity within the period specified by law, at a reasonable cost. Information that affects personal privacy and that is expressly excluded by law or for reasons of national security is not subject to disclosure.

The post-communismpost-communist era constitutions of many countries in Eastern and Central Europe specifically guarantee the right to information. In **Romania**, for example, Article 31 of the 1991 Constitution states:

1. A person's right to access information of public interest cannot be restricted.

2. The public authorities, according to their competence, shall be bound to provide for correct information of the citizens in public affairs and matters of personal interest.
3. The right to information shall not be prejudicial to the protection of the young or to national security ...

The constitutions of **Bulgaria**,⁷⁸ **Estonia**,⁷⁹ **Hungary**,⁸⁰ **Lithuania**,⁸¹ **Moldova**,⁸² **Poland**,⁸³ and the **Russian Federation**⁸⁴ all guarantee the right to access information held by the State.

1.4.2 National Legislation

Historically, the right to access information held by the State has evolved from administrative law, which attempts to redress the imbalance of power between the individual and the State. James Michael explains these developments in the following terms:

Most "freedom of information" statutes evolved from administrative law. There was first established a basic rule that government is subject to law, and that citizens have rights to take legal actions against the state for breaches of the law. A consequence of such a right is that citizens have legally enforceable rights of access to records in the possession of government that are relevant to their claims. Once such a right of access is established, the next major step is to remove the requirement that the records be relevant to a legal claim, making the right to access a right of citizenship (or often simply a right of humanity).

Therefore, open government laws have usually developed as a step beyond a right of access to relevant records necessary for citizens to pursue separate legal claims against the state. Such laws establish rights of access as a right of citizenship, attempting to redress the balance of "information power" between the individual and the state.⁸⁵

Freedom of information laws, which include the right to access information held by the State, have existed for more than 200 years, but very few are more than 20 years old. However, there is now a veritable wave of freedom of information legislation sweeping the globe and, in the last ten years, numerous such laws have been passed, or are being developed, in countries in every region of the world.

The history of freedom of information laws can be traced back to **Sweden** where, in 1766, the Parliament passed the Freedom of the Press Act, which required the disclosure of official documents upon request. The Freedom of the Press Act, Act is now part of the Constitution, decrees in Chapter 2, Article 1 Constitution and Chapter 2 is Sweden's freedom of information law. Among other things, it provides that "every Swedish subject shall have free access to official documents." The rest of Chapter 2 is in essence a freedom of

information law documents," sets out the exceptions to free access, and in most cases provides for a right to appeal refusals to grant access to the courts.⁸⁶ Another country with a long history of freedom of information legislation is **Colombia**, whose 1888 Code of Political and Municipal Organization allowed individuals to request documents held by government agencies or in government archives. The **USA** passed a freedom of information law in 1967⁸⁷ and this was followed by legislation in **Australia**,⁸⁸ **Canada**⁸⁹ and **New Zealand**,⁹⁰ all in 1982.

In Asia, a number of countries have passed freedom of information laws in the last few years. The **Philippines** recognised the right to access information held by the State relatively early, passing a Code of Conduct and Ethical Standards for Public Officials and Employees in 1987.⁹¹ A Code on Access to Information was adopted in **Hong Kong** in March 1995, and in **Thailand**, the Official Information Act came into effect in December 1997. In **South Korea**, the Act on Disclosure of Information by Public Agencies came into effect in 1998, and in **Japan**, the Law Concerning Access to Information Held by Administrative Organs came into effect in April 2001. In other countries in the region, concrete steps are being taken towards adopting similar legislation. For example, **Taiwan** is currently preparing freedom of information legislation and there are important developments in this direction underway in **Indonesia**. Draft freedom of information legislation has also been introduced in **India** and **Pakistan** (see the sections of this survey on India and Pakistan), and similar moves are afoot in Nepal, and civil society in Sri Lanka is actively engaged in advocacy on the issue (see the section on Sri Lanka).

In the Middle East, only **Israel** has freedom of information legislation. The Freedom of Information Law was passed by the Israeli Parliament in May 1998.⁹²

South Africa remains the only African country to have actually passed freedom of information legislation, but in a number of other African countries, there are moves underway to adopt such laws. In **Nigeria**, for example, a Freedom of Information Bill is currently being considered by the Parliament. There are also efforts, with varying degrees of government involvement, to promote freedom of information laws in **Botswana**, **Kenya**, **Malawi**, and **Zimbabwe**.

In **Peru**, as mentioned previously, legislation was passed in 1994 implementing the constitutional right to *habeas data*.⁹³ In November 1998, the **Autonomous Government of the City of Buenos Aires, Argentina** passed a law recognising every person's right to request information in the city government's possession.⁹⁴ With the assistance of the OAS Special Rapporteur on Freedom of Expression, **Guatemala** has recently drafted a bill on access to information, which is now pending before the legislature.

In the Caribbean, **Belize** and **Trinidad and Tobago** passed freedom of information legislation in 1994⁹⁵ and 1999,⁹⁶ respectively, and in Jamaica similar legislation is being considered.

Most countries in Western Europe now have freedom of information laws in place, with the passage, in November 2000, of the Freedom of Information Act by the **United Kingdom**.⁹⁷ There is also a rush to pass freedom of information laws in Central and Eastern Europe, with many countries – including **Albania**,⁹⁸ **Bosnia and Herzegovina**,⁹⁹ **Bulgaria**,¹⁰⁰ the **Czech Republic**,¹⁰¹ **Estonia**,¹⁰² **Georgia**,¹⁰³ **Hungary**,¹⁰⁴ **Latvia**,¹⁰⁵ **Lithuania**,¹⁰⁶ **Moldova**,¹⁰⁷ **Slovakia**,¹⁰⁸ **Russia**,¹⁰⁹ and **Ukraine**¹¹⁰ – having passed such laws recently. In a number of others countries in Europe – including **Armenia**, **Macedonia**, **Montenegro**, **Poland**, **Romania** and **Serbia** – there are moves to prepare or pass such legislation.

There is, therefore, a very significant global trend towards adopting freedom of information legislation granting, among other things, a right to individuals to access information held by the State.

1.4.3 Intergovernmental Organisations

During the past decade, intergovernmental organisations have also begun to formally recognise a right to access information held by public bodies. Many of these organisations, which for most of their existence operated largely in secret, or disclosed information purely at their discretion, are now acknowledging in a practical way (through policies, guidelines or codes) that public access to the information that they hold is a right, not a privilege. As Claudia Saladin of the Center for International Environmental Law explains:

International organizations are becoming increasingly important in the day-to-day lives of people around the world. Particularly in developing countries, international economic institutions can profoundly affect national macro-economic policies, governance structures, as well as development priorities and projects. ...

If international finance institutions are given the power to dictate and constrain domestic policymaking and to develop international policies that override domestic policy decisions, it is crucial that they institutionalize and guarantee a genuine and substantive role for civil society in their decision-making process.¹¹¹

A significant milestone in this process was the adoption of the 1992 Rio Declaration on Environment and Development, which put enormous pressure on international institutions to implement policies on public participation and access to information.

This section looks at some of the most important developments in intergovernmental bodies.

1.4.3.a The United Nations

The United Nations Development Programme (UNDP) adopted a Public Information Disclosure Policy in 1997.¹¹² The rationale for the Policy is as follows:

The importance of information disclosure to the public as a prerequisite for sustainable human development (SHD) has been recognized in major United Nations intergovernmental statements, including the Rio Declaration on Environment and Development. ... As a custodian of public funds, UNDP is directly accountable to its member Governments and indirectly accountable to their parliaments, their taxpayers, and the public in donor and programme countries.¹¹³

The Policy provides for a presumption in favour of disclosure,¹¹⁴ subject to the following exceptions:

- a. Proprietary information, intellectual property in the form of trade secrets, or similar information that has been disclosed to UNDP under conditions of confidentiality and the release of which would cause financial or other harm;
- b. Internal notes, memoranda, and correspondence among UNDP staff, including documentation relating to internal deliberative processes among UNDP staff, unless these are specified for public circulation;
- c. Privileged information (e.g., certain legal advice concerning matters in legal disputes or under negotiation), including disciplinary and investigatory information generated within UNDP or for UNDP;
- d. Personal, health or employment-related information about staff, except to the individual staff member concerned; and
- e. Information relating to procurement processes that involves prequalification information submitted by prospective bidders, or proposal or price quotations.¹¹⁵

The Policy also enumerates specific documents that shall be made available to the public.¹¹⁶

In terms of process, the Policy requires the UNDP to respond to a request within 30 working days. Any denial of access must state the reasons¹¹⁷ and the requester may then apply to the Publication Information and Documentation Oversight Panel to have the refusal reconsidered. The Panel consists of five members – three UNDP professional staff members and two individuals from the not-for-profit sector – appointed by the UNDP Administrator.¹¹⁸

There are problems with the UNDP Policy, but at the same time it is relatively progressive in comparison to other IGOs and has definitely made UNDP more open.

Specific problems include the excessively broad nature of some of the exceptions, the lack of a public interest override for exceptions and the fact that the Oversight Panel is not sufficiently independent. However, the Policy is subject to ongoing review with a view to improvement.¹¹⁹

1.4.3.b International Financial Institutions

Like the UN, international financial institutions increasingly recognise that they are subject to basic democratic principles, such as public participation in decision-making and public access to information. Since the adoption of the Rio Declaration in 1992, the development-oriented international financial institutions – the World Bank,¹²⁰ the Inter-American Development Bank,¹²¹ the African Development Bank Group,¹²² the Asian Development Bank¹²³ and the European Bank for Reconstruction and Development¹²⁴ – have all implemented information disclosure policies.

The World Bank, which first began issuing instructions on disclosure to its staff in 1985,¹²⁵ adopted a formal, detailed Policy on the Disclosure of Information in 1993.¹²⁶ The Policy recognises the "importance of accountability and transparency in the development process" and that as "an organization owned by governments, the Bank is accountable for its stewardship of public moneys and has an obligation to be responsive to the questions and concerns of shareholders."¹²⁷

The Policy establishes a presumption in favour of disclosure,¹²⁸ subject to certain minimum constraints, which the Bank has summarised as follows:

- information is provided to the Bank on the understanding that it is proprietary or confidential;
- disclosure would violate the personal privacy of staff members, and thus such information is disclosed only to the extent permitted by Staff Rules;
- in the Bank's judgment, disclosure could impede the integrity and impartiality of the Bank's deliberative process and the free and candid exchange of ideas between the Bank, its members, and its partners;
- in the Bank's judgment, disclosure would be detrimental to the interests of the Bank, a member country, or Bank staff; for example, disclosure would have a significant adverse effect on Bank-country relations;
- proceedings of the Board are, under the Board's Rules of Procedures, confidential;
- in the Bank's exercise of sound financial management practices, it does not disclose certain financial information for prudential reasons; and
- disclosure would be impracticable for the Bank or its members for reasons of excessive cost or logistics.¹²⁹

The Policy also sets out a list of specific documents which are available on a routine basis from the Bank.¹³⁰

The Policy does not meet international standards on freedom of information for a number of reasons:

- some of the exceptions are too broad and others are subjective in nature, referring to the "Bank's judgment" rather than an objective harm test;
- there is no provision for information to be disclosed if the public interest in disclosure outweighs the harm;
- there is no provision for an independent review of refusals to disclose information; and as a matter of practice, several significant documents are not disclosed, including for example, the Country Assistance Strategy, Strategy – a key document which provides the development framework for Bank assistance in a client country – for certain countries.¹³¹

Although the content of the Policy is flawed, the Bank has taken concrete steps to review it – in 1995, 1997, 1998 and 1999 – resulting in progressively more openness and an increase in the number of documents subject to disclosure. A major review, with a public consultation process, is currently underway, and this should further extend the range of documents subject to disclosure.¹³²

The regional development banks have largely followed the World Bank's lead and the disclosure policies that they have adopted are very similar.

1.4.3.c The European Union

The European Union (EU), a body committed to furthering the political, social and economic integration of its 15 Member States, has undergone a number of major institutional changes over the years. The EU's predecessors – the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community – were essentially completely opaque in terms of information disclosure. Meetings were often held in secret and minutes were not published. Moreover, public access to documents held by the Communities was not generally regulated by rules, but was a matter of wide, often arbitrary, discretion.

The Treaty of the European Union (the Maastricht Treaty), which came into force in 1993,¹³³ represented the first major step towards openness and included a *Declaration on the Right of Access to Information* which stated:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

This Declaration was put into effect by the Commission, the EU's executive body and the The Council, the EU's main decision-making body, composed of ministerial representatives from Member States, through the adoption in 1994 and the Commission, the EU's executive body, put this Declaration into effect through the adoption in 1993 and 1994, respectively, of a Code of Conduct on public access to Commission and Council documents.¹³⁴ The Code of Conduct is guided by the general principle that "[t]he public will have the widest possible access to documents held by the Commission and the Council." Access to any document must be refused where disclosure could undermine the protection of the public interest, privacy, commercial and industrial secrecy, the Community's In 1997, the European Parliament adopted its own rules on public access, which provide that "[t]he public shall have the right of access to European Parliament financial interest, and/or confidentiality. documents under conditions laid down in this Decision."¹³⁵

Neither the Declaration nor the Code of Conduct explicitly confer a legal right to access official information held by the Commission and Council, and the European Court of Justice (ECJ) has refused to read in such a right.¹³⁶ However, the Amsterdam Treaty, which amended the Treaty of Rome and came into force in 1999, does effectively recognise this right in a new article, Article 255, which states:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

To give effect to this Treaty right, in May 2001 a new code of access was adopted by the the European Parliament and the Council adopted a regulation on access to European Parliament, Council and Commission documents.¹³⁷ It will replace the Code of Conduct and the European Parliament rules from 3 December 2001.¹³⁸ The preamble, which provides the rationale for the Regulation, states in part:

Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights. ...

Like the Code of Conduct, the purpose of the Regulation is "to ensure the widest possible access to documents,"¹³⁹ but, in contrast to the Code, it also provides for a legal right to access documents. Article 2 states:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.¹⁴⁰

The Regulation has several other positive features, including a narrow list of exceptions, all of which are subject to a harm test and some which are subject to a public interest override. Article 4 states:

1. The institutions shall refuse access to a document where disclosure would *undermine* protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would *undermine* the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits, unless there is an *overriding public interest* in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would *seriously undermine* the institution's decision-making process, unless there is an *overriding public interest* in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would *seriously undermine* the decision-

making process, unless there is an *overriding public interest* in disclosure.

The Regulation also provides for an application for reconsideration of a decision to refuse to disclose information, as well as an appeal to the courts and/or the Ombudsman.¹⁴¹

However, the Regulation is flawed in the following respects:¹⁴²

- the fact that exceptions to disclosure for the protection of public security, defence and military matters; international relations; the financial, monetary or economic policy of the Community or a Member State; and the privacy and integrity of the individual¹⁴³ are not subject to a public interest override;
- the provision that a Member State may request that a document which originated from that Member State shall not be disclosed without its prior agreement, and sensitive documents originating from the EU institutions, Member States, third countries or international organisations, which relate to public security, defence and military matters, can only be released with the consent of the originator.¹⁴⁴ These exceptions are not subject to a harm test or a public interest override;
- the requirement that a Member State that holds a document which originated from an EU institution must consult with the institution in order to take a decision on disclosure that does not jeopardise the attainment of the objectives in the Regulation.¹⁴⁵ This has the potential to undermine domestic freedom of information legislation which is more open and progressive than the EU Regulation.

At the same time, the European Union is taking steps to establish for the very first time a Charter of Fundamental Rights relating to its own activities. The Charter, which was signed and proclaimed by the Presidents of European Parliament, the Council and the Commission on 7 December 2000, guarantees both freedom of expression and a right to access information held by European institutions. Article 42 states:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

The question of whether to make the Charter legally-binding by incorporating it whether, and if so how, the Charter will be incorporated into European Union law is currently being considered as part of the general debate on the future of the EU.

1.5 The Content of the Right to Information

It is now clear that individuals do have a human right to freedom of information, including access to information held by public authorities. The specific content of that right has been elaborated by a number of authoritative sources, including the UN Special Rapporteur on Freedom of Opinion and Expression¹⁴⁶ and the Council of Europe's Group of Specialists on access to official information. The content can also be derived from the Aarhus Convention, the many national laws on freedom of information and the policies and guidelines of IGOs.

ARTICLE 19 has set out the international standards and best practice for access to information regimes in *The Public's Right to Know: Principles on Freedom of Expression Legislation*.¹⁴⁷ These standards were endorsed by the UN Special Rapporteur in his 2000 Annual Report.¹⁴⁸ The OAS Special Rapporteur has also endorsed them, describing them as "the fundamental basis and criteria to secure effective access to information."¹⁴⁹ The *Principles* may be summarised as follows:

The exceptions section is often the most controversial aspect of a freedom of information law or policy. In particular, a notional guarantee of access to publicly held information can be largely undermined by an excessively broad or subjective exceptions regime. A table setting out the exceptions regime in access to information systems of different countries and bodies – the UK, Japan, South Africa, the World Bank Australia, Canada, Ireland, New Zealand, the USA – is found in Annex II. If some countries manage effectively without a given exception, the legitimacy or necessity of it in other countries needs to be questioned.

Nine Principles Underpinning Freedom of Information (Fol) Legislation

Principle 1: Maximum Disclosure

Fol legislation should be guided by the principle of maximum disclosure, which involves a presumption that all information held by public bodies is subject to disclosure, and that exceptions apply only in very limited circumstances. Exercising the right to access information should not require undue effort, and the onus should be on the public authority to justify any denials.

Principle 2: Obligation to Publish

Freedom of information requires public bodies to do more than accede to requests for information. They must also actively publish and disseminate key categories of information of significant public interest. These categories include operational information, costs, information on complaints, procedures for public input, and the content of decisions affecting the public.

Principle 3: Promotion of Open Government

FoI legislation needs to make provision for informing the public about their access rights and promoting a culture of openness within the government. As a minimum, an FoI law should make provisions for public education and dissemination of information regarding the right to access information, the scope of information available, and the manner in which the right can be exercised. Also, to overcome the culture of secrecy in government, an FoI law should require training for public employees, and encourage the adoption of internal codes on access and openness.

Principle 4: Limited Scope of Exceptions

Requests for information should be met unless the public body shows that the information falls within a narrow category of exceptions, in line with a three-part test:

- The information must relate to a *legitimate aim* listed in the law;
- Disclosure must threaten *substantial harm* to that aim; and
- The harm must be *greater than* the public interest in disclosure.

Restrictions that protect government from embarrassment or exposure of wrongdoing can never be justified.

Principle 5: Process to Facilitate Access

All requests for information should be processed quickly and fairly by individuals within the public bodies responsible for handling requests and complying with the law. In the case of denial, a procedure for appeal to an independent administrative body, and from there to the courts, should be established.

Principle 6: Costs

The cost of access to information should never be so high as to deter requests. Public interest requests should be subject to lower or no fees, while higher fees may be charged for commercial requests.

Principle 7: Open Meetings

FoI legislation should establish the presumption that all meetings of governing bodies are open to the public so that the public is aware of what the authorities are doing, and is able to participate in decision-making processes. Meetings may be closed, but only where this can be justified and adequate reasons are provided. To facilitate attendance, adequate notice of meetings should be provided.

Principle 8: Disclosure Takes Precedence

Other legislation should be interpreted in a manner that renders it consistent with the disclosure requirements of FoI legislation. In

particular, in case of a conflict between the FoI law and a secrecy law, the former should prevail.

Principle 9: Protection for Whistleblowers

FoI legislation should include provisions protecting individuals from legal, administrative or employment-related sanctions for releasing information on wrongdoing.

1.6 Conclusion

Freedom of information, including a right of access to information held by public bodies is now widely recognised as a fundamental human right, most commonly as an aspect of the right to freedom of expression. This is clear from the numerous authoritative statements to this effect, as well as the policy and practice of national governments, intergovernmental organisations (IGOs) and international financial institutions. Indeed, the rapid proliferation of freedom of information laws among IGOs, and in countries in all regions of the world, is a dramatic global trend and one of the most important democratic developments of recent times.

ENDNOTES

1. 14 December 1946.
2. Resolution 217 A (III), 10 December 1948.
3. Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.
4. The Commission was established by the UN Economic and Social Council (ECOSOC) in 1946 to promote human rights and is composed of 53 representatives of the UN Member States, rotating on a three-year basis. It is the most authoritative UN human rights body and meets annually for approximately six weeks to discuss and issue resolutions, decisions and reports on a wide range of country and thematic human rights issues.
5. Resolution 1993/45, 5 March 1993.
6. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1995/31, 14 December 1995, para. 35.
7. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31, 4 February 1997.
8. Resolution 1997/27, 11 April 1997, para. 12(d).
9. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
10. Resolution 1998/42, 17 April 1998, para. 2.
11. 26 November 1999.
12. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.
13. *Ibid.*, at para. 43.
14. *Ibid.*, at para. 44.
15. This mandate was established by UN Security Council Resolution 1031, 15 December 1995, in accordance with the Dayton Peace Agreement.

16. Decision of the High Representative, *Decisions on the restructuring of the Public Broadcasting System in BiH and on freedom of information and decriminalisation of libel and defamation*, 30 July 1999. The Freedom of Access to Information Act was adopted by the Bosnia and Herzegovina State Government in October 2000, by the Republika Srpska Government in May 2001, and by the Government of the Bosnia and Herzegovina Federation in June 2001.
17. Commonwealth Heads of Government Meeting, 20 October 1991, paras. 4 and 9. See also the Millbrook Commonwealth Action Programme, Commonwealth Heads of Government Meeting, 12 November 1995.
18. Quoted in "Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know", background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
19. *Ibid.*
20. *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999), para. 21. See also Annex I.
21. The *Durban Communiqué*, (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.
22. *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.
23. Adopted by the Ninth International Conference of American States, Bogota, Colombia, 2 May 1948.
24. Adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.
25. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 30.
26. *Ibid.*, paras. 32, 70.
27. The admissibility decision in this case is expected later this year.
28. Mexico City, 11 March 1994.
29. *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter III.
30. The countries are Argentina, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Puerto Rico, Uruguay, and the USA.
31. The Commission was established in 1960 by the OAS Council and has jurisdiction over all OAS Member States. It has treaty responsibilities for implementation of the human rights obligations set out in the American Convention on Human Rights, which apply to State Parties to the Convention.
32. See IACHR Press Release No. 2/98, 6 March 1998, paras. 14-15.
33. Note 29 above, at 24.
34. 108th Regular Session, 19 October 2000.
35. E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
36. 26 March 1987, 9 EHRR 433.
37. 7 July 1989, 12 EHRR 36.
38. 19 February 1998, App. No. 14967/89.
39. Note 36 above, at para. 74.
40. Note 36 above, at paras. 48, 67.
41. "EU rights law rests on Swedish lies", *The Guardian*, 30 December 1997.
42. Note 38 above at para. 58.
43. Note 37 above, at para. 49.
44. Note 38 above, para. 60.
45. Note 37 above at para. 37.
46. Resolution No. 428 (1970), containing a declaration on mass communication media and human rights, adopted 23 January 1970, p. 2.
47. Recommendation No. 854 (1979) on access by the public to government records and freedom of information, adopted 1 February 1979, para 13(a).
48. 25 November 1981, p. 2.

49. Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.
50. Draft Recommendation No R (...)... of the Committee of Ministers to Member States on access to official information, elaborated by the DH-S-AC at its 7th meeting, 28-30 March 2001.
51. UN Doc. A/Conf.151/26 (vol. 1).
52. Ibid., (vol. 3), paragraph 23.2.
53. Report of the Secretary-General, *Rio Declaration on Environment and Development: application and implementation, Commission on Sustainable Development*, UN Economic and Social Council, E/CN.17/1997/8, 10 February 1997, paras. 65-66.
54. UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, not in force as of May 2001.
55. Ibid., Article 3(1).
56. Ibid., Article 1.
58. Ibid., Articles 2(2)-(3).
59. Ibid., Article 4(4).
60. Ibid., Article 9.
61. For the most part, the standards set out in the Convention are consistent with *The Public's Right to Know: Principles on Freedom of Expression Legislation*. A summary of the *Principles* may be found at the end of this section. They are on ARTICLE 19's website in full, see: www.article19.org/docimages/512.htm
62. Resolution 53/144, 8 March 1999.
63. Act No. 2, 2000.
64. *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), 5. Online at www.article19.org/docimages/869.htm
65. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), p. 15.
66. The relevant part of the First Amendment states: "Congress shall make no law ... abridging the freedom of speech, or of the press, or of the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."
67. L Repeta, *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3.
68. *S.P. Gupta v. President of India* [1982] AIR (SC) 149, p. 234.
69. Sung Nak-in, *Korea Country Report* (English summary), presented at the Asian Conference on Civil Society and Access to Government-Held Information, Tokyo, Japan, 13-14 April 2001.
70. *Zimbabwe Lawyers for Human Rights and Ors v. The President and Ors*, Case No. SC3/1/99.
71. See below, under National Legislation.
72. Article III, Section 7.
73. See also Article 74 of the Constitution of **Mozambique** and Article 18(2) of the Constitution of **Tanzania**.
74. Article 32(2) and Schedule 6, item 23 of the 1996 Constitution.
75. Act No. 2, 2000.
76. See also Article 28 of the Constitution of **Venezuela**.
77. Article 200(3).
78. Article 41.
79. Article 44.
80. Article 61(1).
81. Article 25(5).
82. Article 34.
83. Article 61.
84. Article 24(2).
85. J Michael, "Freedom of Official Information", *Vol. 5:1, OSCE Office for Democratic Institutions and Human Rights Bulletin* (Winter 1996/1997), 15.
86. Articles 1, 2 and 15. Article 15 provides that refusal by a Minister to grant access to official documents may be appealed to the Government, refusal by an agency of Parliament is governed by special provisions, and refusal by any other public authority may be appealed to a court of law.

87. USC Title 5, Section 552.
88. Freedom of Information Act, 1982.
89. Access to Information Act, Chapter A-1.
90. Official Information Act, 1982.
91. Republic Act 6713, 1987.
92. Law 5758-1998.
93. Law N° 26301, 2 May 1994.
94. Law No. 104, 1998.
95. Freedom of Information Act, 1994.
96. Freedom of Information Act, 1999.
97. Freedom of Information Act, 2000, Chapter 36.
98. Law No. 8503 on the right to information over the official documents, 1999.
99. The Freedom of Access to Information Act was adopted by the Bosnia and Herzegovina State Government in October 2000, the Republika Srpska Government in May 2001, and the Government of the Bosnia and Herzegovina Federation in June 2001.
100. Access to Public Information Act, 2000.
101. Freedom of Information Law, 1999.
102. Public Information Act, 2000.
103. Law of Georgia on Freedom of Information, 1998.
104. Act No. LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest.
105. Law on Freedom of Information, 1998.
106. Law on the Right to Receive Information from the State and Municipal Institutions, 2000.
107. The Law on Access to Information, 2000.
108. Act on Free Access to Information and Amendments of Certain Acts (The Freedom of Information Act).
109. Law on Information, Disclosure and Protection of Information, 25 January 1995, Act No. 24-FZ.
110. Law on Information, 2 October 1992, Law No. 2657-XII.
111. C Saladin, *Public Participation: An Essential Component of a Sustainable Economy* (Washington, D.C.: The Center for International Environmental Law, November 1998), 1.
112. Public Information Disclosure Policy, UNDP, 1997.
113. *Ibid.*, para. 3.
114. *Ibid.*, para. 6.
115. *Ibid.*, para. 15.
116. *Ibid.*, paras. 11-14.
117. *Ibid.*, para. 19.
118. *Ibid.*, paras. 20-23.
119. *Ibid.*, Chapter III.
120. The World Bank Policy on the Disclosure of Information (Washington, D.C.: World Bank, 1994).
121. OP-102 Disclosure of Information, Inter-American Development Bank, December 1994.
122. Disclosure of Information Policy, African Development Bank Group.
123. Confidentiality and Disclosure of Information, Asian Development Bank, August 1994.
124. Policy on Disclosure of Information, European Bank for Reconstruction and Development, 1996.
125. Administrative Manual Statement 1.10, *Directive on Disclosure of Information*, 1985, revised in 1989.
126. Note 120.
127. *Ibid.*, at para. 3.
128. *Ibid.*, at para. 4.
129. *Discussion Draft: World Bank Policy on Information Disclosure*, 18 September 2000, para. 6. For more details see The World Bank, *Policy on the Disclosure of Information*, note 120, paras. 49-56.
130. Note 120, at paras. 10-47.

131. See *Discussion Draft*, note 129, at para. 7.
132. See *Discussion Draft*, note 129.
133. It was signed by the Foreign Ministers of Member States on 7 February 1992.
134. Annexed to Commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents, 8 February 1994; Council Decision 93/731/EC/ECSC/Euratom on public access to documents, 6 December 1993.
135. European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, 10 July 1997.
136. *Netherlands v. Council*, Case C-58/94, ECR I-2169.
137. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
138. *Ibid.*, Article 19.
139. *Ibid.*, Article 1(a).
140. *Ibid.*, Article 2(1).
141. *Ibid.*, Articles 7 and 8.
142. The Regulation has been harshly criticised by some freedom of information watchdog groups, who believe that it weakens the rights of citizens and does not fulfill the Amsterdam treaty requirements. See European Citizens Action Service, European Environmental Bureau, European Federation of Journalists, the Meijers Committee, and Statewatch, "Open letter from civil society on the new code of access to documents of the EU institutions," 2 May 2001. See also critical comments on the drafting process in Tony Bunyan, Deirdre Curtin and Aidan White, *Essays for an Open Europe*, European Federation of Journalists, November 2000.
143. Note 137, at Article 4(1).
144. *Ibid.*, Articles 4(5) and 9.
145. *Ibid.*, Article 5.
146. Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44. The Special Rapporteur's elaboration was quoted above.
147. (London: ARTICLE 19, June 1999). Online at www.article19.org/docimages/512.htm
148. Note 12, at para. 43.
149. Note 32, at 27.

ANNEX I

COMMONWEALTH FREEDOM OF INFORMATION PRINCIPLES

Commonwealth Law Ministers recalled that at their Meeting in Barbados in 1980 they emphasised that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information".

Ministers noted that since that time a number of Commonwealth countries have enacted freedom of information legislation establishing a public right of access to government information. Their experience has demonstrated that these laws enhance

the effectiveness of government. Other Commonwealth countries are preparing legislation drawing on this rich practical experience.

During the 1990s the Commonwealth, guided by its fundamental political values enshrined in the 1991 Harare Commonwealth Declaration, has sought to promote democracy, the rule of law, just and honest government and fundamental human rights. In consolidating the achievements of the past decade the Commonwealth seeks to focus its efforts on strengthening the processes of open and accountable government together with the promotion of sustainable development.

The 1990s has been a decade of democratisation with a number of countries, many within the Commonwealth, making the transition from one party and authoritarian regimes to elected representative governments.

The new millennium promises to be an era for transparency and accountability on the part of government and all sectors of society concerned with public life. These trends will be further stimulated by the growth of information technology and increased globalisation and interdependency of national economies.

Benefits Of Freedom Of Information

Freedom of information has many benefits. It facilitates public participation in public affairs by providing access to relevant information to the people who are then empowered to make informed choices and better exercise their democratic rights. It enhances the accountability of government, improves decision-making, provides better information to elected representatives, enhances government credibility with its citizens, and provides a powerful aid in the fight against corruption. It is also a key livelihood and development issue, especially in situations of poverty and powerlessness.

Commonwealth Freedom of Information Principles

Ministers formulated and adopted the following Principles

1. Member countries should be encouraged to regard freedom of information as a legal and enforceable right.
2. There should be a presumption in favour of disclosure and Governments should promote a culture of openness.
3. The right of access to information may be subject to limited exemptions but these should be narrowly drawn.
4. Governments should maintain and preserve records.
5. In principle, decisions to refuse access to records and information should be subject to independent review.

The Role Of The Commonwealth

Ministers recommend that the Commonwealth Secretariat takes steps to promote these principles and to report to Law Ministers about the progress achieved at their next Meeting. They also asked that the Secretariat, subject to the availability of resources, facilitate and assist governments in promoting these principles through technical and other assistance including measures to promote the sharing of experience between member countries and the involvement of civil society in this process.

Ministers encouraged Commonwealth associations and organisations to consider ways in which they can contribute to the process of promoting the right to know.

ANNEX II

EXCEPTIONS TABLE

Explanatory Note

The following table compares the regime of exceptions in freedom of information legislation in eight countries – Australia, Canada, Ireland, Japan, New Zealand, South Africa, the United Kingdom and the United States – as well as the Policy on Information Disclosure of the World Bank. Each box in the table contains two different types of information. First, each box sets out the scope of the exception in the relevant jurisdiction. Each box also provides the test used to determine whether information falling within the scope of an exception may be withheld, which may be referred to as the 'harm test'. For example, in some cases information may be withheld only if it is "reasonably expected to harm" the protected interest, or it is "likely to cause prejudice" to it. In some cases, no harm is required (i.e. the law establishes a class exception in relation to a whole category of information). In that case, the table indicates that there is "no harm test".

The table does not include a small number of exceptions which are only found in one law and appear to have narrow, country-specific relevance (for example, the South African law excepts certain records of the Revenue Service). As the table shows, there is fairly broad agreement as to which social or personal interests are sufficiently important to overcome the presumption in favour of disclosure of information.

| Exceptions | Australia | Canada | Ireland |
|---------------------------|--|--|--|
| Future Publication | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ publication required by law <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ deferred access until publication due (21) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ believes reasonably <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ will be published by a public body within 90 days (26) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ publication required by law within 12 weeks <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ no access (10(1)(d)) |
| Security Bodies | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test | no such exception | no such exception |

| | | | |
|--------------------------------|---|---|---|
| | <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ security bodies excluded ○ document originated with or received from security bodies (7) | | |
| National Security | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to cause damage ○ Minister's certificate conclusive <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ security ○ defence (33) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to be injurious <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ defence of Canada ○ detection or prevention of subversive or hostile activities (15) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably be expected to affect adversely ○ Minister's certificate conclusive <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ security and defence, including intelligence and information communicated in confidence relating thereto (24) |
| Defence | no separate exception (see National Security) | no separate exception (see National Security) | no separate exception (see National Security) |
| International Relations | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to cause | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to affect adversely |

| | | | |
|--|---|---|--|
| | <p>damage</p> <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ international relations ○ information supplied in confidence (33) | <p>expected to be injurious</p> <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ conduct of international affairs ○ positions of government for international negotiations ○ diplomatic correspondence with foreign states (15) <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ obtained in confidence from State, IGO, province or municipal government (13) | <ul style="list-style-type: none"> ○ Minister's certificate conclusive <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ international relations ○ relations with Northern Ireland ○ communications between Ministers and diplomatic missions (Irish and foreign) ○ confidential communications with IGOs (24) |
| Relations between Administrations | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to cause damage ○ Minister's certificate conclusive <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ relations between the Commonwealth and a State ○ information supplied in confidence from State to Commonwealth (33A) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to be injurious <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ conduct of federal-provincial affairs (14) | no such exception |
| The Economy and Financial or Commercial Interests of the Government | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ contrary to public interest because reasonably expected to have a substantial adverse effect or result in undue disturbance <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ ability of the government to manage the economy ○ ordinary course of business (44) ○ financial or property interests of | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to prejudice or materially injure <p><u>Element:</u></p> <ul style="list-style-type: none"> ○ competitive position of a government institution ○ financial interests of government ○ ability of the government to manage economy (18) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to have a serious adverse effect or to result in undue disturbance to <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ financial interests of the State ○ ability of the Government to manage economy ○ ordinary course of business (31) |

| | | | |
|------------------------|---|---|--|
| | Commonwealth (39) | | |
| Investigations | no separate exception (see Law Enforcement) | no separate exception (see Law Enforcement) | no separate exception (see Law Enforcement) |
| Law Enforcement | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to prejudice <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ investigation of breach of law ○ tax law administration ○ of justice ○ fair trial ○ law enforcement (37) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ investigations into crimes or unlawful activities or threats to security ○ investigative techniques (16) <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to prejudice or impair <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ prevention, detection, investigation of offences ○ enforcement of any law ○ security of penal and mental health institutions, buildings and certain communication systems |

| | | | |
|---|--|---|--|
| | | <p>expected to be injurious to or facilitate</p> <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ law enforcement ○ conduct of lawful investigations ○ security of penal institutions ○ commission of an offence (16) | <ul style="list-style-type: none"> ○ reveal confidential sources of information <p><u>Other:</u></p> <ul style="list-style-type: none"> ○ does not apply to an illegal investigation or ○ information on performance of public bodies or law enforcement programme (23) |
| Court Records | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ non-administrative court documents (5) | <p>courts are excluded from the ambit of the Act (Schedule 1)</p> | <p>courts are excluded from the ambit of the Act (46)</p> |
| Decision-making and policy formulation | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test but purely factual material not included <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ Cabinet documents (34) ○ Executive Council documents (35) ○ opinions or advice for deliberative purposes if not in public interest to disclose (36) ○ substantial adverse effect on management or conduct of an agency (40) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test but time limit of 20y and not applicable to reasons for decisions affecting individuals <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ advice or recommendations by government institution ○ deliberations involving officers ○ negotiations on behalf of the government (21) <p><u>Test:</u></p> | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test but time limit of 5y and does not cover factual information relating to published decision <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ submitted for consideration by Minister ○ Government record other than a decision to publish statements made at meetings (19) <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ contrary to |

| | | | |
|---------------------------------------|---|--|--|
| | | <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ confidences of the Queen's Privy Council (69) | <p>public interest</p> <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ deliberative processes <p><u>Other:</u></p> <ul style="list-style-type: none"> ○ does not apply to factual information, reasons for making a decision, reports of efficiency of public bodies (20) |
| Communication with Her Majesty | no such exception | no such exception | no such exception (but the President is excluded from ambit of the Act (46(d))) |
| Health and Safety | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to endanger <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ life or physical safety ○ prejudice the protection of public safety (37) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to threaten <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ safety of individuals (17) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to prejudice or impair <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ safety of the public, persons or property (23) |

| | | | |
|--|--|--|---|
| <p>Personal Information</p> | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ unreasonable to disclose <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ personal information (41) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ refers to Privacy Act <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ personal information pursuant to s.3 of Privacy Act (19) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ personal information <p><u>Other:</u></p> <ul style="list-style-type: none"> ○ does not apply if: relates to applicant; third party consents; information generally available; disclosure is necessary to avoid serious and imminent danger to life or health (28) |
| <p>Information provided in confidence</p> | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ actionable breach of confidence <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ obtained from third party (45) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ consistently treated as confidential <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ obtained from third party (20) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ various <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ supplied in confidence and likely to prejudice the future flow of information to the public body ○ actionable breach of confidence <p><u>Other:</u></p> <ul style="list-style-type: none"> ○ does not apply to information not confidential by law and where confidentiality owed to member of public body (26) |
| <p>Legal Privilege</p> | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ covered by professional legal | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ covered by solicitor-client privilege | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ covered by legal professional privilege |

| | privilege (42) | (23) | (22)(1)(a) |
|-------------------------------|---|---|--|
| Commercial Interests | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ trade secret (43) ○ document of Ministerial Council for Companies and Securities (47) <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably expected to <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ destroy commercial value of information ○ unreasonably adversely affect business affairs ○ prejudice future supply of information to the Commonwealth (43) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ trade secret (20) <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ reasonably be expected to <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ result in financial loss or gain ○ prejudice the competitive position of a third party ○ interfere with negotiations of a third party (20) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ various <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ trade secrets ○ reasonably expected to result in loss or gain ○ could prejudice negotiations <p><u>Other:</u></p> <ul style="list-style-type: none"> ○ does not apply if person consents, generally available, necessary to avoid serious danger (27) |
| Statutory Prohibitions | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ prohibited under laws in Schedule 3 ○ this section expressly engaged (38) ○ contempt of court ○ order of Royal Commission ○ infringe Parliamentary privilege (46) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ prohibited under laws in Schedule II (24) | <p><u>Test:</u></p> <ul style="list-style-type: none"> ○ no harm test <p><u>Elements:</u></p> <ul style="list-style-type: none"> ○ prohibited under any other law except those listed in the Third Schedule (which includes parts of the Official Secrets Act) ○ non-disclosure is authorised by any other law (32) ○ would constitute contempt of court (22)(1)(b) |

| | | | |
|-----------------------|----------------------------|----------------------------|----------------------------|
| Additional Exceptions | no power to add exceptions | no power to add exceptions | no power to add exceptions |
|-----------------------|----------------------------|----------------------------|----------------------------|

CHAPTER 2

COUNTRY STUDY - INDIA

2.1 Introduction

In India, the right to information¹⁵⁰ has been developed through diverse strands for almost the entire period of the country's independent history. Only now are these strands coming together to form the 'critical mass' needed to crystallise the issue into positive action on the part of the people as well as the government.

India is a vast and densely-populated country with a variety of different cultures, customs and languages. The problems which beset this huge nation range from low literacy rates, high birth and infant mortality rates, social and economic tensions ranging from differing levels of development to class, caste and communal conflicts, gender discrimination and a relatively poor record of civil rights. The last few years have also seen political instability, with frequent elections and governments with small parliamentary majorities. Despite these problems, India has a dynamic Constitution, a dogged commitment to democracy and a large number of civil society groups working on a diverse range of issues including health, education, civil and political rights, communalism and empowerment of women.

India shares with other Commonwealth countries a colonial past,¹⁵¹ and much of the legal framework derives from this period. Having gained independence in 1947, in 1950 India adopted its own Constitution setting up a federal parliamentary democracy with universal adult franchise. Importantly, the Constitution enshrined a Bill of Rights,¹⁵² which has been instrumental in protecting basic human rights. India has a bicameral central legislature, or Parliament, and mainly unicameral State Legislative Assemblies. A third tier has recently been added in the form of local government, including the

important village-level *Gram Panchayats*, elected directly by the local people and now vested with wide powers including control over development funds and powers in relation to revenue collection and generation.

The civil administration is run along much the same lines as during the colonial period – through a network of powerful, centrally-controlled bureaucracies supported by the State. For administrative purposes, the country is divided into 463 districts, each headed by a senior bureaucrat called the District Magistrate or the Collector. All these different levels of administration affect people directly and it is primarily at the local level that ordinary people find themselves grappling with issues of access to information.

This study traces developments regarding the right to information both in the social and legal spheres, as well as demonstrating the relevance of the right to information to the entire spectrum of rights. Developments regarding the right to information have taken place at a number of levels and around many issues, all of which now complement each other in a forceful campaign for greater openness and transparency. Over the last five years in particular, more frequent interventions regarding transparency and access to information across a range of issues have brought it into sharp focus.

2.2 Information: What it Means and to Whom

The phrase 'freedom of information' has itself become a subject of debate in India. Many local activists and legal experts prefer to use the term 'right to information' as they see 'freedom' as signifying mere prohibition of government interference, whereas applying the term 'right' imposes a positive duty on government to disseminate information to the people. In the Indian Constitution, most of the freedoms enumerated in Article 19, which guarantees freedom of expression, require the State to refrain from interfering. A 'right', on the other hand, is understood in India as placing a positive duty on the State to take steps to ensure its fulfilment. Madhav Godbole, erstwhile Union Home Secretary and right to information activist, says in his critique of the Freedom of Information Bill, 2000, "Since the Bill makes it a point to talk only about *freedom* of information as opposed to *right* to information, it has lent itself to some clumsy construction ... all citizens have a right to information."

Two aspects of the right to information are particularly important to the current debate:

- information to which access must be given upon request; and
- information which must be published and disseminated *suo motu* (proactively) by public authorities, including information

which would affect fundamental rights such as food, environment and civil liberties.

Particular emphasis is being paid to *suo motu* publication, given the background of illiteracy and poverty that prevails in most parts of the country.

Although 'information' in the current debate refers primarily to information held by public authorities, strong arguments can be made to extend the scope of the term to certain kinds of information held by private parties. The right to information would then become a right to seek and receive information from public authorities, as well as a right to access certain kinds of information from private actors.

The right to information derives from the democratic framework established by the Constitution and rests on the basic premise that since government is 'for the people', it should be open and accountable and should have nothing to conceal from the people it purports to represent. In this context, the following observation seems to sum up the philosophical basis of the right to information:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purpose of parties and politics or personal self-interest or bureaucratic routine. *The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.* [emphasis added]¹⁵³

2.3 The Need for the Right to Information

Harsh Mander, a government official and advocate of the right to information, has described the importance of this right as follows:

Information is the currency that every citizen requires to participate in the life and governance of society. The

greater the access of the citizen to information, the greater would be the responsiveness of government to community needs. Alternatively, the greater the restrictions that are placed on access, the greater the feelings of 'powerlessness' and 'alienation'. Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices. Government information is a national resource. Neither the particular government of the day nor public officials create information for their own benefit. This information is generated for purposes related to the legitimate discharge of their duties of office, and for the service of the public for whose benefit the institutions of government exist, and who ultimately (through one kind of import or another) fund the institutions of government and the salaries of officials. It follows that government and officials are 'trustees' of this information for the people.¹⁵⁴

The main thrust of the movement for the right to information in India has seen this right as being closely related to survival. Food security, shelter, environment and employment are all bound up with the right to information. In the absence of information on these issues, people remain marginalised and excluded from their rightful place in society. It is for this reason that in India, the movement for right to information has been as vibrant in the hearts of marginalised people as it is on the pages of academic journals and in media coverage.

The net result of secrecy has been disempowerment of common people and their exclusion from processes which vitally affect their existence. Information on matters such as employment schemes, obtaining certificates for various purposes, recommendations for different types of loans, access to different poverty alleviation programmes, irrigation, drinking water, sanitation and education is a must for ordinary people, whether provided proactively or on request.

In recent years, the historic lack of information on these and other matters has been mitigated by factors such as the growth of democratic values, the 'information revolution' and the decentralisation of governance through the *Gram Panchayats* (village elected bodies), which are responsible for all of the issues noted in the preceding paragraph. However, although political power has been decentralised, the problem of gaining access to information remains at the level of local officials, who are often reluctant to be open because they represent vested interests or are party to corruption and misappropriation of funds.¹⁵⁵

2.3.1 An Antidote to Corruption

India has the dubious tag of being the twentieth most corrupt nation in a recently-compiled list of 91 countries around the world.¹⁵⁶ This is consistent with most people's everyday experiences; corruption in India is rampant, from the common clerk to the highest offices of the country. Big scams – for example regarding defence deals,¹⁵⁷ fodder procurement¹⁵⁸ and sugar prices¹⁵⁹ – have frequently made the headlines. Although formally they are just 'allegations' (by its very nature proof of corruption to the level required by the law is difficult) many appear to have substance. Coupled with the tardiness of the judicial system, these scams have done serious harm to the economy. Although media attention tends to focus on mega-scams, small-scale corruption is widespread and affects the everyday lives of ordinary people, for whom it has become a routine social and financial burden. People even have to pay bribes to access basic information, such as their own electricity bills. The right to information is thus a potent tool for countering corruption and for exposing corrupt officials.

Lack of transparency leads to suspicion of corruption even when it is absent, miring the government in unnecessary controversy and slowing down reform. For example, every move to privatise the public sector leads to suspicion on the part of the public and there are frequent allegations of corruption and bribery. An interesting example was the sale of 51 per cent of the shares of Balco, an aluminium plant in Chhattisgarh, to Sterlite, a private company. Although the sale was dogged by allegations of bribery, they have not been substantiated. More openness would have helped deflect false allegations, reassured the public and bolstered support for the reform process.

2.3.2 Limiting Abuse of Discretion

Officials can abuse their discretion to suit various political or other vested interests, as well as to misappropriate funds. For instance, the power given to Collectors¹⁶⁰ to allocate tribal land to non-indigenous people or to convert agricultural land to non-agricultural land has been seriously misused all over the country. Since these are administrative matters, they tend to be hidden from disclosure, fostering abuse of power. While in theory it is possible to obtain a State High Court order to compel disclosure of this information, in practice this is not possible for poor indigenous people or villagers, given the cost, distance and delays involved.

Another problem is the lack of transparency regarding selection for public posts. To counter this, in one district in Bihar an official advertised the posts in the local newspapers and then published the entire list of applicants along with their qualifications. This created a space for people to challenge both wrong information and inappropriate appointments. By being open, the appointing authority was also protected from pressures from managers and politically powerful people.¹⁶¹ The right to information is therefore important to check abuse of administrative discretion and to ensure fair process.

2.3.3 Protection of Civil Liberties

The right to information is also necessary for protecting civil liberties, for example by making it easier for civil society groups to monitor wrongdoing such as 'encounter killings' (extra-judicial killings by the police) or the abuse of preventive detention legislation. In a recent case in Uttar Pradesh, several people, including a 14-year-old boy, were shot dead by the police in an alleged run-in with 'naxalites'.¹⁶² Angry citizens' groups have alleged that those killed were innocent indigenous people and have demanded the criminal records of those killed.¹⁶³ The fact that the authorities regularly refuse to release information to civil society on such issues is indicative of the need for right to information legislation.

Custodial institutions are some of the most opaque places in the country. Violations in custody range from blinding prisoners, keeping convicts in jail long after they have served their sentences, and abuse of women and children. Effective community monitoring of these institutions, for example through unofficial visits, is dependent upon access to information. The Supreme Court of India has found it necessary to address the problem of torture and ill-treatment in custodial situations by enforcing transparency through specific guidelines. In a recent case, the Court stated:

Custodial violence, including deaths and torture in the lock ups, strikes a blow at the rule of law. ...
Transparency of action and accountability perhaps are the two safeguards which this court must insist upon.¹⁶⁴

Some governments are considering providing explicitly for the right to information in relation to prisons. This is the case, for example, with a new Prisons Bill presently under consideration in Rajasthan. Although abuse remains rampant despite these developments, there are a few examples of prisons where the record of abuse has diminished; in most cases this is a direct result of transparency enforced by the officials in charge.¹⁶⁵

2.3.4 A Matter of Life and Death

Food, shelter, livelihood and education, the most important aspects of a person's life, are provided in most rural areas through numerous 'schemes' run by the central or State government. Food, for example, is distributed through the notoriously corrupt 'Public Distribution System' – a network of 'ration shops' which distribute subsidised grains and other essentials. Stock registers are poorly maintained and are not available for inspection by the public. Corrupt practices include the replacement of grains with poor quality stocks or even non-distribution on the pretext of 'unavailability'.

There are also schemes for providing housing,¹⁶⁶ employment¹⁶⁷ and education.¹⁶⁸ Funds for these schemes are routed through the network of bureaucrats from the central or the state government down to the village. Although meant for the poorest of the poor in the rural areas, these funds have been routinely misappropriated and/or misused on a scale which, even on a rough calculation, would amount to many times that of the better-known large-scale corruption scandals.

In most cases, people do not know about the existence of these schemes, or at least salient details, such as their entitlements under the scheme, paving the way for them to be tricked into accepting less than their allocation through forgery. Furthermore, records are often tampered with, a relatively simple practice because no one outside the tight-knit governmental circle has access to them. For example, many records list fictitious beneficiaries of the schemes.

Land and lack of information about land entitlements and records is a major problem, especially since nearly two-thirds of the population are dependent on agriculture. A regular complaint with rural people is the inability to access their own land records. To get a copy of their *patta*¹⁶⁹ is difficult. Not only are there delays and repeated time-consuming visits to various offices, but they also routinely have to pay bribes to the *patwari*, the *tehsildar* or the Block Development Officer (BDO).¹⁷⁰ Lack of access to land records and knowledge about land laws have led to frequent instances of 'land grabbing' by powerful people. Here again, a common problem is the manipulation of records, especially where the beneficiary is a widow or an indigenous person.

Health schemes are rarely advertised sufficiently to enable people to benefit from them. The anti-polio campaign is a case in point. The polio immunisation programme has received large amounts of government and international funding and yet many people are left out, due to ignorance about the scheme. This is compounded by an inability to monitor whether or not the vaccines have been administered properly, in part because information is not publicly available. In one incident in Uttar Pradesh, an epidemic of Japanese encephalitis broke out. Local health organisations were told that the preventive vaccine was not being manufactured at the responsible institute whereas in fact the government had simply failed to requisition the medicine. This only came to light long after the epidemic had broken out.¹⁷¹

The Case of the Sardar Sarovar Dam

The Sardar Sarovar dam, on the Narmada river as it flows through Madhya Pradesh, has been mired in controversy for nearly two decades for being environmentally unsound and for displacing thousands of villagers in a largely indigenous belt. The dam-building process has been going on for years (starting

with State acquisition of land from the villagers) but the availability of information about this important project has been very limited. People affected have been provided with almost no information regarding the construction of the dam, the acquisition of their lands, their own Displacement, and compensation or relief packages. This is highlighted in a series of reports by a Delhi-based NGO working on the issue of displacement and rehabilitation.¹⁷² The foreword to the report presents the picture succinctly:

[W]e found that the level of information about the dam, the submergence, displacement and rehabilitation is lamentably low. Information about the dam was given only when displacement began to loom on the state government's horizon. Though stone markers indicating the level of submergence were put in or were supposed to have been put in five to ten years ago, no-one bothered to explain their purport to the villages. ... There was no interaction with the local people at all. Even more pertinent is the total illegality of the whole operation. Section 4 of the Land Acquisition Act, 1894 (and its successor 1984) requires that the occupier must be given a notice that his land is likely to be acquired for a public purpose. Only after giving the notice can any work of surveying, soil testing etc. be done in that land. Admittedly, the notice does not have to be served individually but what sort of a public notice is it, if no-one, not even the *pati*¹⁷³ has seen it? What sort of democracy is it if the stone markers are implanted with indifference and silence at best and callous secrecy at worst? Nowhere in the valley did we meet anyone who had actually seen a public notice or had it read out to him.

The quality and quantity of information given to the villagers had varied quite a bit from village to village, *tehsil to tehsil*.¹⁷⁴ Some were ill-informed, others were misinformed. But no-one had been informed about the full extent of their rights under the Award.¹⁷⁵ "Go to Gujarat if you want land" they were told; no one added that they had right to land in Madhya Pradesh. "You can get five acres of land", said some other officer without adding that this was the bare minimum and a farmer who had more than five acres was entitled to as much land as he loses, subject to ceiling laws.¹⁷⁶

Environmental issues like contamination of groundwater have a direct effect on people's lives and yet very little information on these problems is available. This means that people continue to suffer the ill-effects until it is too late to take action, often with disastrous consequences. The government's own environmental policy states this succinctly:

The Case of the Union Carbide Corporation

The Union Carbide Corporation disaster occurred in Bhopal, Madhya Pradesh in 1984 and is (in)famous worldwide. Methyl isocyanate, a lethal gas, spread out into a densely-populated area of this large capital city, killing several hundred people and harming many more. The lack of information about this massive disaster continues to raise serious questions even today. People are still asking about the government's responsibility. Did they allow this factory to function without finding out about its real nature? If someone in government did know of the potentially harmful nature of its activities, how was it allowed to carry on? Did the people have a right to know about the dangers of this chemical? What about the responsibility of Union Carbide, as a private business, towards the people in whose environs they operate? As one author has noted:

The tragedy in Bhopal can be seen not merely as a failure of technology but as a failure of knowledge. The accident might not have happened at all if the right people had obtained the right information at a time when they were capable of appreciating it and taking appropriate preventive action. ... A central challenge for the future right to know policies is to bridge the information gaps and the communication gaps that are likely to arise in the course of technology transfer.¹⁷⁷

The government's response even in the wake of the tragedy has been secretive.

It has refused to release crucial information, for example to help people to get medical treatment and rehabilitation packages. It has also tried to stem the flow of information, in one case by arresting people under the Official Secrets Act for taking notes at a meeting where officials and non-governmental organisations were present.

[T]he public must be aware in order to be able to make informed choices. A high government priority will be to educate citizens about environmental risks, the economic and health dangers of resource degradation and the real cost of natural resources. Information about the environment will be published periodically. ... Access to information to enable public monitoring of environmental concerns will be provided for.¹⁷⁸

An Indian scientist has commented on the need for the government to share information on nuclear radiation:

If the government claims that nuclear plants are necessary, then it ... has to inform the public about the sacrifices involved. ... The BARC¹⁷⁹ should disclose how much of the highly radioactive waste generated from the plutonium processing plant is stored there and in what forms. ... [T]he use of the Official Secrets Act in preventing public access to data relating to their health is an artefact of British imperialism and should be abandoned. Moreover, there is no reason to keep health and environment data secret.¹⁸⁰

Consumer information is another area where it is important to have proactive dissemination of information, and consumer groups are fighting for stricter labelling laws on domestic as well as foreign products, especially food and medicines. Mandatory labelling of non-vegetarian products has recently been approved by the government under the Prevention of Food Adulteration Act.¹⁸¹

2.3.5 Participation

Participation in political and economic processes and the ability to make informed choices is restricted to a small elite in India. Consultation on important policy matters, even when they directly concern the people, is rare. Even where 'consultation' is mandatory, for example under the Environment Protection Act, information-sharing is limited, undermining the whole 'consultative process'. Furthermore, reports pertaining to these consultations are difficult to access.

The impact on local people of globalisation, and the 'economic reforms' it has brought, is often made far more severe because of the non-participatory way in which these reforms were developed and the lack of information about them. For example, small dairy farmers were not informed about the opening up of the Indian market to imports of milk products under World Trade Organisation rules. As a result, they failed to prepare for this change and many of them have been forced out of the market.

The need for more openness as an aspect of democratic and effective governance has been accepted not only by international organisation like the World Bank (which is presently conducting a widespread consultation on how best to strengthen its Disclosure Policy), but also by private enterprise. A recent industry report on infrastructure development made a strong case for greater transparency:

[F]rom the viewpoint of infrastructural development, information regarding state and local bodies when regularly and routinely available to the people, should do much to reform governments, especially in their enterprise and regulatory dimension. Nothing could be better for commercial provisioning and for good governance which engenders local (and general) development.¹⁸²

2.3.6 Knowledge of Laws and Policies

India has some very progressive legislation,¹⁸³ backed up by progressive court judgments, but these laws are often largely confined to the books and fail to be fully implemented because they have not been effectively disseminated. For example, for years after the new forest laws were put into place, few people understood the conditions they placed on cutting down trees, leading to harassment and threats by local forest officials against villagers for cutting on their own land. In Madhya Pradesh, it was reported that any 'pink coloured paper' could be used to exploit indigenous people as they identify it as a penalty slip for violating forest laws.

2.3.7 Elixir for the Media

The need for the media to be able to access information is of crucial importance in India, as it is elsewhere the world. The media provide a link between the people and their government and act as a vehicle of mobilisation. This role is particularly important in India, where the media played a major role in the freedom struggle as well as during the period of internal emergency, when civil and political rights were suspended.¹⁸⁴ The media's right to information is not a special privilege but rather an aspect of the public's right to know, which the media play a key role in ensuring. This view finds support in statements of the Supreme Court of India in cases involving claims of press freedom.¹⁸⁵

Unfortunately, the media in India are starved of important official information. A former Chairman of the Press Council of India remarked in 1987:

[I]mportant information is at times sought to be withheld by the authority in power on the plea of the bar of the Official Secrets Act even in matters where the Act may not have any application at all, causing a great deal of harassment to journalists and imposing improper curbs on the freedom of the press. ... I feel that appropriate legislative measures should be adopted in our country not only for the right of the Press to information but also for proper implementation of this right.

The lack of a right to access official information causes many problems for the media. Balanced reporting is often difficult and it may be impossible to substantiate facts. The professional practice whereby journalists should verify information through a second source is difficult when government officials refuse to talk about an issue. Journalists resort to gathering information through illegitimate means, such as bribes and pandering to the whims of officials. As N.R. Mohanty, the regional chief editor of a leading English daily has said: "Investigative journalism has become nothing but collecting basic information". This syndrome has been aptly termed 'co-opting and corrupting' by a senior journalist.¹⁸⁷ The system first 'co-opts' the media and then 'corrupts' it, as journalists provide biased news, suppressing or distorting information and blunting criticism to maintain good relations with officials and, therefore, a flow of information.

2.4 The Existing Information Regime

India does have some legislation that provides for limited access to official information and a line of constitutional interpretation reading a right to information into the guarantee of freedom of expression. However, the free flow of information is severely restricted by three factors:

- the legislative framework includes several pieces of restrictive legislation, like the Official Secrets Act, but there is no law on freedom of information giving individuals a right to access information held by public authorities;
- the pervasive culture of secrecy and arrogance within the bureaucracy; and
- the low level of literacy and rights awareness among the people.

2.4.1 Constitutional Guarantees

The recognition of the right to information as being included in the constitutional guarantees of freedom of speech and expression finds its genesis in Supreme Court decisions challenging governmental control over newsprint and bans on the distribution of newspapers. In a landmark case the petitioners, publishers of one of the leading national dailies challenged restrictions in the Newsprint Control Order on the acquisition, sale and use of newsprint. The Supreme Court struck down the restrictions on the basis that they interfered with the petitioners' right to publish and circulate their paper freely, which was included in their right to freedom of speech and expression. The judges remarked:

It is indisputable that by freedom of the press [is] meant the right of all citizens to speak, publish and express their views. ... Freedom of speech and expression includes within its compass the right of all citizens to read and be informed.

The dissenting judgment of Justice K.K. Mathew emphasised two aspects of freedom of speech: the individual interest in expressing oneself and the social interest in the attainment of truth. Regarding the latter, Mathew noted: "Now in the method of political government the point of ultimate interest is not in the words of the speakers but in the hearts of the hearers".¹⁸⁸

In a subsequent case, the Supreme Court held that media controlled by public bodies were required to allow both sides of an issue to be aired. Mr Shah, the director of a non-governmental consumer rights organisation, wrote a paper highlighting discriminatory practices by the Life Insurance Corporation, a government-controlled body. The Corporation published a critique of this paper in its institutional publication but refused to publish Mr. Shah's rejoinder. The Court held that a State instrumentality having monopolistic control over any publication is under an obligation to publish views contesting those it had presented.¹⁸⁹

The principle that the public have a right to receive information was even more clearly enunciated a few years later when the Court stated:

The basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is *the people's right to know*.¹⁹⁰ [emphasis added]

In the area of civil liberties, the courts have tried to ensure a transparent criminal justice system, free from arbitrariness. The Supreme Court has specifically detailed all the information which must be recorded and provided to the accused or his or her family in order to achieve this objective. Listing the procedural safeguards for arrest and custody, the Supreme Court said, "Transparency of action and

accountability perhaps are the two possible safeguards which this Court must insist upon."¹⁹¹ Furthermore, in *Prabha Dutt v. Union of India*¹⁹² the Court held that there could be no reason for refusing permission to the media to interview prisoners on death row, unless there was clear evidence that the prisoners had refused to be interviewed. Thus, the right to acquire information includes the right to access sources of information.

The linkage between the right to life and liberty, guaranteed by Article 21 of the Constitution, and the right to know was clearly affirmed in another case by Justice Mukharji, who stated:

We must remember that the people at large have a right to know in order to take part in a participatory development in the industrial life and democracy. Right to know is a basic right to which citizens of a country aspire under Article 21 of our Constitution.¹⁹³

The right to access official information was further developed in a case where the respondent sought access to documents pertaining to the security arrangements, and the expenses thereof, of the Prime Minister. The Prime Minister claimed the right to decide whether disclosure of certain privileged documents was in the public interest or not. The Supreme Court noted:

While there are overwhelming arguments for giving to the executive the power to determine what matters may prejudice public security, those arguments give no sanction to giving the executive exclusive power to determine what matters may prejudice the public interest. Once considerations of national security are left out there are few matters of public interest which cannot be safely discussed in public.¹⁹⁴

The right to know has been reaffirmed in the context of environmental issues which have an impact upon people's very survival. Several High Court decisions have upheld the right of citizens' groups to access information where an environmental issue was concerned. For example, in different cases the right to inspect copies of applications for building permissions and the accompanying plans,¹⁹⁵ and the right to have full information about the municipality's sanitation programme¹⁹⁶ have been affirmed.

The overall impact of these decisions has been to establish clearly that the right to freedom of information, or the public's right to know, is embedded in the fundamental rights provisions of the Constitution. This position has been relied upon not only by independent advocates of the right, but also by official committees, as well as in the Objects and Reasons of the Bill on Freedom of Information, 2000.

2.4.2 Laws Which Facilitate Disclosure¹⁹⁷

Various Indian laws provide for the right to access information in specific contexts. Section 76 of the Indian Evidence Act, 1872 contains what has been termed a "Freedom of Information Act in its embryonic form".¹⁹⁸ This provision requires public officials to provide copies of public documents to anyone who has a right to inspect them. The preceding section defines public documents relatively broadly.

The Factories Act, 1948 provides for compulsory disclosure of information to factory workers "regarding dangers including health hazards and the measures to overcome such hazards", arising from their exposure to dangerous materials. While this is an excellent provision, requiring *suo motu* disclosure from private parties, in practice it is violated with impunity. The only recourse for those who believe their rights under it have been breached is to file a case in court, which in practice presents an impossible hurdle for most people.

Section 25(6) of The Water (Prevention and Control of Pollution) Act, 1974 requires every state to maintain a register of information on water pollution and "so much of the register as relates to any outlet or any effluent from any land or premises shall be open to inspection at all reasonable hours by any person interested in or affected by such outlet, land or premises". The Air (Prevention and Control of Pollution) Act, 1981 contains similar provisions for disclosure of information about air pollution. However, both of these laws allow for the withholding of information if disclosure is "against the public interest". The ambit of this vague term is not specified.

The Environment (Protection) Act, 1986, The Environment (Protection) Rules, 1986 and the Environmental Impact Assessment Regulations provide for public consultation and disclosure in various circumstances. For example, the Environmental Impact Assessment Regulations set out, in paragraph 2(l)(a), read with Schedule IV, a procedure for public hearings and the requirement for the publication of the executive summary of a proposal for any project affecting the environment, prepared by the person seeking to execute that project.¹⁹⁹ Although this provision is meant to facilitate citizen input, in fact it is too limited and environmental groups have had to go to the courts to get more complete disclosure.

2.4.3 Secrecy

The system of governance in India has traditionally been opaque, with the State retaining the colonial era Official Secrets Act (OSA) and continuing to operate in secrecy at the administrative level. This has been exacerbated by the traditional feudal mindset which presupposes a distance between the 'rulers' and the 'ruled', with the former being a privileged class. Openness in government was neither consciously promoted as a culture nor reflected in major legal changes until a few

years ago, when laws like the Environment Protection Act started to impose requirements of public hearings and mandatory disclosures.

The leading piece of secrecy legislation, The Official Secrets Act, 1923, is a replica of the British Official Secrets Act, 1911. Although this legislation has been substantially reformed in Britain, the Indian version retains its original form, apart from some minor amendments in 1967. Experience has verified concerns about the vast scope of this legislation which were expressed by one of India's foremost statesmen and jurists, Sir Hari Singh Gour, when he said during the debate on the Bill in the Central Legislative Assembly:

Your provisions are so wide that you will have no difficulty whatever in running in anybody who peeps into an office for some [information], it may be entirely innocent enquiry as to when there is going to be the next meeting of the Assembly or whether a certain report on the census of India has come out and what is the population of India recorded in that period.²⁰⁰

Section 3 of the OSA deals with 'spying', while Section 5 deals more generally with 'wrongful communication of information'.

Section 3 contains sweeping restrictions, purportedly to protect against spying. It prohibits, among other things, approaching or inspecting any prohibited place, making, obtaining or communicating any sketch, plan or note which may be useful to an enemy, or obtaining or communicating any secret code which may be useful to an enemy, or which is likely to affect the sovereignty of India, the security of the State or friendly relations with other countries. Subsection (2) states that, for evidential purposes, circumstantial evidence may suffice to establish intent to prejudice State interests.

Section 5 is even more draconian and is responsible for most of the State's actions under the OSA. It deals with the possession of information which relates to a prohibited place, is likely to assist an enemy, affects the sovereignty of India, the security of the State or friendly relations with other countries, or *which has been provided in confidence by a government official* [emphasis added]. It is an offence, in relation to any such information, to communicate it without authority, to use it in a manner prejudicial to the safety of the State, to retain it without authority, or to fail to take reasonable care of it. Subsection (2) makes it an offence to receive secret information in contravention of the Act. A violation of these provisions may lead to the imposition of a custodial sentence of up to three years.

These provisions have been roundly criticised. An oft-quoted example of their abuse was in relation to the Narmada Valley Sardar Sarovar Dam project,²⁰¹ when they were used to prevent activists and journalists from accessing the dam site.

One of the main critics of the OSA has been the Press Commission. In 1954, the First Press Commission did not recommend amendment of the Act "in view of the international tensions and consequent need for ensuring that secret policies are not divulged."²⁰² However, by 1982 its position had changed and the Press Commission was of the view that the Act had "a chilling effect on the press" and that "section 5 as it stands can prevent any information from being disclosed to the public and there is widespread public opinion in the country that the section has to be modified or replaced and substituted by a more liberal one."²⁰³ A.G. Noorani summarises his critique of the OSA by saying that it is in breach of the fundamental right to freedom of speech and expression, as well as the right to life and liberty. A partial remedy, according to Noorani, would be to require any allegation of an offence under the Act to be strictly proven and to provide for a public interest defence.²⁰⁴

The Central Civil Service Conduct Rules, 1964 bolster the provisions of the OAS by prohibiting government servants from communicating any official document to anyone without authorisation.²⁰⁵ Moreover, the Manual of Office Procedure provides that only Ministers, Secretaries and other officials specially authorised by the Minister are permitted to meet representatives of the press and to give them information. If any other official is approached by a representative of the press, he or she should refer that representative to the Principal Information Officer of the Government of India.²⁰⁶

Section 123 of The Indian Evidence Act, 1872 prohibits the giving of evidence from unpublished official records without the permission of the head of the relevant department, who is free to grant or to withhold such permission as he or she sees fit. Section 124 provides: "No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

A Matter of Mindset

Often, a refusal to disclose information is the result of an intransigent mindset rather than legal prohibitions. Requests for information are frequently met with hostility, apathy or both. This is often the case even where there is no conflict of interest or question of money, and the requester has a right to the information, for instance because it concerns access to land records or information about minimum wages.

Examples of this abound. In Madhya Pradesh, where a series of executive orders was passed in several departments to implement the right to information pending legislation,²⁰⁷ people faced outright hostility and blunt refusals when asking for information. In one case, the applicants were questioned about their 'qualification' to ask for information and in another case, the applicant was threatened with physical harm. In Bihar, a well-known and respected activist was

imprisoned for several months on a false charge for daring to demand the details of expenditure for a local school building.²⁰⁸ Also in Bihar, a woman who requested information on the *Indira Awaas Yojana*, a housing scheme for the poor, was rudely asked, "aainey mein mooh dekhilil ba?"²⁰⁹ In Rajasthan, where the right to get information from local bodies was established in 1997, civil society groups have had to battle to get records relating to ordinary development work from the local *Gram Panchayats*. After a series of manoeuvres to avoid giving the records, including a formal 'resolution' of the *gram sabha*²¹⁰ denouncing the requester²¹¹ as a 'trouble maker working to create disharmony in society', the matter was taken to court and a temporary injunction against giving the documents was obtained by the *gram sewak*, a local functionary.

2.5 The State of Official Records

In many regions the standard of record-keeping is extremely poor. A typical picture of a government office is stacks of dusty files in cupboards, on shelves and on the floor, providing an easy excuse for refusing access to records on the grounds that they have been 'misplaced'. Usually, getting information from the 'records section' of an office is accompanied by delays and demands for bribes.

When 'computerisation' started, most of the computers found their way into the offices of senior staff. In the last few years, some States have started large-scale computerisation programmes to reach out to village level communities. The rapid growth of the information technology business has meant that most States are now trying to promote technology, primarily to attract investment, and this is certainly making a significant contribution to increasing the flow of information. As N. Vittal, Chief Vigilance Commissioner and Member of the Prime Minister's IT Task Force has noted:

IT makes the best use of information ... it lets people access information. ... Breakthrough in IT will expand our reach. This can empower our rural masses. We ought to put information related to all kinds of government projects on our websites. It will lead to better management of our resources. People in villages can actually get to know of the projects aimed at their development and the kind of funds that are available. They can demand better management from the administration.

One problem is that local personnel may not be properly trained to use computers to good effect, even when they are available.

Investment in technology has had positive results. For example, the '*Gyandoot*'²¹² project in Dhar District, Madhya Pradesh, which started in

January 2000, has established a network of about 600 villages (about half a million people). A computer installed in the *Gram Panchayat* office can give information about market prices or land records to any villager upon payment of a fee. Complaints can be sent to the authorities through e-mail. Andhra Pradesh and Rajasthan are also using computers to provide villages with information. However, these 'success stories' need to be viewed with some caution. A recent appraisal notes that three factors have limited the impact of these projects: lack of electricity, lack of connectivity and lack of software in regional languages.²¹³

2.6 Illiteracy and Poor Means of Communication

The poor flow of information is compounded by two factors, low levels of literacy and the absence of effective communication methods. Methods of communication are unimaginative and there is a surprising over-dependence on the written word, which is inappropriate for the large illiterate population. Traditional means of communication such as *munad*²¹⁴ have not been considered sufficiently.

There is also excessive reliance on English, instead of vernacular languages. For example, for many years the traffic authorities in New Delhi used the slogan 'Lane driving is sane driving' to encourage people to adhere to traffic safety, although the majority of bus and truck drivers are, if not illiterate, at least unable to understand this rather cryptic English. Three years ago, a cyclone warning to fishermen in coastal Gujarat was flashed across the screen of the national TV channel while a popular film was being screened. The warning was flashed in English, which few fishermen can read, instead of Gujarati or Hindi. The same problem applies regarding style. Laws, rules, notifications, orders and other official documents are drafted in an excessively legal style, which the common person cannot comprehend. Even notices designed to inform the public are often poorly worded, without keeping the user group in mind.

The mass media has been used effectively in recent times to inform people and to promote social change. Radio programmes such as *Tinka Tinka Sukh*²¹⁵ and the leprosy eradication programme have been successful. However, much more could be done, particularly by the publicly funded broadcast media. For example, a listener complained that on the day of the earthquake in Gujarat, *All India Radio* only provided information on the situation in the late afternoon.²¹⁶

2.7 Developments Towards a Right to Information²¹⁷

The campaign for a right to information has sought two key legal reforms: the amendment or repeal of the Official Secrets Act, 1923 and enactment of a specific law giving effect to the right to information.

2.7.1 Amending the Official Secrets Act

Objections to the Official Secrets Act have been raised ever since 1948, when the Press Laws Enquiry Committee recommended that "the application of the Act must be confined, as the recent Geneva Conference on Freedom of Information has recommended, only to matters which must remain secret in the interests of national security."²¹⁸

In 1977, a Working Group was formed by the government to look into the idea of amending the Official Secrets Act by relaxing its prohibitions on the dissemination of information to the public. Unfortunately, the Working Group did not recommend changes to the Act, as they were of the view that it related to the protection of national safety and did not prevent the release of information in the public interest, despite overwhelming evidence to the contrary. In 1989, a Committee was set up which recommended limiting the areas where governmental information could be hidden and opening up of all other spheres of information. No legislation followed these recommendations. In 1991, there were reports in the press to the effect that a task force had recommended amendment of the Official Secrets Act and enactment of a Freedom of Information Act, but again, no legislative action followed.²¹⁹

2.7.2 Advocacy by Civil Society

In the last decade or so, citizens' groups have started demanding the outright repeal of the Official Secrets Act and its replacement by legislation making a duty to disclose the norm and secrecy the exception. Official resistance to these demands has only highlighted the need for legal enforcement of the right to information.

The 'Press Council' Draft

The first major draft legislation on the right to information was circulated in 1996 by the Press Council of India. This draft was derived from an earlier one which had been prepared in October 1995, at a meeting of social activists, civil servants and lawyers at the Lal Bahadur Shastri National Academy of Administration, Mussoorie.²²⁰ The fact that serving officials of this institute took the initiative to convene this meeting made it a watershed in the national movement for the right to information.

Importantly, the Press Council draft affirmed in its preamble that the right to information is already protected under the Constitution as an aspect of the fundamental right to free speech and expression, in line

with a number of superior court rulings, noted above. The draft affirmed the right of every citizen to information from any public body. Significantly, the term 'public body' included not only the State, as defined in the Constitution,²²¹ but also all privately-owned undertakings, non-statutory authorities, companies and other non-State bodies whose activities affect the public interest. Thus, both the commercial sector and non-governmental organisations were included in the ambit of this draft.

The draft did provide for a limited number of restrictions on the right to information, in line with those allowed in relation to other fundamental rights. These included where disclosure would prejudicially affect the sovereignty and integrity of India, the security of the State and friendly relations with foreign States, public order, investigation of an offence, or where disclosure would lead to incitement to an offence. Bona fide grounds of individual privacy and trade and commercial interests were also included as exceptions.

A significant saving provision was that information which cannot be denied to Parliament or the State Legislature shall not be denied to a citizen. This would have been a powerful defence against wanton withholding of information by public bodies, because the agency seeking to withhold the information would have had to commit itself to the position that it would also withhold the information from Parliament or the State Legislature. The draft also provided for personal fines for failing to provide information and for appeals to the local civil judiciary against a failure or refusal to supply the requested information.

The "CERC" Draft

By far the most detailed proposed freedom of information legislation in India was drafted by the Consumer Education Research Council (CERC). This draft, in line with international standards, gives the right to information to anyone, except "alien enemies", whether or not they are a citizen. It requires public agencies at the federal and state levels to maintain their records in good order, to provide a directory of all records under their control, to promote the computerisation of records in interconnected networks, and to publish all laws, regulations, guidelines, circulars related to or issued by government departments and any information concerning welfare schemes.

Requesters are liable only for the cost of supplying copies of records, with fees being waived for journalists, newspaper organisations and public interest groups. The CERC draft contains a class exception for cabinet documents but documents relating to security, defence, international relations, and economic and commercial affairs are subject to a "grave and significant damage" test. There are also exceptions for personal information in the interests of privacy and the research activities of voluntary organisations if disclosure would undermine their functioning or result in "grave and significant damage"

to another person. Records relating to the internal deliberative processes of government – the one exception being the cabinet documents – and centre–state relations are not excepted under the CERC draft.

The draft also provides for the outright repeal of the OSA, but does not provide specific protection for whistleblowers. Finally, the CERC draft provides for an appeal against refusals to disclose information, first to a network of independent information commissioners at the national, state and district levels, and then to an Information Tribunal.²²² The draft was introduced as a private member's bill in Parliament, but was never taken up for discussion.

2.7.3 Legislative Developments at the Centre

The election manifestos of most of the major political parties in the last decade have promised transparency and administrative reform. These promises were given impetus at the 24 May 1997 Conference of Chief Ministers of Indian States, which discussed an Action Plan for Effective and Responsive Government at the Central and State Levels. The Prime Minister presided over the deliberations and the Conference was also attended by the Central Home Minister, the Finance Minister, the Law Minister, the Minister of State for Personnel, Public Grievances and Pensions, the Cabinet Secretary, the Chief Secretaries of the States and Union Territories, and other senior Government of India officials.

The 1997 Conference represented the culmination of a national debate on "effective and responsive administration", initiated at the Conference of Chief Secretaries in 1996. It was agreed that immediate steps must be taken to restore the faith of the people in the fairness, integrity and responsiveness of the administration. The Prime Minister favoured a right to information to combat undue secrecy in the government and the idea of social audit as an instrument of greater accountability was emphasised.

The Conference resolved that the central and state governments would work together on a number of themes, including transparency and the right to information. The Conference recognised that secrecy and lack of openness is largely responsible for corruption in official dealings and is also contrary to accountable and democratic government. To address this, the Government of India agreed to take immediate steps, in consultation with states, to introduce freedom of information legislation, along with amendments to the Official Secrets Act and the Indian Evidence Act, before the end of 1997. Those states which had not already provided for a right to information would take the necessary steps to do so. Two states passed right to information legislation that year and the Government of India appointed a Working Group²²³ which drafted the Freedom of Information Bill, 1997.

The central and state governments also agreed to a number of other measures to promote openness. These included establishing accessible computerised information centres to provide information to the public on essential services, and speeding up ongoing efforts to computerise government operations. In this process, particular attention would be given to computerisation of records of particular importance to the people, such as land records, passports, investigation of offences, administration of justice, tax collection, and issuance of permits and licenses.

The "Shourie Committee" Draft

The Working Group appointed by the government in 1997 was known as the "Shourie Committee" since it was headed by former bureaucrat and consumer rights activist H. D. Shourie. It had a mandate to make recommendations regarding secrecy legislation, and to prepare draft legislation on freedom of information. Unfortunately, the legitimacy and effectiveness of the work of this Committee was undermined by lack of public consultation and the fact that the recommendations were never sufficiently publicised.²²⁴ The Shourie Committee itself consisted of ten persons, all male, eight of whom were senior bureaucrats from the central government.

The Shourie Committee's draft freedom of information law was significantly diluted by comparison with the civil society drafts. The scope of exceptions was very wide and included a remarkable clause, seriously undermining the whole project, whereby public authorities could withhold "information the disclosure of which would not subserve any public interest." The draft also failed to provide for penalties for groundless refusals to disclose. Appeals were allowed to consumer courts, providing a simple remedy to consumers. However, these courts are already overburdened and have serious backlogs. The draft excluded the private sector and non-governmental organisations not "substantially funded or controlled" by government from its ambit. The draft did, however, include the judiciary and legislatures within its purview.

The Freedom of Information Bill, 2000

With the demise of two governments in quick succession, the Shourie draft was never introduced into Parliament. However, it was revived with some changes, in July 2000, when it was introduced as the Freedom of Information Bill, 2000. Prior to the Bill being introduced in Parliament, there was no official effort to publicise the draft or engage in a debate over its provisions. There was debate on the expected law in certain media, academic, non-governmental organisations and other interested circles, but it was based primarily on conjecture as to the Bill's contents. At the time of writing, the Freedom of Information Bill, 2000 was before the Parliamentary Standing Committee on Home

Affairs, which was receiving submissions from various groups and individuals.

On the basis of a review of the objections voiced by academics and activists, as well as several interactions with varied groups around the country, CHRI produced two publications encapsulating the chief objections to the Freedom of Information Bill for, respectively, civil society²²⁵ and legislators.²²⁶ Overall, the Bill fails in important ways to conform to international standards and best comparative practice on access to information. Nor does it reflect a serious attempt to address information issues in the Indian context, as the laws of South Africa and Japan do for their countries. Overall, the weakness of the Bill reflects the lack of political will to implement a good information disclosure system. Indeed, the Bill is so weak that civil society has debated whether this Bill should be resisted outright, at the risk of losing the opportunity to have legislation on the right to know, until at least the non-negotiable standards are included.

Most freedom of information advocates in the country now concur in their main criticisms of the Freedom of Information Bill, 2000.²²⁷ Despite the strength of these objections, legislators do not seem to have taken them into account in revising the Bill. It remains to be seen whether the Standing Committee proceedings and legislative advocacy will improve the Bill and address the issues raised by civil society.

Perhaps the most serious problem with the Bill is that it fails to provide for an independent review of refusals to disclose information, either by an independent administrative body or by the courts. This means that decisions on whether or not to release information rest entirely within government. A blanket exclusion of key intelligence and security organisations and an excessively broad regime of exemptions significantly undermine the potential for the Bill to promote the public's right to know. The lack of a public interest override for these exclusions and exemptions further undermines the Bill. A detailed analysis of the key problems with the Bill is provided in Annex V.

State Laws and Orders on the Right to Information

Several Indian states have, in the last three years, passed either right to information laws or executive orders to implement this right. A comparative overview of these state laws shows that the various models adopted have different kinds of pros and cons.²²⁸ Some of the State laws have a long list of exceptions and few have adequate provisions for imposing liability for not providing information. Moreover, as pointed out by a legal expert, "the somewhat sparse public debate of the peoples' right to know began to concentrate on the need for legislation rather than providing and making information available to the public immediately ... somehow, the basic strategy that seems to have evolved in public discourse became 'legislation first, information

later'.²²⁹ Brief notes on the various state's laws and orders on the right to information are provided in Annex III.

2.8 Advocacy on the Right to Information

2.8.1 The MKSS Movement

Advocacy on the right to information has been addressed most effectively in the rural areas of India, where peoples' movements have shown how information can empower common people in their daily lives. The Mazdoor Kisan Shakti Sangathan (MKSS) movement has led the way in terms of advocacy on the right to information in India.²³⁰ The MKSS, born in 1990, is now a massive grass roots organisation that grew out of a local struggle for minimum wages and a realisation among the founding members that change for the local people will only come through a political process. The MKSS does not take government or donor funds and is completely supported by the local people it is agitating for through public donations and even, at times, donations of grain from local households.

Historically, local people have had difficulty getting paid the minimum wage, and this issue would become important at election time when various politicians made promises to secure the minimum wage in return for votes. However, these promises never translated into lasting change and over time campaigners realised that it was only by obtaining the relevant documentation, in particular the muster rolls,²³¹ that they could be successful. The right to information and the right to survive thus became united in peoples' minds.

Initially, demands to see the muster rolls were met with refusal, on the grounds that these were 'secret documents'. These refusals led to agitation for the right to information. Some people, especially in the government, felt it was absurd for villagers to be demanding to see the muster rolls and this led to a long struggle – including hunger strikes, sit-ins and rallies – for the right to access this information. By 1994, MKSS hit upon a new, empowering strategy, based on the idea of a '*jan sunwai*' or 'public hearing'. Under this strategy, MKSS brought people together and simply read out official documents that they had procured, either through surreptitious means or from officials who had no idea of their import. The documents related to construction records for school buildings, *Panchayat bhawan* and *patwari bhawan*,²³² dams, bridges, and other local structures. These were shared with the people in the villages where the documents said the construction works had taken place.

A serious effort was made to ensure that the debate was transparent and accessible to the outside world. The government boycotted the first four hearings. To ensure openness and publicity, anyone could attend

and each hearing was chaired by an outsider, usually a lawyer, activist, poet, academic or journalist who came from elsewhere in the state or another part of the country. This showed that the process was serious and that it was considered important not just to locals, but also to the outside world. Local officials and public representatives were invited, including those likely to be criticised, and given places of respect on the dais alongside the members of the panel. Despite the expense, the proceedings were videotaped. This deterred speakers from making misrepresentations and put them on oath as they knew that what they said could be referred to later. The videotapes also allowed for comparison between the documentation and people's personal testimonies.

There was often laughter when the records were read out because it was immediately obvious that they contained false information. Examples were items like bills for transport of materials for 6 km when the real distance was only 1 km, or people listed on the muster rolls who lived in other cities or were dead. The documentation also proved that corrupt officials and others were siphoning away money and that minimum wages were being paid only on paper. The exploitation of the poor in two ways – by denial of their minimum wages and through corruption by some of the village middle class – was revealed at the *jan sunwais* in front of the entire village. People who would have been intimidated on their own now had a platform where they could speak out. This process also brought together the poor and sections of the middle class who had not previously supported them but now spoke out against corruption, which they realised also hurt them.

As time went on, the word spread that on a certain day and time, records would be read out in public and that anyone would be welcome to come up and say what they thought, for example, of the quality of the construction work. Violence was threatened, and sometimes used, but the mere fact that large numbers of people showed up, and that recorded information had been shared in public, largely neutralised violent tactics.

With publicity by activists and support from the press, this local movement provoked a state-wide, and indeed national, reaction. The *gram sevaks* of the area, village-level bureaucrats who look after record keeping, went on strike, saying that they would not release documents to the people because they were 'not accountable to them, but only to their seniors'. *Gram sevaks* from other parts of the State also threatened to go on strike in support and politicians who had used development funds to recover their election expenses also resisted. By this time, people had begun to understand the need for information in order to combat local corruption and exploitation and to take control over their lives. They also came to realise that a 'social audit' of funding and disbursement at village level would bring into question the whole functioning of democracy and accountability, requiring macro-level policy answers. There was a surge in demand for a legal entitlement to

access these documents in order to counteract bureaucratic and official resistance. After a long battle, the government announced a change in the Panchayat Act, so people could inspect local documents pertaining to development works.

Early in 1999, when the government of Rajasthan constituted a committee to draft a right to information law or executive order, the MKSS travelled through the five divisional headquarters of Rajasthan, holding consultations, street-corner meetings, performing street plays and reaching out to large numbers of people. Apart from mobilising people and creating pressure, the street meetings also became platforms for democratic debate, eliciting local views on the draft orders passed by the government. The use of different mechanisms of participation, such as street theatre, led to people's empowerment. The meetings would end with the sale of postcards addressed to the Chief Minister urging the government to pass legislation on the right to information immediately. The postcards elicited a response far beyond that expected and were an innovative way to get people personally involved: "Buy a postcard, address it, post it. Put in your vote for a Right to Information Act."

The main strength of this approach was its power to illustrate to the vast majority of the poor and illiterate the relevance of the right to information to them personally. Although it was a struggle of the rural poor, it caught the attention and got the support of a cross-section of the country's media,²³³ lawyers and jurists,²³⁴ academics,²³⁵ and even bureaucrats²³⁶ and legislators,²³⁷ many of whom came together to form the National Campaign on the People's Right to Information (NCPRI).²³⁸

The advocacy therefore ranged from the village level to the media, and to policy-making at the State level and at the centre. NGOs and activists all over the country have adopted this strategy with minor changes in methodology and linkages have been made with major peoples' movements such as the Narmada Bachao Aandolan.

2.8.2 The National Campaign on People's Right to Information

The NCPRI was formed as a support group for the MKSS and also to carry out advocacy on the right to information at the national level. The presence in the NCPRI of senior and respected media persons, serving and retired bureaucrats, and members of the bar and judiciary make it an important nodal body. Members like Prabhash Joshi, one of India's most senior journalists, have been publicising the issue through their writing and travelling around the country.

The National Campaign also brought out a journal, *Transparency*, which was very useful for campaigning and networking purposes, but which has been discontinued for the time being for want of funds.

Members of the NCPRI have also made submissions on the Freedom of Information Bill, 2000 to the Standing Committee.

2.8.3 The CHRI Campaign

CHRI views the right to information as providing a basic link between various human rights and promotes that perspective in its advocacy work. In mid-1997, when important developments were taking place both at the grassroots level and on the legislative front, CHRI sought to engender a country-wide debate around the issue through dissemination of information. CHRI produced a series of publications targeted at different levels to help simplify the issues.

CHRI has also conducted a number of workshops and other smaller meetings, mostly at the regional level but also nationally²³⁹ and internationally.²⁴⁰ The participants have been a mix of NGO representatives, academics, lawyers and jurists, youth groups and students, media workers, bureaucrats, and people from other walks of life. The workshops are designed to elicit feedback on the information needs of people, problems of access to information and people's expectations from the law. Certain practical issues, such as the methodology for a people's audit using the MKSS model, are also discussed.

CHRI has also been involved in governmental initiatives on the right to information in the States of Madhya Pradesh, Delhi, Karnataka and Rajasthan, as well as with the central government. The CHRI campaign has brought together people doing advocacy work at all levels and has forged links between actors working at different levels, both within civil society as well as with government.

2.8.4 Consumer and other groups

Consumer groups have taken up the right to information, as it is clearly of some importance to consumer rights. For example in the early 1980s, the Consumer Education and Research Centre (CERC) in Ahmedabad conducted research on freedom of information laws in place in other parts of the world, in particular the USA and Canada and, as noted above, drafted legislation which was introduced into Parliament as a private member's bill. CERC also held a series of workshops on the issue. The strength of CERC lies in their painstaking research and their grasp of grassroots problems in the context of consumer rights.

The Consumer Action Group (CAG) in Chennai has actively been using the Tamil Nadu Right to Information Act, 1997 and has filed several applications for information which are serving as early case studies on the operation of the Act.

Smaller groups and movements which have been struggling for various causes have also invoked the right to information in their advocacy. *Panchayat Bachao Abhiyaan*, an informal movement in Bihar and Jharkhand, has been pushing for local elections to be held,²⁴¹ making the connection between the importance of political representation and citizens' entitlements. As part of their voter education programmes, they have been demanding right to information legislation.

Some non-governmental organisations (NGOs) have reinforced the demand for the right to information by holding 'transparency fairs' of their organisations, throwing open their own records. This is an important process as the first reaction of governments to demands for transparency is often to accuse NGOs, especially those receiving foreign funds, of a lack of integrity and openness.²⁴²

In Goa, right to information issues have been raised by journalists, backed by civil society groups, who have requested information under the Goa Right to Information Act. The media has also supported the movement for the right to information by giving the issue frequent coverage (both academic debate and developments at the grass-roots level). In the course of the CHRI campaign on the issue, state and local level media, including radio and television, have covered the issue frequently and related it to local concerns.

2.8.5 Advocacy Within the Government

Important advocacy work has also been undertaken by 'activist' bureaucrats. A key example is the initiative of the then Commissioner of Bilaspur Division,²⁴³ Harsh Mander, who introduced a record maintenance and disclosure system, including through on-the-spot photocopying, in key departments such as the Public Distribution System,²⁴⁴ the Employment Exchange, pollution control and the State Transport System. The impact of these simple steps soon became apparent when the ration shops, whose normal response had been 'no stocks available', started showing excesses because it was now difficult to siphon off stocks. Pollution levels, which were required to be published daily, came down drastically in an area that is one of the most polluted in the country due to the functioning of multiple polluting industries.²⁴⁵ Unfortunately, this initiative resulted in Mander being transferred in order to appease local political heavyweights whose activities were being challenged. Despite this, the experiment caught the imagination of several other bureaucrats and was replicated in their own areas of operation.

The right to information is now a regular part of the training given to new civil servants at the Lal Bahadur Shastri National Academy of Administration, Mussoorie. At the academic level, the right to information has been supported by several civil servants, whose advocacy has lent credence to the issues raised by civil society groups and has helped to counter some of the standard challenges raised by

bureaucrats. Regular and thorough analysis of draft laws by Dr. Madhav Godbole,²⁴⁶ for instance, has helped refine and define the issues for civil society advocates as well as the public at large.²⁴⁷

2.9 Conclusion

India presents a mixed picture with much secrecy legislation still in place restricting the free flow of information, but at the same time some significant developments at state level in terms of promoting freedom of information laws, as well as draft national legislation.

To some extent, these legislative developments represent the implementation of the constitutional right to information, which has been progressively developed by the courts over the last two decades. They are also in important ways a response to effective advocacy and mobilisation work by civil society and grass-roots organisations.

Unfortunately, the draft law presently being considered by the central government is woefully inadequate. It lacks any independent oversight mechanism, providing only for internal appeals within the government apparatus. It contains an excessively broad regime of exceptions and lacks a provision providing for disclosure in the public interest. The requirements in terms of proactive, or *suo motu*, publication are weak and the draft fails to provide protection for whistleblowers. Cumulatively, it is a weak law which will fail to implement in practice the right to information. It is essential that decision-makers fundamentally rework this draft, to ensure that legislation is passed which protects the public's right to know and promotes the free flow of information in India.

ENDNOTES

150. For reasons detailed below, this term is used in preference to 'freedom of information'.
151. In India's case, of about 200 years.
152. In Chapter III of the Constitution.
153. Justice K.K.Mathew in *State of UP v. Raj Narain*, AIR 1975 SC 865. Although this was part of a dissenting opinion, it has been reiterated in succeeding judgments upholding the right to know. See below, Judicial Interventions and Developments.
154. Mander and Joshi, "The Right to Information Movement in India – People's Power for the Control of Corruption" (CHRI, New Delhi, 1998).
155. See the section on The MKSS Movement.
156. Transparency International's Corruption Perception Index (CPI) for 2001, online at <http://www.transparency.org/documents/cpi/2001/cpi2001.html>
157. For example, the Bofors gun purchase deal, alleging huge kickbacks and involving an array of senior public persons.
158. A chief minister was alleged to have 'eaten' fodder provided by World Bank and meant for poor farmers.

159. A Central minister was alleged to have taken huge bribes for 'fixing' sugar prices for the sugar lobby.
160. Heads of District Administrations.
161. Narrated by Manoj Srivastav of the Indian Administrative Service at a CHRI workshop in Patna, Bihar, 1999.
162. A banned militant group.
163. 'CPML demands fresh statement on Bhawanipur killings', *Times of India*, 15 May 2001.
164. *D.K. Basu v. State of West Bengal* (1997) 1 SCC 216.
165. This has happened, for example, in the jails of Bilaspur, Madhya Pradesh and Tihar, Delhi.
166. The "Indira Awaas Yojana".
167. The "Jawahar Rozgaar Yojana".
168. Such as the "Padho Badho" scheme in Madhya Pradesh.
169. Title document showing lease of land from the government.
170. Village-level revenue and administrative officers.
171. Case narrated by a health activist at a CHRI workshop in Lucknow, Uttar Pradesh, 2000.
172. "Sardar Sarovar Oustees in Madhya Pradesh – What Do they Know?" (Multiple Action Research Group, 1992).
173. Village headman.
174. A revenue unit in administrative areas.
175. The decision as to the compensation package given by the Narmada Valley Development Authority (NVDA).
176. Dr. Vasudha Dhagamwar, Director, Multiple Action Research Group.
177. Jasanoff, "The Bhopal Disaster and the Right to Know", *27 Social Science and Medicine* 1113 (1988), in Divan and Rosencranz, *Environmental Law and Policy in India*.
178. *Policy Statement for Abatement of Pollution*, Ministry of Environment and Forests, Government of India (1992).
179. The Bhaba Atomic Research Centre, a leading Indian nuclear research institute.
180. Interview with Arjun Makhijani, President of the Institute for Energy and Environment Research, a US-based independent organisation which monitors the working conditions in nuclear plants throughout America, in the *Times of India*, 22 February 2001.
181. *Consumer Voice*, Vol. 2, Issue No. 2 (March-April 2001).
182. 3i Network, *India Infrastructure Report 2000* (OUP, 2000), 32.
183. For example, in the area of employment rights such as equal wages for women, accident compensation, and abolition of bonded and child labour.
184. The Internal Emergency was in force between 1975 and 1977.
185. Included in the guarantee of freedom of speech and expression under Article 19(1)(a). See below, under Constitutional Guarantees.
186. Quoted by A. G. Noorani in "The Right to Information" in S Guhan and S Paul (eds), *Corruption in India – An Agenda for Change* (Public Affairs Centre, 1997).
187. Prabhash Joshi, Consultant Editor of *Jansatta*, a popular Hindi daily.
188. *Bennett Coleman & Co. v. Union Of India*, AIR 1973 SC 783.
189. *Manubhai D. Shah v. Life Insurance Corporation*, AIR 1981 Guj 15.
190. *Indian Express Newspapers (Bombay) Pvt. Ltd. v. India*, (1985) 1 SCC 641.
191. *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 216.
192. *Prabha Dutt v. Union of India*, AIR 1982 SC 6.
193. *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd.*, AIR 1989 SC 190.
194. *State of UP v. Raj Narain*, AIR 1975 SC 865. See also *S.P. Gupta v. Union of India*, AIR 1982 SC 149, which strengthened this position.
195. *Bombay Environmental Action Group v. Pune Cantonment Board*, Bombay High Court, A.S. Writ Petition No. 2733 of 1986.
196. *L.K. Koolwal v. State of Rajasthan*, AIR 1988 Raj 2.

197. Much of the information in this section was compiled by Nagarika Sewa Trust, an organisation working on environmental issues, in *A Note on Right to Information*.
198. Quoted by Noorani, see note 37 above.
199. Ministry of Environment and Forests Notification No. S.O. 60 (E), 27 January 1994.
200. Quoted by Noorani, see note 37 above.
201. See the box on The Case of the Sardar Sarovar Dam, above.
202. Quoted by Noorani, see note 37 above.
203. Ibid.
204. Ibid.
205. See Rule 11.
206. See Sections 154 and 161.
207. See below, under State Laws and Orders on the Right to Information.
208. Under the Prevention of Atrocities on Scheduled Castes and Scheduled Tribes Act.
209. A colloquial form of abuse to remind a person of his or her low station in life, literally, "Have you seen your face in the mirror?"
210. A body comprised of eligible voters in a village which meets two or three times per year.
211. The Mazdoor Kisaan Shakti Sangathan (MKSS). See below under The MKSS Movement.
212. 'Gyandoot' means 'Messenger of Knowledge'. The project won the Stockholm Challenge Award for Public Service and Democracy.
213. In *Down to Earth*, an Indian magazine on the environment.
214. Beating of drums.
215. A Hindi 'infotainment' programme broadcast by *All India Radio*.
216. *The New Indian Express*, 8 February 2001.
217. This section draws heavily on Mander and Joshi, *The Right to Information Movement in India – People's Power for the Control of Corruption* (CHRI, 1998).
218. Guhan and Paul, see note 37 above.
219. *The Hindu*, 13 December 1991.
220. The institute where recruits to the elite branches of the civil services are trained.
221. Article 12 defines the State for the purposes of enforcing fundamental rights.
222. Vikram Khub Chand, *Legislating Freedom of Information in India* (CHRI, 1998).
223. Government of India's Working Group on Right to Information and Promotion of Open and Transparent Government, which gave its report in 1997.
224. A detailed critique of the Bill can be seen on CHRI's website, www.humanrightsinitiative.org. For an international perspective, see www.article19.org/docimages/883.htm
225. *Look at the Freedom of Information Bill 2000 NOW* (CHRI, 2000).
226. *Submissions to Legislators on a Right to Information Law* (CHRI, 2000).
227. See *Submissions to legislators on a right to information law* (CHRI, 2000), *Legislating Right to Information: a long way to go*, (Madhav Godbole, 2000), Prashant Bhushan, *A Note on Right to Information 2000* and Rajeev Dhawan, *Freedom of Information Now*. These are all available at www.humanrightsinitiative.org.
228. See Annex IV.
229. Rajeev Dhawan, *Information Now: Need for a New Strategy* (2000).
230. MKSS is a movement for poor farmers and unorganised rural labour. The following account is based on a presentation by Aruna Roy and Nikhil Dey of the MKSS at CHRI's South Asia Conference on Right to Information, Dhaka, July 1999.
231. A list of persons employed and wages paid.

232. Buildings made for the village-level functionaries.
 233. Prabhash Joshi, Ajit Bhattacharjea and Bharat Dogra.
 234. P.B. Sawant, K.G.Kannabiran and Prashant Bhushan.
 235. Shekhar Singh and Asmita Kabra.
 236. Harsh Mander and Mathew Shankaran.
 237. Kuldip Nayyar.
 238. Formally based at the Press Institute of India. Jointly co-ordinated by Asmita Kabra and Bharat Dogra.
 239. New Delhi, December 1999, August 2000.
 240. Harare, January 1999; Dhaka, July 1999; and Durban, October 1999.
 241. Elections to urban local bodies (ULBs) and village *panchayats* had not taken place for 22 years before April 2001.
 242. This happened, for example, to the SWRC in Tilonia, Rajasthan.
 243. A division is an administrative unit comprising several districts.
 244. A network of government-controlled 'ration shops' to supply food at subsidised rates.
 245. Korba region, now in the new Chhattisgarh State.
 246. Retired Union Home Secretary.
 247. See *Right to Information: A Long Way to Go*, (Pune: National Centre for Advocacy Studies).
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ANNEX III

A Brief Analysis of Various State Laws and Orders on the Right to Information

The Goa Right to Information Act, 1997

This is, so far, the best of the laws passed in any Indian State, although it still has shortcomings. It has the fewest categories of exceptions, a provision for urgent processing of requests pertaining to life and liberty, a penalty clause, and it applies to private bodies executing government works. One weakness is that it has no provision for proactive disclosure by government.

Tamil Nadu Right to Information Act, 1997

This law contains 21 categories of exceptions, including 12 sub-clauses within them. Information must be provided within 30 'working' days from the date of receipt of the application. There is no penalty clause and requesters may appeal only to the state government, or any such authority as may be notified by the government. The law is vague in its description of certain key areas, such as 'public interest', 'public order' and 'public harm'. It does not have any provision for proactive disclosure of information.

The Madhya Pradesh Right to Information Act and Orders on Right to Information

Although the State of Madhya Pradesh passed a Right to Information Act in March 1998, Presidential assent was refused and so it has not come into force. The apparent reason is that the legislative competence to pass such a law is with Parliament. Executive orders on the Right to Information are, however, operational in close to 50 departments (see below).

The Act puts an unusual and welcome obligation on public bodies to make information available proactively, especially information relating to health and security, through electronic and print media or any other method deemed fit. An application requesting information must be accepted or refused within 30 days of its receipt and reasons for any rejection must be given. The Act has 11 categories of exceptions, with procedures for appeals and revision. An official who breaches the law can be fined up to Rs. 2000 (US\$ 42.40). The Act sets up an Advisory Board with the Chief Minister as its Chairperson, and including two members from non-governmental organisations, the press and the legal profession.

A series of executive orders²⁴⁸ made to about 50 governmental departments²⁴⁹ to provide information on request as well as a mandatory direction to put up information boards outside various departments are operational in Madhya Pradesh and now also in the new State of Jharkhand. Monitored by the Department of Administrative Reforms, these orders have not been widely used by the public. However, they do have the potential to create a culture of information-sharing if enforced properly. The orders have a provision for charging a nominal fee for inspection of records as well as for obtaining copies of records. Time limits are specified and internal appeals are provided for. Disciplinary action can be taken under these orders against erring officials.

The Rajasthan Right to Information Act, 2000

The Rajasthan Act has 13 sections in all, 10 of which establish categories of exceptions. It has exceptionally weak clauses for proactive disclosure and penalties. There is provision for one internal appeal and one appeal to an independent body.

The Karnataka Right to Information Act, 2000

The Act contains standard exception clauses covering 12 categories of information. It has limited provisions for proactive disclosure, contains a penalty clause and provides for an appeal to an independent tribunal.

Maharashtra Right to Information Act, 2000

The Maharashtra Act has only nine sections in all, but appears to be the most restrictive state law to date, with 22 categories of exceptions. It does not provide for the establishment of an appellate authority which would review refusals to disclose, and purports to bar the jurisdiction of the courts. It has neither provisions for providing information proactively nor penalties for withholding or destroying information.

Delhi Right to Information Act and Orders on Right to Information

In 1999-2000, a governmental working group suggested legislation along the lines of the Goa Act.²⁵⁰ Meanwhile, piecemeal orders have been issued to a couple of departments, such as the Ration Shops, to put up boards displaying the daily stock of Public Distribution Systems items and to allow inspection of stock registers. The right to information has also been introduced in government-run hospitals.

The Delhi legislature passed the Delhi Right to Information Act in 2001. This law is along the lines of the Goa Act, containing the standard exceptions and providing for an appeal to an independent body, as well as establishing an advisory body, the State Council for Right to Information.

Uttar Pradesh Code of Practice on Access to Information

The state of Uttar Pradesh has prepared a 'Code of Practice on Access to Information',²⁵¹ which it has applied to three areas on a priority basis, namely the Agricultural Production Commissioner, the Public Works Department and the Tax and Consolidations Department. These departments have been asked to supply information forthwith in accordance with the Code and to report back to the Department of Administrative Reforms annually.

ENDNOTES

248. Compiled as '*Jaanane Ka Haq*' by the Department Of General Administration, State Secretariat, Government of Madhya Pradesh, Bhopal, India.

249. These departments include: *Panchayats* and rural development, Food, Civil Supplies and Consumer Protection, Social Welfare, Public Works, Jails, Welfare of Indigenous People, Backward Classes and Minority Welfare, Women and Child Development, Local Administration, Co-operatives, Scheduled Tribes, Transport, Medical Education, Labour, School Education, MP State Co-operative Banks, Rehabilitation, Revenue, Forest, Dairy Development, and Bhopal Gas Affected Relief and Rehabilitation.

250. Under the auspices of Secretary, Services, GAD, Training, AR & PR, Govt. of NCT, Delhi, Sham Nath Marg, Delhi, India – 110054.

251. Prepared by the Department of Administrative Reforms, State Secretariat (Sachivalaya Bhawan), Government of U.P. Lucknow – 226 001 India.

ANNEX IV

COMPARATIVE TABLE OF RIGHT TO INFORMATION LEGISLATION IN INDIA

| ISSUE | GOA 1997 | T. NADU 1997 | M.P 1998 (NOT IN FORCE) | RAJASTHAN 2000 | MAHARASHTRA 2000 | KARNATAKA 2000 |
|--|--|---|--|--|---|-----------------------------------|
| Fee | Not exceeding cost of processing and providing info., Sec. 14 | No provision | To be fixed through govt. notification, Sec. 5(4) | To be prescribed and paid at the time of request; information may be refused if not paid, Sec. 8 | To be charged for processing and making available information, Sec. 6 | To be not t actu supp Sec. |
| Exceptions | 6 exceptions but do not extend to info. Available to state legislature | 22 exceptions + 2 more broad exceptions, Sec. 3 | 11 exceptions, Sec. 6 | 10 exceptions, Sec. 5 | 22 exceptions with several sub-classes, Sec. 3 | 8 ex + 4 grou refus and |
| Time Limit | 30 working days, Sec. 4(2) | 30 days, Sec. 3(d)I | 30 days, Sec. 5(2) | 30 days, Sec. 4 | 30 working days, Sec. 4 | 30 w Sec. |
| Urgent Requests | If required for life and liberty, within 48 hrs, Sec. 4(2) | No provision | No provision | No provision | No provision | No p |
| <i>Suo Motu</i> Disclosures | No provision | No provision | Before initiating or finalising projects, if required for health and safety, Sec. 3(1) | Wide discretion to exhibit or expose, Sec. 12(A) | No provision | Lim oblig struc deci pres infor 3 |
| Appeals | No internal | One | Internal | Internal appeal, | Appeal to govt. or | 1 st ap |

| | | | | | | |
|-----------------------------------|--|--|---|--|--|--|
| | appeal; appeal to administrative tribunal, Sec. 6 | internal appeal, Sec. 4; courts barred, Sec. 5 | appeal Sec. 7, courts barred, Sec. 14 | Sec. 7, appeal to district vigilance Commission or civil service tribunal, courts barred, Sec.11 | prescribed authority Sec. 5, courts barred, Sec. 7 | prescribed authority Sec. 5, courts barred, Sec. 7 |
| Private Bodies | Private bodies executing work for or on behalf of the Govt., Sec. 2(c) | No provision | No provision | No provision | No provision | No provision |
| Means of Communication | No provision | No provision | <i>Suo motu</i> info. to be given wide publicity including via traditional means, Sec. 3(2) | No provision | No provision | No provision |
| Publicity for the Act | No provision | No provision | No provision | No provision | No provision | No provision |
| Training of Civil Servants | No provision | No provision | No provision | No provision | No provision | No provision |
| Penalties | Penalties and discretionary imposition of Rs. 100/day (US\$ 2) for delay, Sec. 8 | No provision | Penalty not exceeding Rs.2000 (US\$ 46) for delay, Sec. 9 | Disciplinary action and penalties to be described, Sec. 10 | No provision | For disciplinary action |
| Oversight Body | State Council, Sec. 11 | No provision | Advisory Committee, Sec. 10 | No provision | No provision | No provision |

ANNEX V

Detailed Analysis of the Freedom of Information Bill, 2000

Flawed Overall Perspective

The very title and introduction to the proposed law are flawed as they seem to place the onus on the citizen who is being given "freedom ... to secure access to information...consistent with public interest". The Bill does not, therefore, appear to seek primarily to enforce people's democratic and fundamental right to information.

Limited *Suo Motu* (proactive) disclosures

The proactive disclosures provided for in Section 4 of the Bill are not adequate for effective dissemination of relevant information. The duty to give information proactively is limited to procedural and structural aspects of public bodies. Other details are limited to "initiation of projects". This is, itself, severely hedged in by various terms like "to which it has reasonable access" and "which in its opinion should be known to them in the best interests of maintenance of democratic principles." This is an area of concern for most advocates of the right to information. In a country with low literacy levels, geographical remoteness and inaccessibility of several rural and indigenous peoples' areas, active government dissemination of information to the people is crucial. Active dissemination of information about issues pertaining to life, health and the environment should be added to the Bill.

A Herd of Holy Cows

The exceptions to the general presumption in favour of disclosure are excessive. The Bill not only includes standard exceptions, such as matters affecting the sovereignty and integrity of the nation, but also exempts Cabinet papers, including records of the Council of Ministers, Secretaries and other officials. This effectively shields the whole process of decision-making from mandatory disclosure. The 'class exceptions' for security and defence organisations are also of concern. After the scam in defence deals broken by the dotcom company 'Tehelka',²⁵² where several top army personnel and political leaders were caught on camera with their hands in the till, it is hoped that undue protection to the areas of security and defence will be questioned.

Wide Discretion Without Accountability

Many of the sections of the Bill give the executive wide discretion to withhold information. This is compounded by the fact there are no provisions whatsoever which hold public officials responsible for abuse of that discretion. Most people, and other countries, favour a system of penalties for unreasonable delay or non-disclosure. Where this issue has been raised with officials, they have responded by saying, "there will be something in the rules" or " they are accountable to their

seniors", as though this were a potent remedy which has worked in the past.

Non-inclusion of Private Bodies

The failure to include private bodies within the ambit of the Bill is a concern which has been voiced all over the country. Private bodies, especially where their activities affect the fundamental rights of the public, must be required to disclose information. A few laws – for example, those regulating water and air pollution – already set out a limited right to obtain documents from such bodies. This demonstrates the importance of private disclosure, which should be generalised through inclusion in the Bill. In fact, the Bill excepts trade and commercial information from disclosure, and fails to provide for disclosure even where there is an overriding public interest.

No Independent Oversight

The Bill does not provide for independent oversight of refusals to disclose. This fundamentally undermines the effectiveness of the legislation. Instead of independent oversight, the Bill provides for two internal appeals within the governmental machinery. Although the Ministry which prepared the law claims that they will oversee the working of the Act, an independent body which works as an advocate for the right to information as well as a monitoring body is essential for its success. This problem is compounded by a provision barring access to the courts, despite the constitutional position that access to courts cannot be barred unless an equally effective alternative forum is provided for.

Will Fees Act as a Deterrent?

The Bill provides for a fee for providing access, without specifying what the minimum or maximum fee would be. This has raised concerns about whether the right to information will effectively be denied to the common person through prohibitive costs. Moreover, there is no provision for waiver of fees in appropriate cases such as for poor applicants, researchers or the media, or anyone applying for information in the public interest, or that pertaining to life and liberty.

No Emphasis on Systems and Means of Communication

The Bill fails to ensure adequate budgetary allocation to ensure that public bodies can put into place effective systems for maintaining and retrieving records. One of the reasons often cited by government personnel for not being able to give information to the public is the lack of basic resources such as photocopiers and sometimes even paper and pens. Although, as noted above, new information technology is

being introduced as a matter of policy, the need for effective information systems needs to be underscored in the law.

Training and Orientation of Civil Servants

The Bill fails to address a key impediment to effective disclosure, namely the culture of secrecy within government. At a minimum, the law should provide for sufficient orientation, as well as sustained and regular training of government personnel, to enable them to implement the law.

No Overriding Public Interest or Protection for Whistleblowers

The Bill does not have a provision providing for disclosure of exempted information where this is in the overall public interest. Furthermore, it does not afford protection to ‘whistleblowers’ – civil servants or others who disclose information which is otherwise exempted, but which exposes wrongdoing or corruption.

ENDNOTE

252. Tehelka literally means ‘furore’.

CHAPTER 3

COUNTRY STUDY – PAKISTAN

3.1 Introduction

Pakistan offers a glaring example of a secretive government and a closed society. The people have historically been denied information about State policies and actions that directly or indirectly affect their interests, as a matter of both law and practice. This has inhibited their ability to assess their governing bodies, to participate in decision-making or shaping relations between the government and the rest of society, and to understand the relevance of events at home and abroad.

The present information regime in Pakistan, the long history of restrictions on freedom of expression and information, and the current growth in the demand for access to official information and respect for the right to know cannot be understood without a brief overview of the

political and constitutional history of Pakistan since independence. Pakistan came into being as an independent State in August 1947 when the British colonial power withdrew from India, partitioning it into two dominions. The new State comprised five provinces, including East Bengal (now Bangladesh), which accounted for over one-half the country's population, and was separated from the rest of the country by over 1,000 miles of Indian territory. The other four provinces (Balochistan, North Western Frontier, Punjab and Sindh) lay in the north-western part of the country and were contiguous.

The constitutional framework put into place by the British colonial administration for Pakistan gave the provinces a certain measure of autonomy, and the adoption of a federal structure was something that neither the founding fathers nor their successors could deny. However, key federalist principles were a matter of fierce debate, delaying adoption of a the constitution for nine years. In particular, insistence on parity between the two geographic wings of the State led to the abolition of provincial entities in the western wing in 1955, and this paved the way to enforcement of the first constitution in 1956. However, the smaller western provinces never accepted this arrangement and their status was revived in 1970. The issue of autonomy eventually led to civil war, with East Bengal breaking away in 1971 to become the independent State of Bangladesh.

Pakistan's record in sustaining constitutional, democratic rule has been exceptionally poor. The first constitution, which came into force on 23 March 1956, was abrogated by the President, Iskander Mirza, less than three years later, on 8 October 1958. Mirza then imposed martial law and named the army chief, General Ayub Khan, as the Chief Martial Law Administrator. Three weeks later, Khan threw out the President and assumed the powers of an absolute ruler. He replaced the parliamentary system with a presidential one and imposed a new constitution, adopted undemocratically, in 1962. Khan remained president until March 1969, when political pressure and civil strife forced him to abdicate and hand over power to the Army Chief, General Muhammad Yahya Khan. The latter abrogated the 1962 Constitution and remained Chief Martial Law Administrator until December 1971, when Zulfikar Ali Bhutto succeeded him as both President and Martial Law Administrator. During Bhutto's regime, the 1973 Constitution was adopted. Although this constitution has never been abrogated, it was put into abeyance by the third military ruler, General Zia ul Haq, who was in power from 1977 to 1988, and it was suspended again when the present military ruler, General Pervez Musharraf, took power in October 1999.

These constitutional changes did not materially affect the distribution of powers between the federation and the provinces. The Provisional Constitution (1947-56) had three legislative lists – one for subjects under the exclusive jurisdiction of the federation, another for subjects under provincial control and a third where the federation and the

provinces shared concurrent jurisdiction. The 1973 Constitution has only two lists, one federal and the other concurrent, and any subject not listed in either of these two lists lies in the exclusive jurisdiction of the provinces. Under the Constitution, broadcasting and similar forms of communications are on the federal list, while newspapers, books and printing presses are on the concurrent list, so that both the federal and provincial governments can exercise authority in these areas.

As noted above, the Constitution has been in abeyance since October 1999, when General Musharraf overthrew the civilian government of Prime Minister Nawaz Sharif and assumed power with the designation of Chief Executive.²⁵⁴ Under the proclamation of emergency, Provisional Constitution Order No. 1 of 1999,²⁵⁵ the Constitution is held in abeyance but the Order also stipulates that, "notwithstanding the abeyance of the provisions of the constitution [the country] shall, subject to this order and any other orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the constitution." Furthermore, the Order states that, "the fundamental rights conferred by Chapter I of Part II of the Constitution, not in conflict with the Proclamation of Emergency or any order made thereunder from time to time, shall continue to be in force." As a result the guarantee of freedom of expression, like all fundamental rights, is available to citizens but only to the extent that it is not in conflict with the President's orders. To put it another way, the President has effectively equipped himself with the power to abridge the right to freedom of expression. In a judgment in 2000 upholding the military take-over, the Supreme Court ruled that while 15 of the 21 fundamental rights set out in the Constitution would remain in force, the executive could derogate from the other six, including freedom of expression.

3.2 The Need for Information

As members of the universal human family, the people of Pakistan have a right to freedom of information as established by international standards relating to freedom of expression, including Article 19 of the Universal Declaration of Human Rights. The right to freedom of expression has been recognised in all the constitutions of Pakistan (1956, 1962 and 1973). Article 19 of the 1973 Constitution states:

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.

This provision varies little from its predecessors in the 1956 and 1962 Constitutions, apart from the addition of a separate mention of freedom of the press and the expression 'glory of Islam'.

The Supreme Court of Pakistan has ruled that the right to freedom of expression includes the right to receive information. In the 1993 *Nawaz Sharif* case the Court stated: "The right of citizens to receive information can be spelt out from the freedom of expression guarantee in Article 19 [of the Constitution]."²⁵⁶ The conditions required for the exercise of the right to information are, therefore, the same as those necessary for the exercise of the right to freedom of expression.

In a democratic system of governance, which is understood as rule through consultation, concurrence and consensus, sovereignty resides in the people. As a result, any information held by public authorities is owned by the people and is held in trust for them by the State. It is, therefore, not a privilege but a right for the people to have access to information held by public authorities. Furthermore, the authorities are under an obligation to ensure that the people know in a timely manner and in some detail of the laws, policies and actions taken by the State that have a bearing on their rights and interests.

A free flow of information enables the State to remain in continuous dialogue with the people, facilitates public understanding of its policies and actions, helps prevent unnecessary State-society tensions, and offers the possibility of timely remedies to problems as a result of intervention by an informed public.

In Pakistan, the authorities have consistently failed to explain political and economic policies properly, and the country has suffered grievous losses due to the lack of a free flow of information. The serious misunderstandings between the former East and West Pakistans, which contributed to the break-up of the State in 1971, were undoubtedly related to the lack of a free flow of information. The failure to promote a free flow of information about economic policies has also contributed to huge economic imbalances between the different regions, which today is fuelling dangerous tensions between the federal authorities and Pakistan's less populous units. Indeed, in a federation such as Pakistan, which is diverse in terms of belief, ethnicity and language, effective people's participation is possible only where there is a free flow of information. State secrecy produces political exclusion which, when combined with cultural divisions, is extremely dangerous.

Secrecy in Pakistan has also contributed to the lack of any effective accountability system in government, at untold cost to the country. The link between secrecy and lack of accountability is fairly clear; no one can be expected to render account if his or her functions, the rules applicable to his or her functioning and his or her actual performance are kept secret from the public. Indeed, the government often restricts

the flow of information precisely because it is afraid of being found lacking in fairness, reason or competence, or prefers to hide the truth to prevent public anger at its arbitrariness.

Lack of accountability was a serious problem in the aftermath of the East Pakistan debacle of 1971. The *Commission of Inquiry – 1971 War* was set up in December 1971 under the chairmanship of the Chief Justice of the Supreme Court, Justice Hamoodur Rahman, to examine precisely this issue, but its report, produced in July 1972, was not made public. Only a few copies of the report were prepared and the distribution list was kept secret. Nearly two decades after the event, the Washington correspondent of an Indian newspaper, *Times of India*, disclosed a short excerpt from the report. Pakistani newspapers then reproduced the story. However, the Pakistan government failed to respond and consistently ignored demands by political parties and other public organisations for publication of the report. In August 2000 an Indian magazine, *India Today*, published a lengthy excerpt from the report, which was widely reproduced in Pakistan. Eventually, in January 2001, some twenty-five years after the Commission was established, a major part of the report was declassified. Accountability issues were finally brought to the forefront, but they could have been pursued far more effectively, and had a salutary effect on subsequent administrations, if the report had been published shortly after it was written.

It is now widely acknowledged that the regime of secrecy favoured by successive governments in Pakistan has contributed enormously to Pakistan becoming one of the most corrupt nations in the world. Secrecy is conducive to corruption in many ways. For example, almost all tender notices carry a clause that the grounds for rejecting one bid over another cannot be disclosed.

One of the principal factors contributing to maladministration and corruption in Pakistan has been the abuse of discretionary powers at various levels. In the early sixties, the Cornelius Commission on administrative reform called for increased fetters on the use of discretionary powers for precisely this reason. However, little has been done to curb resort to such powers by officials, mainly because decision-makers from the top down have taken advantage of such powers for personal, group or political ends. A former Prime Minister, ministers, and heads of corporations and departments are all facing criminal charges for corruption, many for abuse of personal discretion.

In view of the above analysis, the term 'information' should be defined in very broad terms in Pakistan, for example as the body of facts relating to the State's functioning and all matters affecting socio-economic and political developments. More specifically, it should include:

- the content of all laws, including their objectives, scope, subsidiary instruments, implications and mechanisms;
- the content, scope, implications, jurisdiction and enforcement schedules of new policies or changes in existing ones;
- all official reports, including from commissions, tribunals or public inquiries;
- reports or statements made at home or abroad on behalf of the State;
- treaties and agreements entered into by the State with foreign parties on a bilateral or multilateral basis;
- details of defence and financial liabilities assumed by the State;
- State budgetary matters, including income and expenditure;
- changes in charges levied for State services and facilities;
- details of administrative actions taken by State functionaries;
- information relating to losses caused by natural calamities, State operations or conflicts among non-State elements; and
- facts relating to public demands and agitations that affect the people's interests, views and attitudes.

3.3 The Existing Information Regime

There are a number of mechanisms and policies in place in Pakistan for publicly releasing information. Notwithstanding these limited systems of disclosure, secrecy and control over information remain the rule, backed up by a veritable host of laws and practices. The key laws and practices are described in the following sections. Most of these laws, which restrict the interdependent rights of freedom of expression and freedom of information and are incompatible with democratic norms, were framed either by the former British colonial regime or by Pakistan's military regimes. They restrict the flow of ideas and information and inhibit public debate, running counter to the arguments presented above for the free dissemination of information.

The authorities use a variety of informal means to restrict access to information, including some that breach legal obligations to disclose. Such means include delaying dissemination of information, publishing in excessively limited form or only in English, or simply refusing to publish information.

The legal framework must be seen in light of a 40-year-old debate between the media and the government regarding press-specific restrictions. The media argue that journalists should be subject to the same legal regime as the rest of the population, in particular in relation to restrictions on freedom of expression. The official response has been that the restrictive laws governing the media will be repealed only if the press accepts a government-approved code of ethics, along with the government's plan for a press council with the power to punish newspapers and journalists.

The government also exerts a large measure of direct control over radio and television broadcasting, thereby undermining the power of broadcasting as part of a democratic system's mechanism for the release of balanced and impartial information. Although there are policies for making public announcements via the broadcast media, they are only partially effective. Government control over these broadcasters means that they only air material that the government approves of, not what the public wants to know or what should be disclosed in the public interest.

3.3.1 Policies and Practices of Disclosure

A number of policies and practices are in place which facilitate the flow of information. For example, all court hearings are required to be open to the public. Annual budgets are presented before the legislature at special sessions to which the public may be admitted, and these statements are broadcast on the electronic media. When the legislature is not in session, budgets are announced via the broadcast media. Important policy statements, such as the Import and Export Policy, are generally presented via the broadcast media and at press conferences, and decisions taken by the Cabinet are normally disclosed to the media soon afterwards. A large Ministry of Information serves to disseminate information about government policies and actions to the public. All important State institutions – including the President House, the defence services, the superior courts, the Law Commission and autonomous corporations – employ spokespersons to announce important decisions and developments. The Department of Statistics issues bulletins on the cost of living and prices, while the Labour Ministry issues key statistics relating to labour. White papers are also issued and an Economic Survey is published annually. All new laws, policies, rules, appointments and the like are notified in the Gazette.

3.3.2 Secrecy Laws and Other Legal Restrictions

The Official Secrets Act, 1926

This Act, a carry over from British colonial rule, is formally designed to deal with espionage and disclosure of military secrets but its scope is far broader than that in practice. It requires accused persons to prove their innocence and the grounds for presuming guilt are broadly worded. It has been used against journalists on a number of occasions. For example, in 1978 the Official Secrets Act was invoked to arrest Mr. Mazhar Ali Khan and Mr. Husain Naqi, respectively editor and columnist of an independent weekly, *Viewpoint*. The grounds for arrest were that Mr. Naqi had alluded to a directive by the government to prepare for action against leftists. Mr. Ali Khan was allowed bail on grounds of old age, but Mr. Naqi spent nearly six months in prison without trial. The case was eventually withdrawn over a decade later, after the restoration of civilian rule. A similar case was instituted in August 1977 against Mr. Mahmud Sham, then the editor of the weekly

Mayar. He was released after a week upon payment of bail and this case was also eventually withdrawn.

The Security of Pakistan Act, 1952

Section 11 of this law gives the Federal Government the power to require an editor, publisher or printer to disclose the name of a confidential source and to prohibit the publication, sale or distribution of a document and to forfeit the same if it is of the opinion that the document contains matter likely to endanger the defence, external affairs or security of Pakistan. To enforce this, any police officer may be authorised to carry out a search and seizure operation. This law also empowers the Federal and Provincial governments to impose a prior censorship regime regarding "any matter relating to a particular subject or class of subjects affecting the defence, the external affairs or the security of Pakistan". No matter disallowed by the censor can be published; the censor has up to 72 hours to give his or her judgment. Appeals may be made within seven days to the government, which must assign the case to a district judge. Breach of these provisions may lead to imprisonment.

During the early years of independence, action was taken under this law against several journalists and publications. Later on, recourse to it became unnecessary as military governments issued special martial law regulations and orders granting power to close newspapers and impose prior censorship. For example, the prior censorship regime imposed by General Zia in 1978 continued, with some modifications, until 1984.

The Maintenance of Public Order Ordinance, 1960

This is probably the most draconian Pakistani law in relation to the media, giving the authorities all the extraordinary powers available under the Security Act and more. It empowers the government or a district magistrate, if "satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of public order", to pass an order:

- ttttt. prohibiting the publication of any material;
- uuuuuu. requiring a publisher to publish material supplied by government within the time and in a manner prescribed by it;
- vvvvvv. imposing prior censorship;
- wwwwww. closing down a publication or a press for a specified period;
- xxxxxx. requiring the disclosure of a confidential source; and/or
- yyyyyy. requiring delivery of relevant material.

Provincial governments are further empowered to prohibit the entry of newspapers into a province and to order a search for material. The Ordinance also empowers a district magistrate to order preventive

detention of citizens, and journalists have been among those detained under this law. The latest example was that of a stringer, Ahmad Nawaz Abbasi, working for Urdu daily *Nawa-i-Waqt*. Abbasi was accused of supplying Agence France-Presse (AFP) with a two-year-old picture of a drought victim from the Cholistan desert in the south-eastern part of Punjab. He is now out on bail.

The Penal Code

A number of provisions in the Penal Code unduly restrict freedom of expression and the free flow of information. Many are extremely broad in scope, while others include undefined, subjective, terms whose interpretation is effectively left to the authorities. Some do not require proof of intent, contrary to basic rules of criminal due process.

Section 123-A criminalizes anything which is prejudicial to the safety or ideology of Pakistan, or which amounts to 'abuse' of Pakistan. It is so widely worded that it can be applied to anyone giving out information which presents the "ideology of Pakistan" (a concept which has never been satisfactorily defined) in a way which displeases the authorities. Similarly, the scope of the notion of 'abusing' Pakistan can only be guessed at. This section is clearly open to misuse and violates the right to freedom of expression. For example, the traditional establishment view is that the two-nation theory (that Muslims in British India constituted a separate nation, distinct from the Hindu majority), expounded to justify the demand for a separate Pakistan, constitutes a part of the ideology of the State. Anyone challenging this theory could be charged under the provision.

Section 124-A deals with sedition and is also extremely broad. It can be invoked for mere criticism of government and has been applied to journalists. For example Maleeha Lodhi, a former editor of *The News*, was threatened with prosecution. She was not actually prosecuted but official pressure led to her becoming the only editor in the country's history who was not allowed to write for the paper she edited.

Section 153-B penalises incitement of students or others to take part in political activity which disturbs, or is likely to disturb, public order. Strict application of this provision would include situations where the media discusses student politics and could interfere with the right of students to receive information about political matters.

Section 292, which prohibits the sale, public exhibition and even possession of obscene books, is extremely broad and vague. An explanation exempts material "used *bona fide* for religious purposes" but the exemption does not extend to artistic works. Since the law does not define obscenity, this term is, in practice, left to subjective interpretation by the authorities. There have been instances of customs authorities tearing pages bearing nude photographs or paintings from art books being imported into Pakistan.

Section 295-C, known as the blasphemy law, reads as follows:

Use of derogatory remark etc. in respect of the Holy Prophet:

Whoever by words either spoken or written, or visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death.

Like the other Penal Code provisions, this rule is excessively vague and does not require intent. It has been invoked against writers and journalists. For example:

- the late Akhtar Hamid Khan, a pioneering social worker, had a private citizen's complaint lodged against him under Section 295-C for writing an innocuous poem;
- in February 2001, the offices of the daily *Frontier Post*, in Peshawar, were ransacked by a mob after the paper published a supposedly objectionable letter. The Peshawar bureau office of the Urdu daily, *Jasarat*, was ordered to be closed for reproducing the letter in a report on the incident;
- foreign periodicals have been banned for carrying representations of holy Islamic personages. The latest victim of this law is *Mohib*, a newspaper from Abbottabad, which was closed in May 2001 for publishing a column in which there was no reference to the Prophet, but which questioned the authority of the rule supposedly obliging a Muslim to wear a beard.

The Code of Criminal Procedure

Section 99-A provides the executive with sweeping powers to proscribe publications and has been used in an indiscriminate fashion. It allows provincial governments to seize any publication which appears to:

contain any treasonable or, seditious matter or any matter which is prejudicial to national integration or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of the citizens of Pakistan or which is deliberately and maliciously intended to outrage the religious feelings of any such class, insulting the religion or religious beliefs of that class, or any matter of the nature referred to in clause (jj) of subsection (1) of section 24 of the West Pakistan Press & Publications Ordinance, 1963 that is to say, any matter the publication of which is punishable under section 123-A or section 124-A or section 154-A or section 295-A or section 298-A or section 298-B or section 298-C of the Pakistan Penal Code ...

Glaring examples of abuse of this provision include the seizure of an issue of *Herald* magazine for publishing a report on religious militants and a report on Pakistan issued by the UN Special Rapporteur on Torture. Several publications issued by dissidents in Azad Kashmir and Northern Areas have been banned. The provision is also reprehensible in that while it allows for an appeal by Pakistani publishers, no such right is available in respect of a newspaper, book or other document printed outside Pakistan. At one time Hitti's *History of the Arabs* was banned. More recently, Stanley Volpert's biography of Quaid-i-Azam Muhammad Ali Jinnah, the founder of Pakistan, was banned, apparently because of the narration of an incident when a friend found the Quaid-i-Azam taking ham. Any publication claiming that Jinnah or Allama Iqbal, the great Islamic poet and philosopher, drank alcoholic beverages would probably be proscribed.

Laws of Contempt and Defamation

These laws have also been used against journalists. Many years ago Arif Nizami, then a reporter at the daily *Nawa-i-Waqt* (and now head of the Council of Pakistan Newspaper Editors), was sentenced to a month in prison for contempt of court. A recent and glaring example was the conviction of journalist Shahid Orakzai, to imprisonment until he withdrew the contempt. The order implied indefinite imprisonment but it was soon withdrawn. General Zia wrote defamation into the Penal Code and influential persons in authority have invoked this provision to harass journalists. One Sindh Governor sent police on a midnight raid to the house of Mrs. Razia Bhatti, then the editor of the monthly *Newsline*, following allegations of defamation.

Threats of Legal Action

For many of the laws noted above, the actual rate of conviction is relatively low, but this does not diminish their effectiveness in restricting the free flow of information. Many cases are withdrawn or forgotten after an initial blow has been struck and the objective of harassing a person or institution has been achieved. The use of the Official Secrets Act and the Maintenance of Public Order Ordinance has been described above. During 1998-9, a number of journalists were threatened with punitive action under these laws but the cases were not actively prosecuted once the journalist in question had provided a guarantee against further 'breach'. A notable case involved Najam Sethi, editor of *The Friday Times*, who was arrested on 8 May 1999 for expressing his views about Pakistan's political crisis at a function in New Delhi. He was beaten after being taken into custody after midnight and was then kept in solitary confinement. He was released after agitation by journalists on 2 June 1999, without any charges having been laid. Obviously this sort of activity has a serious chilling effect on the free exchange of information.

3.3.3 Laws exclusively related to the Press

At the time of independence, Pakistan inherited two laws related to the Press: The Press and Registration of Books Act, originally issued in 1867, and the 1931 Press (Emergency Powers) Act.

The Press and Registration of Books Act required every publication to carry the name and address of the printer and publisher and, in the case of a newspaper, the name of the editor and owner, in the form of declarations filed with the District Magistrate, who was empowered to authenticate them. Authentication could be refused for a newspaper only if its proposed name was already being used by an existing publication. No newspaper could be published without a properly authenticated declaration, which could lapse if the printer or publisher, their addresses, or the periodicity of publication changed. Publishers were required to deliver to the government two copies of each issue of a newspaper.

The Press (Emergency Powers) Act, 1931 was designed to deal with the emergency created by militant nationalist activity by prohibiting publication of matter inciting or encouraging murder or violence. It authorised the local government to demand a security deposit from printing presses against publishing objectionable material. This security could be forfeited and, for repeat offences, the declarations of printing presses and newspapers (see above) could be annulled. The Act was originally to remain in force for only one year, which could be extended for a period not exceeding one year. In the event, it remained in force in Pakistan until 1960, when it was replaced by the West Pakistan Press and Publications Ordinance, promulgated by General Mohammad Ayub Khan.

The West Pakistan Press and Publications Ordinance, 1960 consolidated the two British-period laws, providing for strict control over printing presses and newspapers by, effectively, transforming the declarations into licences.

Authentication was only to be issued if the government was satisfied, on the basis of information in its possession, that the printer or publisher was not likely to act in a manner prejudicial to the defence or external affairs or security of Pakistan. This implied that a District Magistrate could not authenticate a declaration until the government issued a clearance.

Additionally, authentication could be denied on a number of grounds, including:

- if the applicant had been convicted of moral turpitude during the five years preceding the filing of the document;
- if the publisher did not have the requisite financial resources; or
- if the editor did not have reasonable educational qualifications, adequate training or experience in journalism.

A printing press could forfeit its security, be closed and/or have its declaration annulled on any of 15 listed grounds. The grounds included publishing material which was "indecent, obscene, scurrilous, defamatory or intended for blackmail", which amounted to "false rumours, calculated to cause public alarm, frustration or despondency", which questioned the creation of Pakistan or propagated change in its territory, or which "tend[s] directly or indirectly to bring into hatred or contempt the government established by law in Pakistan or the administration of justice in Pakistan; or any class or section of citizens of Pakistan, or to excite disaffection towards the said Government."

In September 1963, this Ordinance was amended to impose further restrictions. Newspapers were obliged to publish only authorised versions of assembly and court proceedings, and official press notes had to be published verbatim. Appeals were to be heard by a special three-member tribunal headed by a retired judge of the Supreme Court or a High Court and including a government official and a representative of working journalists or editors nominated by the government.

The ordinance was challenged before the Federal Shariat Court, the religious court created in 1979 by General Zia ul Haq, with powers to strike laws down on grounds of repugnancy to the injunctions of Islam.²⁵⁷ The Court held that 10 sections of the ordinance were repugnant to Islam and gave the government until September 1984 to modify them. A government appeal to the highest religious court, the Shariat Appellate Bench of the Supreme Court, was unsuccessful²⁵⁸ and the Ordinance was replaced with the Registration of Printing Presses and Publications Ordinance in September 1988. This new law had fewer offensive provisions than its predecessor, since the number of grounds for refusing to authenticate declarations was reduced and provision was made for default authentication if a declaration was not authenticated within four months.

The new law was in the form of a federal ordinance issued under a civilian dispensation, meaning it had a life of only four months but could become a regular statute if approved by Parliament.²⁵⁹ Parliament never approved the Registration of Printing Presses and Publications Ordinance, but it was kept alive by being reissued every four months or so. However, it was last reissued in March 1997 and lapsed four months later. The government of the time promised a new and better law but this never materialised and the current government has taken the position that since the Registration of Printing Presses and Publications Ordinance had repealed the Press and Publications Ordinance of 1963, the lapse of the former has revived the latter, minus the provisions struck down by the Shariat Court. Although a number of experts argue that both Ordinances have lapsed and no specific press law is now in force, senior courts appear to support the government's interpretation. A Sindh High Court ruling that the 1963 Ordinance had

lapsed has been overruled and the government has been taking action against publications under the 1963 Ordinance.

3.4 Restrictive Practices

Denial of the right to information takes many forms in Pakistan, including some which breach established constitutional obligations. For example, the second chapter of the Constitution lays down various Principles of Policy in relation to certain rights – such as the rights to education, health, social security, local government and women's participation in national life – which were not included in the chapter on fundamental rights on the grounds of lack of resources. These principles cannot be enforced through courts but Article 29(3) requires the President (in relation to the Federation), or the relevant Governor (in relation to the affairs of a province), to lay, on an annual basis, a report on the observance and implementation of the Principles of Policy before the National Assembly or the Provincial Assembly, as the case may be. No such report has ever been presented.

A number of other key documents are regularly withheld from the public. Some examples are:

- details of defence expenditure are never included in public budget documents;
- the defence treaty signed by Pakistan with the United States in 1951 has never been released to the public;
- the structural adjustment accord signed with International Monetary Fund (IMF) early in the 1980s is still treated as secret. The IMF and the World Bank justify this on the basis that Pakistan has declared these documents confidential;
- reports of commissions set up to suggest reform or probe events are often not published. Last year, when the Human Rights Commission of Pakistan tried to secure reports of judicial inquiries into cases of extra-legal killings, it was told that the reports were secret.

An extraordinary attempt to withhold information only fully came to light in 1994. As mentioned above, during the Zia regime a new provision, Section 295-C, was added to the Penal Code. It originally provided for death or life imprisonment for anyone defiling the name of the Prophet of Islam. The Federal Shariat Court, also created by General Zia, ruled that according to Islamic injunctions, death was the only punishment for this offence; as such, Parliament was required to delete the alternative penalty (life imprisonment) from the law. As part of this process, the bill was examined by a Parliamentary Standing Committee and its report was published in the Official Gazette, an important purpose of which is to ensure transparency in the legal process. However, the Gazette notification carrying the Standing Committee's report was labelled

'confidential'. The apparent reason for this was to conceal the fact that the Standing Committee had seriously qualified its approval of the proposed amendment by recommending that information be gathered from other Muslim States to see how they dealt with blasphemy of the Prophet. This did not suit the government, which wanted to rush through the proposed legislation.

Outright refusal to disclose information is only one way of preventing its timely or effective publication. The Pakistan authorities also frequently achieve this objective by delaying or restricting dissemination of information. For example, when the eighth amendment to the Constitution was to be adopted in 1985, not all members of the National Assembly had seen the full text of the amendment beforehand. Parliamentarians have often not been given the text of legislative proposals before they are discussed. There have even been instances where legal changes – for example in import/export regulations – are made to benefit a particular party and are withdrawn as soon as the objective has been achieved, without the general public ever knowing about them.

The record of parliamentary proceedings is published but often far too late to be of benefit to journalists or those who need timely access to this information. In addition, very few copies of the debates are published and they are rarely available at bookstores. Reports of parliamentary committees are published in the Gazette. However, the information given is usually confined to decisions taken and summaries of proceedings, and it is very difficult to gain access to the complete transcripts. Even the courts can be denied access to these records. For example, in 1996 the Supreme Court made a number of very significant rulings on the obligation of the executive to accept the views of chief justices of superior courts (the Supreme and High Courts) in the matter of selection and promotion of judges. During the proceedings, known as the *Judges Case*, the Court wanted to see the relevant records of the proceedings of the constitution-drafting committee (1972-73) which adopted the article providing for consultation with chief justices. The records were never made available.

The authorities use various means to restrict access to 'published' information. Key documents such as the Economic Survey, census reports and household surveys are issued in such small numbers that many people cannot gain access to them. Old reports are often unavailable, even in the departments that sponsored them. Many reports are issued only in English, which means that the majority of the population cannot read them. The task of presenting these reports in languages understood by the wider public has been left to the media. An example of official failure to disseminate important information is the census which was due in 1991 and was not held until 1997, mainly because it would have altered the distribution of National Assembly seats among the provinces. The results of this long-delayed survey

have still not been completely released; the head-count of non-Muslim citizens, for example, has been withheld.

Public disclosure of information about administrative policies and decisions is quite limited. Final decisions can normally be accessed, but the process leading to a decision, the background information upon which the decision was based and the views expressed at the different desks a file has touched in the course of its journey to the decision-maker are seldom available, except when the records are called for in a court of law. For example, a request in 2000 by senior journalists to the Information Minister for the written remarks and observations made by various functionaries while processing material relating to the debate on the latest draft freedom of information law was stoutly resisted. This was justified on the grounds that officials did not wish to be identified with views expressed in the files, for fear of reprisals by various vested interests.

Over the years, the importance of the oral question hour in legislatures has been downgraded in a number of ways. The presiding officers have often reprimanded ministers for not taking questions with due seriousness. For example, during the 1998-9 session, the Chairman of the Senate and the Speaker of the National Assembly repeatedly asked Ministers to answer questions themselves, rather than assign the task to their deputies, a plea that was seldom respected. Questions are kept pending from session to session on the basis that the information sought is being gathered or that more time is needed to present a full answer. In addition, the government has frequently suspended question hour, on the basis that it had other urgent work to do.

3.5 Record-Keeping

An archives law is in force and in theory all public records over 30 years of age are open to public inspection. However, this right is rarely invoked by members of the public.

The quality of archival material suffers from poor record-keeping traditions and practices. During the colonial period, great importance was attached to the maintenance of property records, especially of land ownership and cultivation patterns. The system was largely undermined during the partition upheaval and extensive tampering with land records was reported, leading to cases in which land was sold over and over again by unauthorised persons. The failure to maintain up-to-date records has led to difficulties in collecting land revenue, once the main source of income for provincial governments. The recovery rate in Punjab dropped so low that in 1998, land revenue was actually abolished.²⁶⁰ Important records from pre-partition days, lying in

provincial capitals, are kept in utter disorder with scant regard for their preservation.

An extreme example of poor record-keeping involves documents relating to the Rann of Kutch case. The case, between Pakistan and India before the International Court of Justice (ICJ), related to an armed clash in 1965 over territory in the marshlands of Kutch, lying between the Pakistan province of Sindh and the Indian State of Gujerat. Hostilities ended when the two governments decided to refer the matter to the ICJ for adjudication and determination of the boundaries in the disputed area. After the case was over, some of the documents were transferred to the office of the Divisional Commissioner at Mirpurkhas in Sindh. There they were kept in gunny bags, which were thrown into an open office veranda. The guards sold some of the documents to buy coal and others to vendors who used them as wrapping. The keeper of the Sindh Archives discovered this purely by chance when he noticed that some food had been delivered wrapped in documents from the case. He then bought the remaining bags of documents from the guards at the Commissioner's office and transferred them to his office in Karachi.

Police do not keep adequate records, even of cases which are under investigation or pending. This can result in egregious abuse of individual rights. Last year it was reported that Mr. Munawwar Husain had been in jail for seven years while his case was pending because his file was reported to have been misplaced or lost. The case was sent to trial by a sessions court in 1993 but no proceedings took place. When the matter was raised in 2000, the prosecution stated that the case had been referred to another court (an anti-terrorist court), but obviously the record did not reach its destination.

The reluctance to disclose official records and poor record-keeping practices are part of the broader phenomenon of secret governance and a general aversion to disclosure of information. These restrictive practices obstruct the free flow of information and not only deprive the people of their right to participate in decision-making processes, but also lead to miscarriages of justice, administrative excesses and violation of the fundamental principles of good governance.

3.6 Control of information flows via the media

The State has exercised a great deal of direct control over the media and thereby over the flow of information to the public. The electronic media has always been under strict government control and the State has also exercised some control over news agencies.

3.6.1 Broadcasting

Constitutionally, broadcasting has always been included in the federal list but Article 15, dealing with this, is a curious piece of drafting. It does not explicitly recognise provincial powers over broadcasting, but they can be implied in various ways, including through the power to construct and use transmitters. This constitutional provision has not been tested because no provincial government has really tried to establish its own radio or television station. This became a matter of public debate in 1989-90 when, after the 1988 general election, Benazir Bhutto held power at the federal level and her main rival, Nawaz Sharif, was the Chief Minister of the biggest province, Punjab. The two governments soon adopted a collision course and one of the ways Sharif sought to defy the centre was by declaring an intention to establish provincial radio and television stations. However in August 1990, before this debate could conclude and the Punjab government's plans were finalised, the Bhutto government was sacked. In the ensuing general election, Sharif was returned to power federally as well as in Punjab, so he no longer had an interest in pursuing the matter. However, the issue is likely to come up again and the possibility of provinces asserting their rights in the information sector cannot be ruled out.

Pakistan inherited a State radio broadcaster at the time of independence which, since 1973, has been functioning as a corporation under the Pakistan Broadcasting Corporation Act.²⁶¹ This Act vests management powers in a governing board appointed by the federal government.²⁶² Although the Act states that the Board is autonomous in budget and expenditure matters, a director can be removed at any time by the government. Furthermore, the powers of the Board can be delegated to the Director-General, who also holds office at the pleasure of the government.

The general functions of the State radio include "disseminating information, education and entertainment through programmes which maintain a proper balance in their subject matter and a high general standard of quality in morality." The radio is also supposed "to bring to public awareness the whole range of significant activity as to present news or events in as factual, accurate and impartial a manner as possible". However, these obligations are undermined by a number of requirements which effectively require the radio to serve the federal government. These include:

- "to broadcast in the home services such special programmes as the federal government may, from time to time, direct";
- "to broadcast in the external services to such countries and in such languages and at such times as the federal government may from time to time direct";
- "to carry out instructions of the federal government with regard to general pattern or policies in respect of programmes, announcements"; and

- "in the discharge of its functions the corporation shall be guided on questions of policy by the instructions, if any, given to it from time to time by the federal government, which shall be the sole judge as to whether a question is a question of policy."

The Board is also required to submit an annual report to the government, which is obliged to present this report to the National Assembly, although this does not happen in practice. Furthermore, the government has absolute control over the finances of the national radio broadcaster.

The idea that the Pakistan Broadcasting Corporation is an autonomous corporation is a complete fiction, since the government has total control over the Board, its revenues, programming and policy matters. Furthermore, in practice the radio has not functioned in an independent manner, as required under the Act, in particular by failing to present news and events "in as factual, accurate and impartial a manner as possible."

Television was established in Pakistan in 1964, the most immediate reason being President Field Marshal²⁶³ Ayub Khan's desire for visual publicity to assist him in his bid for a second presidential term, the election being due early in 1965. Since its inception, Pakistan Television has been used by successive governments as one of the foremost instruments for securing the people's allegiance.

The Pakistan Television Corporation (PTV) is a limited company established under the Companies Ordinance, with the controlling shares held by the federal government. The company is to be managed by a governing board of not less than seven directors including the Chairman and the Managing Director, all nominated by the government. The Chairman has to be from amongst the directors representing the government and all directors hold office at the government's pleasure. In practice, PTV functions as a department of the Ministry of Information and for most of its life has been headed by the Information Secretary. In 1997 the government appointed a ruling party senator as Chairman. PTV is presently run by a person drawn from the corporate sector, but the functions of the Corporation remain under close government control. The directors, a majority of whom are employees of PTV, are figureheads.

Pakistan has not been able to ignore completely the worldwide trend to open up the airwaves to private broadcasters. A beginning was made in 1989 when Shalimar Recording Company, a private limited company, was allowed to operate a TV channel under the title, Shalimar Television Network (STN). In addition to offering entertainment programmes it was obliged to carry the official PTV news bulletins. It also entered into contracts with the BBC and CNN to broadcast some of their programmes, including news bulletins.

Whatever autonomy STN once enjoyed has been extinguished through a series of measures and now it forms part of the PTV system.

For some years the government has been toying with the idea of establishing a broadcast regulator which could issue licences to private broadcasters and regulate their activities. An ordinance to set up such a regulator was issued in 1997. It provided for the appointment, by the President, of a chairman, who had to be a retired judge of the Supreme Court, and six members, including the Information and Communications Secretaries and four representatives of the public who had an acknowledged record of work in the fields of radio, television, print media and/or public service. Despite these developments and various promises, no private television station has so far been allowed to operate from within the country, though a couple of organisations including Pakistani investors have begun offering satellite programmes via offices abroad. A private FM radio station has been authorised.

3.6.2 News Agencies

The main news service available in Pakistan at the time of independence was Reuters. This service was taken over by a subscribers' trust under the title of Associated Press of Pakistan Trust (APP), and is still the largest national news agency. APP was taken over by the Ayub government in 1961 through the Associated Press of Pakistan (Taking Over) Ordinance, 1961 whose declared objective was "to ensure free and efficient flow of news to the people and to place the undertaking on a stable footing." The Ordinance authorised the government to appoint a person to "manage and administer, on behalf of the central government, the affairs of the undertaking."

The Ordinance also stated that once the affairs of the news agency had been set right, "the central government may transfer the whole or a part of the undertaking or any interest in it to an individual or an organisation or a Board of Trustees set up for this purpose." This has so far not happened and for 40 years APP has remained under government control. During this time, APP's network has expanded, its efficiency has improved and it has acquired greater financial stability. However, these developments fall far short of public expectations and the needs of newspapers. Furthermore, APP has never been able to supply unbiased news and associations of newspaper proprietors, editors and working journalists have consistently demanded that it be freed from government control and turned into a statutory corporation answerable to Parliament.

Another important local news agency is Pakistan Press International, a private organisation with close links, including financial support, to a government party. This agency has, on occasion, done creditable work in disseminating unbiased news and in promoting dissent but its dependence on official support makes it vulnerable to government

pressures. Over the last decade, several other private news agencies have appeared.

Pakistan also has a sizeable network of foreign news agencies including Associated Press (AP), Agence France-Presse (AFP) and Deutsche Press-Agentur (DPA). Attempts were made at one stage through an official notification, to oblige foreign news agencies to operate through a national partner and several such arrangements were made. However, Reuters challenged this rule and the court held that it was not binding as it was merely an official notification, not a law. Since then, foreign news agencies have been working freely and dealing directly with their subscribers. The government has also allowed, on reciprocal basis, the posting of a Press Trust of India (PTI) correspondent and correspondents of two Indian newspapers in Islamabad, though their movements are subject to official clearance. Indian TV channels also operate through associates within the country.

3.7 Recent Developments and Official Resistance

The demand for freedom of information legislation in Pakistan has only taken root recently. During the first decade of independence, when the State was in its infancy and facing post-partition problems, it was incapable and unwilling to respect and promote a democratic framework. This was manifested in the implementation of repressive measures, such as the banning of newspapers. While there was awareness about the importance of access to information within the print media, other issues such as overt censorship and the capacity to survive seemed more critical at that time. Furthermore, the general public was facing a range of other serious problems, and awareness about the need for access to information was limited.

The first military regime, which began in 1958, brought with it a wave of repressive measures against the press, including a new, draconian press law and a series of newspaper takeovers through the government's surrogate, the National Press Trust. Democracy was restored briefly in 1972, but another period of military rule began before these repressive measures had been dismantled. It was really only at the end of the Zia military regime in 1988 that discussion of the fundamental importance of access to information started and that demands for this right to be respected began to be made by the press and the public.

The government has advanced a series of arguments to deny or restrict access to information. Its first justification relates to the difficulty of storing or retrieving information on demand. There are serious flaws in this argument, not least that it basically rests on the claim that the government is unable to fulfil a basic condition of effective governance, namely good record-keeping. Maintenance of accessible information is

a prime responsibility of government, and can hardly be put forward as grounds for rejecting the right of access to information.

A second argument is that the cost of record-keeping and maintaining a structure which facilitates public access to information would be too high. As noted above, record maintenance is a key responsibility of government. In any case, a strong argument can be made that the cost of good record-keeping is not greater than the costs associated with bad record-keeping. Technological developments have now totally transformed the matter of information storage and retrieval and furthermore, it is well-established that the long-term benefits of openness far exceed the costs.

A third argument used by the government is that a right to access information will generate a flood of demands, which will be excessively burdensome, in terms of heavy demands on officials' time, disruption to administrative work and undermining bureaucratic efficiency. The limited extent of recourse to the archives suggests that official fears of a deluge of requests are exaggerated, if not completely unfounded. Furthermore, the volume of demand for information depends on how closed and secretive a government is. If the government takes proactive measures to disclose important information, the volume of requests will diminish accordingly.

The argument the government has relied on most to defend its regime of secrecy is that openness will undermine State security. This is unfounded for two reasons. First, all information regimes include some exception for legitimate defence and security interests. Second, disclosure of much of the information held by the State concerning defence simply would not affect security. For instance, when Pakistan negotiates the purchase of submarines, people all over the world have access to this information, and yet the government of Pakistan tries to keep it secret. Secrecy in such instances simply opens the door to corruption and deprives decision-makers of the benefit of public debate, for example on the need for submarines, appropriateness or otherwise of the model sought, and costs. The government is also unjustifiably secretive on matters relating to the economy. If the economy is in bad shape, it is better to let the people know and mobilise them to address the problems than to give the impression that all is well and then introduce unwelcome austerity measures.

3.7.1 Advocacy Initiatives

The movement for freedom of information began seriously in the early nineties when a Jamat Islami Senator, Professor Khurshid Ahmad, introduced a private member's bill on the subject in 1990. The bill proposed a regime under which the government would have been obliged to supply information about most of its decisions and policies. However, the Pakistan legislative system does not favour private bills and very little time is allowed to debate them. Often, scrutiny of these

bills by standing committees does not conclude during the mover's term in legislature and once his or her tenure ends the bill lapses. The standing committee, however, killed Professor Khurshid Ahmed's bill in a report in 1992.

The next development came at the end of 1996. Spurred by a wave of protest against corruption and intrigue in high places, the grounds used to dismiss the Benazir Bhutto government in November 1996, the Law Minister in the caretaker government, Mr. Fakhruddin G. Ebrahim, declared transparency to be the key to good governance and, invoking the constitutional guarantee of freedom of expression, drafted a freedom of information law. Following differences with the President on this and some other issues, he left the government before the law could be issued. However, the move had gathered too much support to be ignored and the government was obliged to adopt the Freedom of Information Ordinance, 1997.²⁶⁴ This, however, provided much weaker protection for the right than Ebrahim's draft bill had done.

There were several key differences between the bill and the 1997 Ordinance. The bill referred explicitly to the constitutional guarantee of freedom of expression but the Ordinance omitted this important reference. The bill made the law applicable to all authorities – federal, provincial and local – but the Ordinance was limited to federal authorities. The bill provided that it would override all other laws, but this positive feature was dropped from the Ordinance. To make matters worse, the bureaucracy ensured non-implementation of the Ordinance simply by failing to frame the required rules and procedures for accessing information. The Sharif government then failed to introduce the Ordinance as a bill in Parliament, and allowed it to lapse in May 1997.

The present military regime, led by General Pervez Musharraf, began a process to reintroduce a freedom of information ordinance in August 2000. Javed Jabbar, the Minister of Information and Media Development, circulated a draft "Ordinance to provide for transparency and freedom of information" on 28 August for public debate.²⁶⁵ The draft included a number of positive features, such as the right to appeal to the Mohtasib, or Ombudsman, a clear time frame for the release of information and a broad definition of public office. At the same time, there were a number of weak features in the draft, including a limited definition of what constitutes a public record and an excessively broad regime of exemptions. In addition, the draft did not include a number of features which would substantially strengthen the public's right to know, such as obligations on public offices to maintain records and publish certain information, a system for promoting freedom of information and educating civil servants, and protection for whistleblowers and those who release information in good faith under the law. On 15 October 2000, Javed Jabbar resigned from his post and the draft Ordinance has gone no further.

However, the issue of freedom of information has now been taken up by various groups outside government, including most of the rights-oriented non-governmental organisations (NGOs) as well as various print media organisations, and individuals including newspaper proprietors, editors and working journalists. An NGO concerned with consumers' rights has circulated a draft freedom of information law. No political party actually opposes freedom of information legislation, even if they are not all equally enthusiastic about it. Benazir Bhutto's People's Party has in fact circulated a draft of its own freedom of information bill. However, these manifestations of interest in and support for freedom of information by officials and politicians are sporadic and reactive in nature. The need for a concerted and sustained campaign for freedom of information is now very clear. The climate is favourable and neither the present regime nor the one that may emerge after the promised election next year is likely to have the strength to resist public pressure for enacting legislation. It is also quite possible that the courts may throw their weight behind a right to freedom of information, if only as part of their present effort to improve their image.

3.8 Conclusion

Since coming into being as an independent State in 1947, Pakistan has essentially failed to sustain constitutional democracy and has spent most of the last half-century under military rule. Today, Pakistan is again under military rule, with the Constitution suspended and democratic rights in abeyance. In this context, it is hardly surprising that the rights to freedom of expression and information are not respected, either in law or in practice. The legal framework in Pakistan includes a number of laws which impose severe restrictions on the free flow of information, both by imposing secrecy and by subjecting the media to excessive restrictions and government interference. These problems are compounded by poor record-keeping practices and a secretive government and bureaucracy which use every means at their disposal to deny people access to information. They are further compounded by extensive government control over broadcasting and news agencies.

Pakistan does not presently have a law providing for access to official information. The Freedom of Information Ordinance, 1997 was briefly in force but was allowed to lapse before it had been passed into law. A process to introduce a second freedom of information Ordinance began in 2000, but this initiative effectively stalled when its sponsor, the former Minister of Information and Media Development, resigned. However, the cumulative effect of these developments, along with efforts by civil society, has been to promote public consciousness of the importance of freedom of information and demands for legislation to implement this right. It is now imperative that the authorities respond

to these demands and pass effective legislation guaranteeing a right to access information held by public authorities.

ENDNOTES

254. General Musharraf has recently followed the practice of his military predecessors by making himself President.

255. Issued on 14 October 1999.

256. *Nawaz Sharif v. President of Pakistan*, PLD 1993 SC 473.

257. *Federation of Pakistan v. Public at Large and Others*, PLD 1984 FSC 1183.

258. PLD 1988 SC 202.

259. By contrast, military ordinances are valid indefinitely.

260. See Punjab Land Revenue (Abolition) Act 1998.

261. Now the Pakistan Broadcasting Corporation Act of 1993.

262. With not more than seven directors including the Chairman, the Director-General and the Finance Director.

263. He promoted himself to a higher military rank one year after taking power.

264. See Annex VI.

265. See Annex VII.

ANNEX VI

FREEDOM OF INFORMATION ORDINANCE, 1997²⁶⁶

Whereas, transparency and freedom of information are the essence of good governance and improved access to public records it is necessary to ensure that the people of Pakistan are better informed about the management of their affairs and the Government is made more accountable to the people;

And whereas the National Assembly is not in session and the President is satisfied that the circumstances exist which render it necessary to take immediate action;

Now, therefore, in exercise of the powers conferred by clause (I) of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance.

1. Short title, extent and commencement.

(1) This Ordinance may be called the Freedom of Information Ordinance, 1997.

(2) It shall extend to the whole of Pakistan.

(3) It shall come into force at once.

2. Definition.

In this Ordinance, unless there is anything repugnant to the subject or context: –

(a) "designated official" means an official of a public office designated under section 5;

(b) "Government" means the Federal Government;

(c) "Mohtasib" means the Wafaqi Mohtasib (Ombudsman) appointed under Article 3 of the Establishment of office of Wafaqi Mohtasib (Ombudsman) Order, 1983 POI of 1983; and

(d) "Public office" means

- i. any ministry, division department or office of the Government;
- ii. Secretariat of the Parliament (Majlis-e-Shoora);
- iii. any office of any Board, Commission, Council, or other body established by or under a Federal law; and
- iv. any office of a body which is owned or controlled by the Government or in which the government has a controlling share of interest; and

(e) "record" shall include drawings, computer records, photographs, microfilms, cinematography films and audio and video recordings.

3. Declaration of public record.

Subject to the provisions of Section 4, the following record of all public offices are hereby declared to be the public record -

- (a) instructions, policies and guidelines;
- (b) records relating to sale, purchase, lease, mortgage, acquisition or transfer in any other manner of properties both movable and immovable;
- (c) records pertaining to approvals, consents, permissions, concessions, benefits, privileges. Licences, contracts, permits, agreements, and any other advantages; and
- (d) final orders including decisions taken at all meetings.

4. Exclusion of certain records.

Nothing contained in Section 3 shall apply to the following records -

- (a) notings on the files, minutes of meetings and interim orders;
- (b) records of the banking companies and financial institutions relating to the accounts of their customers;
- (c) records declared as classified under the policy made by the Government;
- (d) records relating to the personal privacy of an individual; and
- (e) records of private documents furnished to a public office either on an express or implied condition that information contained in any such document shall not be disclosed to a third person.

5. Designated official.

- (1) Every public office shall, within 30 days of the commencement of this Ordinance, designate an official for the purposes of this Ordinance.
- (2) In case no such official has been designated or in the event of the absence or non-availability of the designated official, the person in charge of the public office shall be the designated official.

6. Procedure for obtaining information etc.

- (1) Subject to the provision of sub-section (3), any citizen of Pakistan may, on the payment of the prescribed fee, make written application to the designated official for obtaining the

information contained in any public record including copy of any such record.

(2) The designated official shall within 2 days of the receipt of the request, supply to the applicant the required information including copy of such record. The information from, or the copy of, any public record supplied to the applicant shall contain a certificate at the foot that the information is correct and that the copy is a true copy of the record and such certificate shall be dated and signed by the designated official.

(3) Nothing contained in sub-section (1) shall apply to such public record as has been published in the official Gazette or in the form of book offered for sale.

7. Recourse to the Mohtasib.

(1) If the applicant is not provided the information or copy of the record declared public record under Section 3 within the prescribed time or the designated official refuses to give the information or copy on the ground that the applicant is not entitled to receive such information or copy, the applicant may, within 30 days of the last date prescribed for giving the information or copy or the communication of the designated official's order declining to give the information or copy, file a complaint with the Mohtasib.

(2) The Mohtasib may, after hearing the applicant and the designated official, direct the designated official to give the information as the case may be, the copy of the record or may reject the complaint.

(3) The decision of the Mohtasib shall be final.

8. Ordinance not to override laws.

This Ordinance shall not override any other law.

9. Power to make rules.

(1) The Federal Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Ordinance.

(2) The rules made under this section may, among other matters, provide for:

(i) the fee payable for obtaining information from, and copies of the public record;

(ii) the form of application for obtaining information from, and copies of, the public record; and

(iii) the form in which information from public record shall be furnished.

ENDNOTE

²⁶⁶ Copied from the *Daily Business Recorder* of 30 January 1997

ANNEX VII

DRAFT ORDINANCE TO PROVIDE FOR TRANSPARENCY AND FREEDOM OF INFORMATION, AUGUST 2000

Whereas it is expedient to provide for transparency and freedom for information to ensure that the citizens of Pakistan have improved access to public records and for the purpose to make the Federal Government more accountable to its citizens, and for the matters connected therewith or incidental thereto;

And whereas the National Assembly and the Senate stand suspended in pursuance of the Proclamation and the Senate stand suspended in pursuance of the Proclamation of Emergency of the fourteenth day of October 1999, and the Provisional Constitution Order No 1 of 1999;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, therefore, in pursuance of the Proclamation of Emergency of the fourteenth day of October 1999, read with the Provisional Constitution Order No.1 of 1999, as well as Order No,9 of 1999, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance.

1. Short title, extent and commencement.

- (1) This Ordinance may be called the Freedom of Information Ordinance, 2000.
- (2) It extends to the whole of Pakistan.
- (3) It shall come into force at once.

2. Definitions.

In this Ordinance, unless there is anything repugnant to the subject or context:-

- (a) "designated official" means an official of a public office designated under section 5;
- (b) "Mohtasib" means the Wafaqi Mohtasib (Ombudsman) appointed under Article 3 of the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 (P.O. No.1 of 1983);
- (c) "prescribed" means prescribed by rules made under this Ordinance;
- (d) "Public office" means:-
 - (i) any Ministry, Division, department or office of the Federal Government;
 - (ii) Secretariat of Majlis-i-Shora (Parliament);
 - (iii) any office of any Board, Commission, Council, or other body established by, or under, a Federal law; and
 - (iv) any office of a body which is owned or controlled by the Federal Government or in which the Federal Government has a controlling share or interest; and
- (e) "record" shall include drawings, computer records, photographs, microfilms, cinematographic films and audio and video recordings.

3. Declaration of public records.

Subject to the provisions of section 4, the following record of all public offices are hereby declared to be the public record, namely:-

- (a) instructions, policies and guidelines;
- (b) record relating to sale, purchase, lease, mortgage, acquisition or transfer in any other manner of properties both movable and immovable;
- (c) record pertaining to approvals, consents permissions, concessions, benefits, privileges, licenses, contracts, permits, agreements, or any other advantages; and
- (d) final orders including decisions taken at all meetings.

4. Exclusion of certain record

Nothing contained in section 3 shall apply to the following record of all public offices, namely:-

- (a) notings on the files;
- (b) minutes of meetings;
- (c) any interim orders;
- (d) records of banking companies and financial institutions relating to the accounts of their customers;
- (e) records declared as classified under the policy made by the Federal Government;
- (f) record relating to the personal privacy of any individual; and
- (g) record of private documents furnished to a public office either on an express or implied condition that information contained in any such document shall not be disclosed to a third person.

5. Designated official.

- (1) The Federal government may, within thirty days of the commencement of this Ordinance, for every public office designate an official for the purposes of this Ordinance.
- (2) In case no such official has been designated or in the event of the absence or non-availability of the designated or in the event of the absence or non-availability of the designated official, the person incharge of the public office shall be the designated official.

6. Functions of designated official.

Subject to the provisions of this Ordinance and the rules made thereunder and the overall supervision and control of the Federal Government, the designated official shall provide the information contained in any public record or, as the case may be, copy of any such record.

7. Application for obtaining information etc.

- (1) Subject to the sub-section (2), any citizen of Pakistan may make an application to the designated official in the form as may be prescribed and shall with his application, furnish such information and documents, pay such fee and at such time as may be prescribed.

(2) Nothing contained in sub-section (1) shall apply to such public record as has been published in the official Gazette or in the form of book offered for sale.

8. Procedure for disposal of application.

(1) Subject to sub-section (2) on receiving an application under section 7, the designated official shall, within twenty-one days of the receipt of request, supply to the applicant the required information or, as the case may be, a copy of any public record.

(2) In case the designated official of the opinion that:-

(a) the application is not in the form as has been prescribed;

(b) the applicant has not furnished such information and documents or has not paid such fee as has been prescribed;

(c) the applicant not entitled to receive such information;

(d) the required information as the case may be, the required records does not constitute a public record under section 3; or

(e) the required information or, as the case may be, the required record constitutes a record which is excluded under section 4, he shall record his decision in writing and the applicant shall be informed about such decision within twenty-one days of the receipt of the applications.

(3) The information from, or the copy of, any public record supplied to the applicant under sub-section (1), shall contain a certificate at the foot thereof that the information is correct or, as the case may be, the copy is a true copy of such public record, and such certificate shall be dated and signed by the designated official.

9. Recourse to the Mohtasib.

(1) if the applicant is not provided the information or copy of the record declared public record under section 3 within the prescribed time or the designated official refuses to give such information or, as the case may be, copy of such record, on the ground that the applicant is not entitled to receive such information or copy of such record, the applicant may within thirty days of the last date of the prescribed time for giving such information or, as the case may be, copy of such record, or the communication of the order of the designated official declining to

give such information or copy of such record, file a complaint with the Mohtasib.

(2) The Mohtasib may after, hearing the applicant and the designated official, direct the designated official to give the information or, as the case may be, the copy of the record or may reject the complaint.

10. Ordinance not to derogate other laws.

The provisions of this Ordinance shall be in addition to, and not in derogation of, anything contained in any other law for the time being in force.

11. Power to make rules.

(1) The Federal Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Ordinance.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for:-

(a) the fee payable for obtaining information from, and copies of the public records;

(b) the form of application for obtaining information from, and copies of, the public record; and

(c) the form in which information from public record shall be furnished.

CHAPTER 4

COUNTRY STUDY - SRI LANKA

4.1 Introduction

Sri Lanka faces enormous challenges in the areas of conflict resolution and national integration. Sri Lanka also faces a crisis of governance and official credibility, both of which need to be addressed to ensure constitutionalism, the rule of law and participatory democracy. One of the major weaknesses in governance in Sri Lanka is the absence of transparency and the strong prevailing culture of authority and secrecy, which undermines accountability and prevents people's effective

participation in law and policy-making processes. This has contributed to the formulation of laws and policies which are 'people unfriendly', in that they are designed to promote executive convenience rather than the rights of ordinary people.

Sri Lanka lacks a freedom of information law. Instead, there are a number of pieces of legislation that promote secrecy and undermine the free flow of information. In addition, government has become used to operating in secret, and a number of routine practices prevent information from reaching the people. As the Law Commission in its Report on Freedom of Information of 1996 rightly pointed out, "the current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access."²⁶⁷ There is some judicial interpretation that suggests that the right to information may be included in the constitutional guarantee either of freedom of expression or of thought. However, existing laws cannot be ruled unconstitutional and there is only a very limited window of opportunity to challenge bills before they become law. There is, therefore, a vital need to effect change both in relation to the legal framework, in particular by adopting freedom of information legislation, and the official practice.

4.2 The Need for Information

4.2.1 Democracy

Democracy, or the 'rule of the people', rests on the belief that dialogue and consensus between all members of society will bring about the fairest decisions on how to manage social affairs and distribute social wealth. In a parliamentary democracy like Sri Lanka, the citizens relinquish direct decision-making powers to elected representatives such as the President, Cabinet and the Parliament. Those representatives are appointed by the people to be public servants and the temporary managers of public assets. The people retain the final say as to the performance of those in office and express their will through the polls.

The 'rule of the people', however, requires more than the mere exercise at regular intervals of the electoral franchise. At the very least, for voters to elect the individuals best suited to represent their views and to serve the common good, they must be able to assess the record of those in office and to know what the various candidates and their parties stand for. But this alone is not sufficient, for in order to make an informed choice, citizens must have access to information about the issues at stake, be they local, national or international, and hence be able to form their own views in full knowledge of all relevant information. Thus, information is crucial not only to the act of voting but also to ensuring that citizens fully and meaningfully participate in the

shaping of their common future. Furthermore, a fundamental value of democracy is the principle of equality: equality of rights, freedoms and duties, and a fair distribution of the fruit of social co-operation. If all, or even some, people are kept in the dark with regard to their rights and entitlements they will not be able to enjoy on an equal basis the full range of political, social and economic opportunities.

The right to information is thus a crucial element in ensuring full, rather than simply token, democracy. It is the responsibility of the State to ensure that everyone has equal access to information pertaining not only to their private lives, but to everything that affects them as citizens.

4.2.2 Accountability and Good Governance

The right to information is necessary to expose corruption and malpractice, and to promote a culture of accountability, both of which are much needed in the Sri Lankan context. The release, or at least accessibility, of information pertaining to the finances, procedures and decisions of all social actors whose activities have an impact on the public – government institutions, departments and agencies, businesses – is the guarantee that such actors will be accountable and fulfil their mandates.

In Sri Lanka, malpractice in the public sector is rampant and expresses itself in the following ways:

- mismanagement at all levels of government;
- abuse of discretion, specifically for patronage and preferential treatment in the allocation of government resources (jobs, documentation, contracts, relief money and so on) is very widespread.²⁶⁸ Among the most noteworthy recent examples is the current impeachment motion against Chief Justice Sarath Silva who, among other things, is alleged to have interfered in a court case brought against one of his friends and to have transferred judges capriciously;
- the common practice of public officials asking for bribes, either to obtain what one is entitled to or to get more than this. The police force, in particular, is infamous for demanding and receiving bribes. However, the practice is certainly not limited to the police and even officials from the Samurdhi Poverty Alleviation Programme, who are supposed to be assisting the poor, are suspected of corruption and of allocating funds depending on the political affiliation of the recipient in question,²⁶⁹
- there is believed to be rampant and large-scale corruption at the highest levels of government. This is reflected in the numerous allegations or cases currently filed against public servants. A few specific examples from among many include:

- allegations that the Chairman of the Board of Investments is involved in a corruption scandal of US\$5m regarding the granting of a contract to a businessman;
- both the Ceylon Electricity Board and the Urban Development Authority are currently under investigation;
- the government has been accused of malpractice in the granting of the multi-billion rupee contract for the building of the Katunayake–Colombo expressway;
- the President has been criticised in the media in relation to the allocation of land around the Parliament;
- earlier this year, Justice Minister Batty Weerakoon deplored in Parliament the high level of corruption in the multi-million dollar purchases of arms, alleging that officials from the Department of Defence were paying over the market price for arms and equipment in exchange for commissions.

The examples and allegations of malpractice, corruption and bribery mentioned above are simply the tip of the iceberg, even from among those cases which have been reported or otherwise made public. They do, however, give an indication of the scale of the problem. A right to information guaranteed in law would help to combat these practices, to bring those responsible to justice, and to enhance accountability in the public sector.

4.2.3 Protecting Other Human Rights

Lack of access to a wide range of information, including official documents on governmental policies, medical records, poverty alleviation programmes, legal aid and education, affects the enjoyment of other human rights, including economic and social rights. Furthermore, people's ignorance of the full range of human rights to which they are entitled under the Constitution and international human rights treaties which Sri Lanka has ratified is a serious impediment to their enjoying those rights and, importantly, to their seeking redress when these rights are violated. This is compounded by a general lack of awareness of the mechanisms available or procedures to follow to obtain legal redress.

Freedom of information and basic needs: the case of the displaced

Hundreds of thousands of people in Sri Lanka have been displaced over the years by the ethnic conflict and successive military operations. These so-called "internally displaced persons" (IDPs) have sought refuge either in camps or with friends and relatives. Many are dependent for their most basic needs – including food, shelter and health care – on aid provided by international humanitarian agencies and the government. Government distribution of aid has been unsatisfactory and policies in this area have been shrouded in secrecy. Lack of access to information on entitlements and policies has led to

discrimination and arbitrariness in the distribution of aid. Delays in distribution are common, food rations are often stopped arbitrarily, or subject to embargoes in the case of areas under the control of the Liberation Tigers of Tamil Eelam (LTTE). IDPs often have to rely on hearsay to ascertain their entitlements and the procedure to follow to obtain relief. Addressing these problems would be significantly easier if there was adequate access to information.

Freedom of information, environmental hazards and public participation: the phosphate mining case

In the 1990s, plans by a US–Japanese consortium to undertake high-intensity phosphate mining in the village of Eppawela sparked strong protest from villagers, scientists, environmentalists and human rights activists. The project would have displaced up to 12,000 people and might have seriously depleted Sri Lanka's non-renewable phosphate reserves. Despite these protests, successive governments approved the project.

In 1999, seven residents of the area filed a fundamental rights application in the Supreme Court challenging the project.²⁷⁰ The petitioners argued that their constitutionally guaranteed rights to freedom of movement and residence, to occupation, and to equality before the law had been violated. They further argued that their right to information and to public participation had been violated, as the agreement between the government and company had not been disclosed and no environmental impact assessment carried out, although such an assessment was required by law. In a landmark judgment on 2 June 2000, the Supreme Court ruled in favour of the petitioners.²⁷¹ The court ordered the government to release the agreement with the company and to desist from entering into any agreement relating to the Eppawela phosphate deposit without first carrying out and publishing a comprehensive study on the subject.

An extract of the decision reads as follows:

The proposed agreement makes no reference to the preparation or submission of any Environment Impact Assessment as required by the National Environmental Act and the regulations made thereunder. What the proposed agreement does is to provide for an environmental study to be prepared by an international firm, selected by the company and approved by the government as part of its feasibility study.

In terms of the proposed agreement, although there is an undertaking to comply with the laws of the country ... what is attempted to be done is to contract out of the obligation to comply with the law.

The Article of the proposed agreement dealing with matters concerning environmental issues, read with the provision on confidentiality, in my view, attempts to quell, appease, abate or even under the guise of a binding contract, to legally put down or extinguish public protests.

...

If the genuine intention was, as claimed by the respondents, to comply with the requirements of the law, it was, in my view, unnecessary to refer in the proposed agreement to a study relating to environmental matters as part of its feasibility report.

The law is clearly laid down in the National Environmental Act and the regulations framed thereunder. What was being attempted by the proposed agreement was to substitute a procedure for that laid down by the law. It was assumed that by a contracted agreement between the executive branch of the government and the company, the laws of the country could be avoided. That is an obviously erroneous assumption, for no organ of government, no person whatsoever is above the law ... ²⁷²

Freedom of information and the rights to life, liberty and integrity of the person: 'disappearances'

In Sri Lanka, the fundamental rights to life, liberty and integrity of the person are violated as a result of the lack of transparency and accountability of the police and the military. Under the Prevention of Terrorism Act,²⁷³ the security forces are granted wide powers of arrest. A person may be detained for a renewable period of three months without charge. It is a common occurrence for Tamil civilians, especially in the war-torn north and east of the country, to be arrested and taken in for questioning on the flimsiest evidence. The abuse, rape and torture which takes place behind the doors of detention centres has been well documented and reported by human rights activists both within and outside of Sri Lanka.

The veil of secrecy which surrounds all operations under the Prevention of Terrorism Act has also led to numerous cases of 'disappearances', a phenomenon for which Sri Lanka is, unfortunately, infamous. The very term 'disappearance' implies a culture of secrecy and impunity. Since 1996, there have been hundreds of reported 'disappearances' in the Jaffna peninsula and the number of actual cases is almost certainly much higher. Civilians who have 'disappeared' were usually last seen at military checkpoints, or in the custody of the security forces. Until recently, the security forces were not even obliged to inform the families of those they had detained, facilitating the practice of 'disappearances'.

Those missing are sometimes traced to detention centres, thanks to the intervention of international aid agencies or the National Human Rights Commission. At other times, the bodies of the 'disappeared' are found in illegal graves or are returned to the families with suspicious reasons given for the death in custody. A large number of people remain unaccounted for. Following numerous complaints by the families of the so-called 'disappeared', official policy was changed to require officers to notify the next-of-kin when arresting someone. However, the new policy is implemented on an *ad hoc* basis and families continue to face problems tracing their missing relatives. There is still no obligation under domestic law on arresting officers to inform either the detainee or the family of reasons for an arrest.

4.2.4 Promoting Peace

Reporting of the conflict in Sri Lanka has been hampered by, among other things, restrictions on access to the conflict zone and censorship regulations (discussed below). Sri Lankan citizens have to rely on, and form opinions on the basis of, statements issued by the government, the military and the LTTE, much of which is propaganda or misinformation. The outcome of military operations, as well as the plight of the thousands of civilians in the north and east, remains largely unreported. Even the number of those killed, wounded or missing in action is a matter of speculation, as are the living conditions and needs of the population in areas under LTTE control.

The lack of information on the conflict has far-reaching implications for the right of the Sri Lankan people to know what is happening in the conflict zone and to participate in the shaping of their own future. The ongoing peace process is itself veiled in secrecy. Lack of independent reporting on the process has led to situations verging on the absurd. For example, in mid-May 2001, newspapers reported on a statement from the Ministry of Foreign Affairs claiming that an agreement on pre-peace talks between the LTTE and the government had been reached. This was vehemently denied by the LTTE in a statement by the movement's chief spokesperson and negotiator in London, Anton Balasingham, and eventually by the Norwegian mediator, Eric Solheim. Similarly, the content of the Memorandum of Understanding (MoU), the peace proposal currently being discussed by the parties to the conflict, has neither been released nor discussed publicly.

The Sri Lankan people bear the human and financial cost of the conflict, but government and military policies and practices regarding the conflict are inaccessible to the public and remain largely shielded from public scrutiny and challenge, precluding citizens from participating in a meaningful way in promoting a solution to the conflict. The Sri Lankan people are thus unable to pursue their legitimate right to monitor the peace talks, challenge either party for lack of political will or commitment to peace, or even to form opinions and political loyalties in an informed manner.

4.3 The Existing Information Regime

Sri Lanka has neither a Freedom of Information Act nor any other legislation guaranteeing access to official information. Rather, as mentioned above, it boasts a raft of secrecy legislation, as well as laws which restrict the free flow of information and prevent the media from informing citizens. However, there has been some judicial interpretation suggesting that the Constitution may guarantee the right to access information held by public authorities.

4.3.1 Constitutional Provisions

Article 10 of the Constitution of the Democratic Socialist Republic of Sri Lanka states:

Every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

This important fundamental right may not be restricted in any way. Furthermore everyone, whether a citizen or not, enjoys the fundamental right to freedom of thought and conscience.

The right to freedom of speech and expression, including publication, guaranteed by Article 14(1)(a) of the Constitution, applies only to citizens:

Every citizen is entitled to the freedom of speech and expression including publication.

Furthermore, it may be subject to restrictions which are prescribed by law for the protection of various interests,²⁷⁴ including:

- promoting racial and religious harmony;
- parliamentary privilege;
- contempt of court;
- defamation;
- incitement to an offence;
- the interests of national security and public order;
- the protection of public health or morality;
- securing due recognition and respect for the rights and freedoms of others; and
- meeting the just requirements of the general welfare of a democratic society.

For members of the Armed Forces, the Police Force and other bodies charged with the maintenance of public order, Article 15(8) allows

restrictions in the interests of the proper discharge of their duties and the maintenance of discipline. Article 15(8) states:

[T]he exercise and operation of fundamental rights declared and recognised by Articles 12 (1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces ... be subject to such restrictions as may be prescribed by law. ...

It may be noted that the grounds for restrictions on freedom of expression in the Sri Lankan Constitution go beyond those allowed under international law or many national constitutions and have been subject to consistent criticism from civil society groups in Sri Lanka. By contrast, the Indian Constitution permits only restrictions which are reasonable in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.²⁷⁵ The need for restrictions to meet a reasonableness or necessity test is particularly important because it sets out an objective standard to be applied by courts when considering the constitutional validity of laws or administrative actions. With this condition, the court can consider whether or not the law strikes a proper balance between key social needs on the one hand, and the rights of the individual on the other. Such balancing is far more difficult in Sri Lanka, due to the absence of a reasonableness or necessity test.

Although the Constitution does not explicitly guarantee freedom of the press, courts have ruled that this right is an integral part of the right to expression. In a landmark case, Sri Lanka's Supreme Court stated:

Although the Constitution does not specifically refer to the Press, the provisions guaranteeing the fundamental right of speech and expression to every citizen are adequate to ensure the freedom of the Press in this country.²⁷⁶

Similarly, the Indian Supreme Court has held: "There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is secured by freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value."²⁷⁷

Sharvananda C.J., former Chief Justice of Sri Lanka, spelt out the scope of the constitutional guarantee of freedom of expression as follows:

Freedom of speech and expression means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. It

includes the expression of one's ideas through banners, posters, signs etc. It includes the freedom of discussion and dissemination of knowledge. It includes freedom of the Press and propagation of ideas. ... There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. ... One of the basic values of a free society to which we are pledged under our Constitution is founded on the conviction that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. All ideas having even the slightest social importance, unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion have the protection of the constitutional guarantee of free speech and expression.²⁷⁸

One of the most serious impediments to respect in practice for the rights guaranteed by the Constitution is Article 16, which maintains the validity of all existing law, both written and unwritten, notwithstanding any inconsistency with the provisions of the Chapter on Fundamental Rights. It is, therefore, impossible to enforce fundamental rights *vis-à-vis* laws that were already in existence when the Constitution came into force. This provision ensures that many old laws remain valid, including those enacted in a different political context, prior to independence, and which are inconsistent with human rights provisions in the Constitution.

Furthermore, the right to challenge new legislation is extremely restricted. The Constitution allows only for a review of bills before they are enacted into law.²⁷⁹ Once they have been passed, their constitutionality can no longer be challenged. In addition, a challenge to the constitutionality of any bill must be initiated in the Supreme Court within one week of its being placed on the Order Paper of the Parliament. It has often been noted that this period is hopelessly inadequate, given that anyone considering a challenge has to obtain a copy of the bill, scrutinise it, obtain legal advice and prepare a legal brief challenging it. To achieve all of this within one week is often impractical.

Time pressures become even greater when the Cabinet uses its power to endorse a bill as urgent in the national interest.²⁸⁰ In this case, the Supreme Court must decide on its constitutionality within twenty-four hours, or such longer period not exceeding three days as Parliament may specify. Recently, for example, the Cabinet of Ministers certified a Consumer Protection Bill as urgent in the national interest.²⁸¹

In addition, some bills may appear innocuous when considered in the abstract, with their real effect becoming clear only when they are

put into operation. Therefore, protection of human rights requires the possibility of judicial scrutiny of legislation even after it is in force.

Where the Supreme Court finds that a bill breaches fundamental rights, it may refer the draft law back to Parliament, where it can still be passed either by a simple two-thirds majority vote, or by such a vote and, in addition, the approval of the people in a referendum.²⁸²

A claim of infringement or imminent infringement of fundamental rights by executive or administrative action may be challenged in the Supreme Court, but such a claim must be filed within one month of the alleged or imminent infringement.²⁸³ The Supreme Court has treated the one month period strictly, refusing to extend it.²⁸⁴ The Court has also adopted a very strict interpretation of *locus standi* (who has the right to bring a case), holding in one case, for example, that even the victim's wife was not allowed to file a fundamental rights petition.²⁸⁵ In terms of remedies, the Court has been vested with wide powers to grant such relief or issue such directions as it may deem just and equitable in the circumstance of each case.²⁸⁶ The Supreme Court has used this jurisdiction very liberally to grant varied remedies in different contexts.

As a result of these limitations in applying the Constitution in practice, many laws which violate fundamental rights remain in force.

In a series of judgments, the Supreme Court of Sri Lanka has held that the Constitution does guarantee a right to information. *Visuvalingam and Others v. Liyanage and Others* was the first fundamental rights case that challenged the Court to imply a right to information as part of the guarantee of freedom of expression.²⁸⁷ In that case the Competent Authority, the official appointed under emergency regulations, had used emergency powers to seal a press that printed a newspaper published in Jaffna, *The Saturday Review*. The ban had been imposed on the basis of several articles carried by the newspaper, which were deemed to pose a threat to national security by allegedly espousing the minority separatist cause and inciting Tamil youth to violence.

Several readers of the newspaper petitioned the Supreme Court under Article 126 of the Constitution alleging, among other things, a breach of their right to receive information, as part of the guarantee of freedom of expression, because they could no longer get the newspaper. The petitioners averred that *The Saturday Review* was a newspaper that sought to build bridges between the Sinhala and Tamil communities, focusing on news and views of the public in the north, information that was not available through other media sources. The sealing of the press deprived them of a unique source of information. The petitioners argued that Article 19 of the International Covenant on Civil and Political Rights was a binding source of law in Sri Lanka, and that it included the right to information. They also argued that freedom of

expression is a hollow concept if the freedom of the recipient to receive information is not recognised.

The State countered by arguing that the petitioners did not have *locus standi*, as the banning order affected only the printers, publishers and distributors of the newspaper and not their "dependants", who included readers and newspaper vendors. Implicit in this argument was a refusal to acknowledge that free expression also protects the rights of recipients.

The Court held that the right to freedom of expression does include the right to receive information, so that the petitioners' *locus standi* was recognised. Wimalaratne J. stated:

Public discussion is not a one sided affair. Public discussion needs for its full realisation the recognition, respect and advancement, by all organs of government, of the right of the person who is the recipient of information as well. Otherwise the freedom of speech and expression will lose much of its value.

The second case recognising a right to freedom of information was *Fernando v. The Sri Lanka Broadcasting Corporation and Others*.²⁸⁸ The publicly funded Sri Lanka Broadcasting Corporation (SLBC) carried a large volume of "non-formal education programmes" (NFEP) which allowed for listener input. In February 1995, an NFEP programme was interrupted during broadcasting and thereafter the programmes continued in a very altered format, which allowed for far more control over their contents. Wimal Fernando, a frequent listener of, and contributor to, NFEP, petitioned the Supreme Court alleging that his rights under the free expression clause of the Constitution had been violated both as a listener and as a contributor. He claimed that the NFEP covered a broad range of issues and was a very important source of information. The termination of the programme deprived him both of access to this information and also of the right to participate in the programme.

Justice Mark Fernando, delivering the judgment, refused to recognise "a right to free information *simpliciter*." He accepted that freedom of information was important to the effective exercise of the right to free expression and categorised instances in which courts in other jurisdictions had made findings based on the right to information as follows:

- xix. where a person is entitled to receive information because it is related to or necessary for the exercise of free speech, for example for journalists;
- xx. where Constitutional provisions on free expression explicitly include the right to information;

- xxi. where listeners' right to information is acknowledged in situations when it is necessary to receive information in order to reply to adverse comments made about them; and
- xxii. where constitutional provisions such as the free expression clause in the Sri Lanka Constitution have been construed to contain a guarantee of the right to information.

Fernando distinguished between the first three categories on the one hand, and the latter one on the other hand. The last category, in his opinion, was not a matter of freedom of expression, whereas the first three are purposive, in that they envisage a right to information as being necessary to sustain freedom of expression. This judgment gives no clear reasons for departing from the earlier precedent, other than the Court's refusal to accept what it calls a "right to information *simpliciter*" under Article 14 or, in other words, a right to receive information that does not serve a freedom of expression-related purpose.

However, the Court also held that the "right to information *simpliciter*", though not included in the right to freedom of expression, is included in Article 10 of the Constitution, which guarantees freedom of thought. In so holding, Fernando relied on case law from the US Supreme Court, which found a violation of the First Amendment of the US Constitution when the State interfered with private possession of pornographic material, as such interference abridged the individual right to access information of one's choice.²⁸⁹ The Sri Lankan Court stated: "The observations in *Stanley v. Georgia* suggest a better rationale, that information is the staple food of thought, and the right to information, *simpliciter*, is a corollary of the freedom of thought guaranteed by Article 10."²⁹⁰

The Court therefore refused to acknowledge that the rights of the petitioner as a listener were violated. However, it did find that his rights as a participatory listener had been infringed, as the arbitrary termination of the NFEP had deprived him of the opportunity to articulate his ideas and opinions on that programme.

One consequence of the view that the right to information is derived from freedom of thought rather than freedom of expression is that since freedom of thought is an absolute right, subject to no constitutionally recognised restrictions, the right to information should be similarly absolutely protected.

In a third case, challenging the constitutionality of a bill seeking to establish a Broadcasting Authority to regulate the electronic media, the Supreme Court appeared to uphold the distinction in the *Fernando* case between the free expression rights of broadcasters on the one hand, and the right to information of listeners and viewers as an aspect of freedom of thought on the other.²⁹¹

4.3.2 Secrecy Laws and Other Legal Restrictions on access to information

A number of laws limit access to information either directly or by imposing severe and unwarranted restrictions on freedom of the press. There follows an overview of some of these laws.

Official Secrets Act No. 32 of 1955

An Act to Restrict Access to Official Secrets and Secret Documents and To Prevent Unauthorised Disclosure Thereof

The Act makes it an offence for any person entrusted with any official secret or secret document to communicate it to any person unless he or she is authorised to communicate it to that person or it is in the interests of the State for him or her to communicate it.²⁹² In addition, any person who is not entrusted with, but who otherwise has possession or control of any official secret or secret document, also commits an offence if he or she communicates it in an unauthorised fashion.²⁹³ Breach of these provisions can lead to a fine and/or imprisonment for up to two years.

The Act defines an official secret and secret documents as follows:

"official secret" means –

- xxiii. any secret official code word, countersign or password;
- xxiv. any particulars or information relating to a prohibited place or anything therein;
- xxv. any information of any description whatsoever relating to any arm of the armed forces or to any implements of war maintained for use in the service of the Republic or to any equipment, organization or establishment intended to be or capable of being used for the defence of Sri Lanka; and
- xxvi. any information of any description whatsoever relating directly to the defences of Sri Lanka.

"secret document" means any document containing any official secret and includes –

- xxvii. any secret official code or anything written in any such code; and any map, sketch, plan, drawing, or blue-print, or any photograph or model or other representation, of a prohibited place or anything relating to the defences of Sri Lanka.²⁹⁴

Sri Lanka Press Council Law No. 5 of 1973

A law to provide for the appointment of a Sri Lanka Press Council, to regulate and to tender advice on matters relating to the Press in Sri Lanka, for the investigation of offences relating to the printing or publication of certain matters in newspapers and for matters connected therewith or incidental thereto

The constitutionality of this document, while it was still a bill, was challenged before the Constitutional Court in January 1973, on the basis that it was an attempt to impose government control over newspapers and to stifle criticism and free expression. These arguments were rejected on the ground that although vast powers were vested in the Press Council, one must not assume that such powers would be abused. Similarly, the petitioners argued that the exclusion of the government-controlled press and radio from the ambit of the law discriminated against the private media, contravening the principle of equality before the law. This argument was also rejected by the Court and the bill was enacted into law.

Section 3 of the Law establishes a Press Council, all of whose members are nominated by the President and who could, pursuant to Section 4, be dismissed by the President. These two sections have been criticised as they clearly result in a situation whereby the Council is not independent of government. The Press Council has various powers including, pursuant to Section 9, to hold an inquiry to investigate allegations of the publication of untrue, distorted or improper material or a breach of the code of journalists' ethics. Section 15 makes it an offence to publish in a newspaper profane, defamatory, indecent or obscene matter or an advertisement calculated to injure public morality. Sections 16(1) and (2) prohibit newspapers from publishing any part of a document sent to a Minister by the Secretary to the Cabinet and any matter which is said to be a decision or a part of a decision of the Cabinet, unless publication has been approved by the Secretary to the Cabinet. These are sweeping restrictions which fundamentally undermine investigative journalism and the practice of informing the public.

The Press Council Law also provides for the Council to act on its own in respect of any matter which appears to undermine the declared objects of the Law, but there are very few instances in which the Council has done this. In most cases, it responds to complaints by members of the public. The Council can order a newspaper to print an apology in case of breach. For the purpose of conducting an inquiry, the Council is given, pursuant to Section 11, all the powers of a District Court to summon and compel the attendance of any person, to compel the production of documents, and to administer any oath or affirmation to any person. Section 25 confers on the Council the power to make regulations for the registration of newspapers

and to levy fees in respect of registration. This provision has been widely criticised for being open to abuse, for example by the refusal or cancellation of registration of a newspaper that is critical of government. A person who disobeys a lawful order of the Press Council may, under Section 31, be convicted after summary trial in a Magistrate's Court.

There are, however, a few positive features in the Press Council Law. For example, one of its objectives is to ensure freedom of the press and that newspapers will be free to publish true statements of fact and any comments based upon true statements of fact. In addition, the power of the Press Council to deal with complaints about untrue, distorted or improper material enables an aggrieved party to obtain redress without recourse to the courts. Remedies before the Press Council take the form of a correction, censure of the newspaper concerned or an apology by it, rather than fines and/or compensation. Also, Section 32(1) protects newspapers and journalists from demands to disclose confidential sources of information.

Despite these positive features, most commentators are of the view that on balance, the Press Council Law unduly restricts media freedom and allows for unwarranted executive interference in the media. As a result, media workers and human rights activists have campaigned for fundamental reform or repeal of the legislation.

Official Publications Ordinance No. 47 of 1946

This Ordinance provides immunity from civil and criminal proceedings in respect of the publication or reproduction of any report or other official document which is ordered by the government to be published.

Public Security Ordinance No. 25 of 1947

This Ordinance provides for the power to enact emergency regulations or to adopt other measures in the interests of public security and the preservation of public order and for the maintenance of supplies and services essential to the life of the community. The President may engage the provisions of Part II of the Ordinance if, in view of the existence or imminence of a state of public emergency, he or she is of the opinion that it is expedient to do so for the reasons stated above. When Part II becomes operative, the President has the power to enact emergency regulations which have the effect of overriding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.²⁹⁵

The President has adopted emergency regulations under this provision on a number of occasions in the past. Since 1970, and to an even greater extent after 1983 with the escalation of the ethnic conflict, Sri Lanka has had in place a number of state of emergency regulations under Part II of the Public Security Ordinance. A particular weakness of this law is that it does not require publication of these emergency regulations and members of the public have serious problems in accessing them. This raises fundamental questions relating to the rule of law, let alone the right to information. The Committee to advise on the Reform of Laws affecting Media Freedom and Freedom of Expression recommended that the Public Security Ordinance be amended to require that all emergency regulations which restrict freedom of expression, assembly or association be published in the national newspapers. This recommendation has not been implemented by the government.

Prevention of Terrorism Act No. 48 of 1979

The stated purpose of this Act is to prevent acts of terrorism in Sri Lanka and the unlawful activities of any individual or group or body of persons within or outside Sri Lanka. Part V, dealing with the prohibition of publications, comes into operation only upon the issuance of an Order to this effect by the Minister, and then only for such period as is specified in the Order. Section 14(2) makes it illegal, without the approval of a competent authority, to print or publish in any newspaper any matter relating to (i) the commission of any act which constitutes an offence under this Act or the investigation of any such offence; or (ii) incitement to violence, or which is likely to cause religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups. The distribution of a newspaper containing matter falling into these categories is also prohibited. Conviction for an offence under Part V can lead to imprisonment for the individual involved. The court may, in addition, order that no person shall print, publish or distribute the newspaper concerned for a specified period and that the printing press in which such newspaper was printed shall not be used for a specified period for any purpose whatsoever, or for such purpose as is specified.

4.3.3 Restrictions Related to the Conflict

A network of laws and official practice has led to severe restrictions on the ability of the media to report on the conflict in the north and east of Sri Lanka, fundamentally undermining the public's right to know about what is happening in this crucial area of public interest. The three main means of restricting the flow of independent information about the conflict are the imposition of prior censorship, limited access for journalists to

the conflict areas, and harassment, both through threats of and actual violence to journalists.

Prior Censorship

The Sri Lankan authorities have, on a number of occasions, put into place prior censorship regimes relating to reporting on the conflict. This is achieved through emergency regulations under the Public Security Ordinance. These moves have been justified by officials as necessary to protect national security, in particular by ensuring that information pertaining to military operations would not reach the LTTE and thereby adversely affect the outcome of those operations. In practice, however, crude and excessively broad censorship provisions have been used to cover up military setbacks, to stifle criticism of the government and to prevent the exposure of corruption and other malpractice.

In June 1998, prior censorship of military news was re-imposed under the Emergency (Prohibition on Publication and Transmission of Sensitive Military Information) Regulations, No 1. of 1998.²⁹⁶ This Regulation required any material falling within a certain description to be submitted to the 'Competent Authority' (in practice the Director of Information) prior to publication. The Competent Authority has the power to censor this material. The massive breadth of the censorship regime can be seen from the very broad scope of information that needed to be submitted to the Competent Authority under the Regulation, including,

... any material containing any matter which pertains to any operations carried out or proposed to be carried out, by the Armed Forces or the Police Force (including the Special Task Force), the deployment of troops or personnel, or the deployment of use of equipment, including aircraft or naval vessels, by any such forces, or any statement pertaining to the official conduct or the performance of the Head or any member of the Armed Forces or the Police Force.

In May 2000, following a serious military setback, the censorship provisions were tightened, requiring both the local and foreign media to submit their material to the Competent Authority for prior censorship.²⁹⁷ The new regulation gave the Competent Authority wide powers to ban media outlets on a number of vague grounds, for example for being prejudicial to national security or the preservation of public order.

The media complained of the arbitrariness of the decisions of the Director of Information, with news unrelated to national

security being censored to suit political interests. For example, on 14 May 2000, *The Sunday Leader* published two almost identical cartoons and stories, the only difference being that one targeted the opposition UNP party while the other targeted the governing PA party. The former had been approved by the Competent Authority but the latter, although in essence identical, had been completely censored. A week later, on 21 May 2000, *The Sunday Leader* published a front-page article entitled "War in fantasy land – Palaly is not under attack". The article was essentially a spoof on the censorship regime, purporting to be about the fighting in the Northern Jaffna peninsula between government forces and Tiger rebels but including a negative in every sentence. The Competent Authority ordered the banning of *The Sunday Leader* for this latter story, on the basis that it had not been submitted for approval. A challenge to the ban was successful, but on the rather technical grounds that the Competent Authority had not been properly appointed.²⁹⁸ In another action under these Regulations, one of the two newspapers still operating in Jaffna, *Uthayan*, was forcibly shut down by the authorities allegedly for having violated the censorship laws by failing to submit news articles for prior censorship.

In a surprising move, the government repealed the censorship regulations on 30 May 2001. Media groups and human rights organisations island-wide and around the world welcomed this development. At the same time, their welcome was cautious given the many other means at the disposal of the government to restrict reporting on the conflict. These include lack of access to the conflict zone, remaining repressive legislation, physical threats and the self-censorship which ensues.

Access to the North and East

Lack of access to the north and east has been the single most serious obstacle to independent reporting on the conflict and constitutes a serious violation of the public's right to know.

Local and foreign journalists wishing to visit either the 'cleared areas', under Army control, or the 'uncleared areas' under LTTE control, have to apply through the Ministry of Information to obtain an authorisation from the Ministry of Defence. While no legislation formally prohibits media access to these zones, authorisation is rarely forthcoming, and the Ministry of Defence often simply fails to respond to applications.

Where authorisation is given, it is normally very limited, with journalists being taken on supervised tours of areas under the control of the Sri Lankan Army. Authorisation for journalists to enter LTTE areas at their own risk has not been granted in the

past five years. Lack of access to the conflict zones has recently become a matter of international public debate, following an incident involving Marie Colvin, a correspondent for the *Sunday Times*, London. The journalist had entered an 'uncleared area' without the prior authorisation of the Ministry of Defence. While attempting to cross over into a cleared, Army-controlled area, at the Forward Defence Line between the northern towns of Mannar and Vavuniya, she was caught in cross-fire between the Sri Lankan Army and the LTTE, sustaining injuries and needing surgery on her left eye. This unfortunate incident could have been avoided were it not for the *de facto* ban on access to the conflict zone. Following the incident, the Director of Information, Ariya Rubasinghe, stated: "Journalists can go, we have not debarred them, but they must be fully aware of and accept the risk to their lives." Despite this claim, applications for travel to these areas still remain unanswered and the media rights group Tamil Media Alliance has stated that entry to the northern town of Vavuniya, the main crossing point into the North, is more difficult than ever for foreign and local journalists. The Sri Lankan and foreign media thus have to rely on press statements issued by the government and the LTTE, and reports from local correspondents for information from this region.

In mid-July 2001, it was reported that the system for granting approval for journalists to enter both 'cleared' and 'uncleared' areas had been abolished. It remains to be seen whether, in practice, this will have an impact on the ability of both foreign and domestic journalists' freedom to move around the island and report from conflict areas.

Threats, violence and self-censorship

Under the Prevention of Terrorism Act (PTA), the security forces are granted sweeping powers of arrest, as well as the power to keep a person under preventive detention for up to nine months. The PTA has been highly detrimental to respect for the fundamental rights of the civilian Tamil population in the North and East. The general impunity and free hand which security personnel enjoy under the PTA has had a serious chilling effect on the reporting of news from the conflict areas by Tamil journalists. For example, on 21 March 2001, A.S.M. Fasmi, correspondent in the northern town of Mannar for the Colombo Tamil newspaper *Thinakkural*, was summoned and held for questioning by the intelligence unit of the army's 21-5 brigade. Fasmi had reported the brutal gang-rape and torture on 19 March 2001 of two young Tamil mothers at the hands of security forces personnel. Since his questioning, the journalist has been threatened by members of the security forces.

In January 1998, following the LTTE bombing of the Temple of the Tooth in the central town of Kandy, the government imposed a ban on the LTTE. Under the Emergency (Proscribing of LTTE) Regulations No. 1 of 1998,²⁹⁹ it is an offence punishable by 7 to 15 years' imprisonment to communicate or attempt to communicate an order, decision, declaration or exhortation made or purported to have been made by a proscribed organisation.

Accusations of ties to the LTTE continue to be used by government officials and the Army to question, arrest and threaten journalists. Reporting LTTE statements is particularly dangerous for Tamil journalists. In January 2001, the editor of *Uthayan* was questioned by the police following the publication of an interview with the LTTE's chief spokesperson and negotiator in London, Anton Balasingham. The police wanted to know how the interview was arranged and the identity of all individuals involved in setting up the interview. Suspicion of links to the LTTE is enough to put the life of journalists at risk, and the government has been taken to task by human rights organisations for levying such accusations.

Threats and violent attacks on journalists allegedly by the Security Forces or paramilitary groups allied to the government are reported regularly. On 19 October 2000, Mylvaganam Nimalarajan, a correspondent for a number of media outlets including the BBC, was assassinated in his Jaffna home. Unidentified gunmen shot him and lobbed a grenade into his home, killing him and injuring his parents and 11-year-old nephew. Nimalarajan was one of the few journalists to provide independent coverage from the Jaffna peninsula. Shortly before his murder, he reported on the intimidation and vote-rigging which had marred the recent parliamentary elections in Jaffna District. He had, in particular, implicated the pro-governmental Tamil party and para-military group, the Eelam People's Democratic Party (EPDP), a group which is now part of the coalition in power. Nimalarajan's murder remains unpunished. On 23 May 2001, a smoke bomb similar to those used by the Army was thrown at the office of Sinhala-language weekly *Ravaya*, in Colombo. The bomb hit a tree and caused no material damage or injury. Victor Ivan, the editor of *Ravaya*, has stated that he believes the incident was a warning linked to his recent support for the impeachment of Sri Lankan Chief Justice, Sarath Silva.

Criminal defamation charges continue to be used to silence editors who are critical of the government or trying to expose high-level corruption. Lasantha Wickrematunga, editor of the critical English language weekly *Sunday Leader*, was given a suspended two years imprisonment sentence on 5 September

2000. Victor Ivan, editor of *Ravaya* (see above) currently has six criminal defamation cases pending against him. The State charged Sinha Ratnatunga, editor of the *Sunday Times*, on two counts of criminally defaming the President in a gossip column, using the Press Council Law and Section 479 of the Penal Code. High Court Judge Upali de Z. Gunawardene delivered a lengthy judgement after a 15-month trial, finding the accused guilty on both counts and sentencing him to a fine and a suspended prison term. The sentence was upheld on appeal.³⁰⁰

4.4 Restrictive Practices and Record-Keeping

The government rarely volunteers to share information in the public interest, unless this also serves the interests of party politics. Government notices are published in the Official Gazette and the media receives and reports government decisions and the political situation on an *ad hoc* basis. However, there is no practice or procedure among public bodies to facilitate the release of information in response to a request from NGOs, the media or members of the public.

The issue of language is of particular importance in the Sri Lankan context. Although the Constitution recognises Sinhala and Tamil as official languages, and English as a "link language", in practice the government discriminates against Tamil-speaking citizens. For example, police reports in Sinhala are often given to Tamil speakers, hampering their right to be informed of charges against them and to seek redress.

Frequently it is impossible to gain access to information other than by filing official petitions, for example to the Human Rights Commission or the Supreme Court. For example, on 15 September 2000, the Centre for Policy Alternatives (CPA), Dr. P. Saravanamuttu, Executive Director of CPA, Rohan Edrisinha, Legal Director of CPA and Manjula Sirimanne, Attorney-at-Law, petitioned the Human Rights Commission to direct the Commissioner of Elections and the Inspector General of Police to make public all directions, circulars and/or instructions issued by them to ensure free and fair elections. A direct request to the Commissioner of Elections for this material had been unsuccessful.

The petitioners stated that they were concerned for the integrity of the democratic process and the people's franchise guaranteed by Article 3 of the Constitution, given the imminence of parliamentary elections, which were to be held on 10 October 2000. The main concerns addressed in the petition were politicisation of state institutions, particularly the Police

Department, and government intimidation and interference in the actions of the Commissioner of Elections, undermining his independence and raising fears of an infringement of the petitioners' fundamental rights as voters.

The petitioners claimed, among other things, that as citizens they had a legitimate right to be informed as to whether the Commissioner of Elections and the Inspector General of Police had taken all necessary precautions by issuing directions, circulars and/or instructions to officers under their command to ensure that the elections were conducted in a free and fair manner. At the hearing of this petition, both the Commissioner of Elections and the Inspector General of Police forwarded the relevant directions, circulars and instructions, thereby accepting that the petitioners had a right to this information. However, the information was released only after the threat of a petition, reflecting the reluctance of public bodies to operate in an open and transparent nature.

4.5 Control of Information

The media are a key vehicle for ensuring the free flow of information to the public. As a public watchdog, exposing wrongdoing in both the public and private sectors, the media should foster accountability at all levels of government and act as a platform for public debate, giving the public access to alternative political and other views, as well as reflecting the views of the public.

For these same reasons, successive governments in Sri Lanka have sought to exercise control over the media, not only through censorship, pressure and interference, as described above, but also directly, through the publicly funded media. These media – comprising the Sri Lankan Broadcasting Corporation, the Sri Lankan Rupavahini Corporation, the Independent Television Network and the Associated Newspapers of Ceylon Limited, more commonly known as the Lake House newspaper group – are under the *de facto* editorial control of the government and serve as its mouthpiece, rather than reporting in the public interest, as they should. Unfortunately, the private media are also very much under the influence of party political interests and their reporting is far from objective.

The present coalition government, the People's Alliance (PA), was first elected in 1994 having pledged, among other things, to implement wide-ranging media reforms. In a Statement on the PA government's Media Policy, released on 13 October 1994, Dharmasiri Senanayake, then Minister of Information,

recognised that the PA pledge of greater media freedom had "led to the strengthening of the pro democracy [i.e. pro PA] vote." The Minister also stated:

The PA in its election manifesto has promised media freedom, as an integral component of the policy towards renewal of democracy in Sri Lanka. Media democracy can best be ensured by:

- i. Freeing the existing media from government/political control;
- ii. Creating new institutions, aimed at guaranteeing media freedom as well as raising the quality and standards of free media, both print and electronic;
- iii. Promoting a new democratic media culture through new practices.

The Minister further pledged to "put an end to the abhorrent practice of intimidating and assaulting journalists" recognising that such threats were often a response to attempts to expose public corruption or abuse of power. As part of the promise to free the media from government control, the statement promised to broad-base the ownership of the State-owned Lake House group of newspapers and to grant the State media the freedom to decide on news content.

As part of the implementation of these pledges, on 5 January 1995 the Media Minister set up a Committee to advise on the Reform of Laws affecting Media Freedom and Freedom of Expression, with a mandate to study and make recommendations for amendments to legislation and regulations pertaining to media freedom, freedom of expression and the public's right to information. The report of this Committee contained a number of far-reaching recommendations for reform, including some relating directly to the right to information (discussed below). Unfortunately, few of these recommendations have been implemented. In particular, ownership of the Lake House group of newspapers has not been broad-based and the State broadcaster continues to be very biased towards the government, as a recent monitoring exercise carried out by the Centre for Policy Alternatives, INFORM and ARTICLE 19 clearly showed.³⁰¹

4.6 Recent Developments and Advocacy Efforts on Freedom of Information

4.6.1 The Committee on Media Law Reform

The 13 October 1994 Statement on the PA Government's Media Policy, by Dharmasiri Senanayake, then Minister of Information, included the following clear commitment to freedom of information: "In future amendments to the Constitution, the government shall seek to widen the scope of this [Freedom of Expression] constitutional guarantee by including the Right to Information."

The right to information was also included within the mandate of the Committee to advise on the Reform of Laws affecting Media Freedom and Freedom of Expression, established on 5 January 1995, and chaired by senior lawyer, R.K.W. Goonesekere. The Committee made a number of recommendations in its Report of 27 May 1996, including the following relating to the right to information:

1) The 1978 Constitution does not mention freedom of information but draft constitutional amendments produced since then have recommended the inclusion of a guarantee of freedom of publication and information. The Committee recommended that the Constitution spell out the right to freedom of expression in Article 14(1)(a) of the 1978 Constitution more clearly. In particular it recommended that the following formulation be adopted:

This [the right to freedom of expression] includes the freedom to seek, receive and impart information and ideas, either orally, in writing, in print, in the form of art or through any other medium of one's choice.³⁰²

2) The Committee recommended the repeal or amendment of those sections of the Penal Code which impinge on freedom of expression, including the sections on sedition (Section 120), insulting the Head of State (Section 118), wounding religious feelings (Section 291A) and criminal defamation (Section 479).

3) The Committee was of the view that part of the problem with the Emergency Regulations, under which censorship provisions are promulgated, is the lack of public awareness of the content of those regulations. To address this problem, it recommended:

[T]he Public Security Ordinance be amended to require that all emergency regulations which restrict freedom of expression, assembly or association:

- d. should besides being published in the Gazette be also published expeditiously in the national newspapers in Sinhala, Tamil and English.³⁰³

4) The Committee recommended that all restrictions on freedom of expression based on national security respect the standards set out in the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*.³⁰⁴

Specifically in relation to protection of journalists' confidential sources of information, the Committee recommended:

[T]he right of journalists not to be compelled to reveal their sources of information be guaranteed by law. Any exceptions should be strictly confined to the requirements of criminal justice in cases of grave crime, and should be on a court order made after a hearing at which the journalist concerned has the right to be represented.³⁰⁵

5) On the key question of a Freedom of Information Act, the Committee had the following comments:

A Freedom of Information Act should be enacted which makes a clear commitment to the general principle of open government and includes the following principles:

- disclosure to be the rule rather than the exception;
- all individuals have an equal right of access to information;
- the burden of justification for withholding information rests with the government, not the burden of justification for disclosure with the person requesting information;
- individuals improperly denied access to documents or other information have a right to seek relief in courts.

The law should specifically list the types of information that may be withheld, indicating the duration of secrecy. Legal provision must be made for enforcement of access, with provision for an appeal to an independent authority, including the courts, whose decision shall be binding.

The law should make provision for exempt categories, such as those required to protect

individual privacy including medical records, trade secrets and confidential commercial information; law enforcement investigations, information obtained on the basis of confidentiality, and national security.

The legislation should include a punitive provision whereby arbitrary or capricious denial of information could result in administrative penalties, including loss of salary, for government employees found in default.

Secrecy provisions in other laws must be subordinate to the freedom of information law or must be amended to conform with it in practice and spirit.³⁰⁶

Following the report of the Committee on Media Law Reform, the government appointed a Parliamentary Select Committee to review the recommendations of the Committee on Media Law Reform. This decision has been widely criticised as a delaying tactic, in part because there is no need for further review. These criticisms are backed up by the fact that to date, the Parliamentary Select Committee has failed to come up with any reports or recommendations of its own. The Parliament having been dissolved prior to Sri Lanka's last general elections, there is at present confusion as to whether the Parliamentary Select Committee still exists.

4.6.2 Draft Access to Official Information Act, 1996

In November 1996, the Law Commission of Sri Lanka prepared a draft Access to Official Information Act, along with a set of Recommendations on the right to information (Annex VIII). The Recommendations recognised that the culture of secrecy was endemic in Sri Lanka, but at the same time the Commission was of the view that the principle of maximum disclosure would be 'inappropriate' to Sri Lanka.³⁰⁷ Instead, it recommended the establishment of guidelines for the exercise of discretion by government officials in disclosing information, along with progressive advancement towards the "establishment of an open access to information regime at a future date."³⁰⁸ The Commission concluded:

The recommendations and draft Act may be seen by the media and proponents of freedom of information as restrictive. However, the Commission believes that gradual and cumulative

reform of this area of the law would be a better approach more likely to succeed.³⁰⁹

The preamble of the draft Act states that it is intended "to complement and not replace existing procedures for access to information." The draft Act recognises the right of Sri Lankan citizens to be given access to public information upon request if it "affect[s] the citizen requesting such information." Access to information may be refused if it pertains to, or adversely affects, one of the following:

- the economy;
- personal or commercial privacy;
- intra-departmental communications;
- law enforcement;
- personal safety;
- a financial institution;
- geological or geophysical information;
- privileged information;
- national defence;
- foreign policy; or
- international relations.

The draft Act also requires Ministers to publish, proactively and on a regular basis, a description of the government institutions assigned to their Ministries as well as a description of the records, manuals and guidelines, and contact details pertaining to those institutions. It also requires the Information Minister, within one year, to determine the procedure for making and processing requests, including the timeframe, applicability, amount of fees, and applicable language. Thereafter ("as soon as convenient") the regulations will be placed before Parliament for its approval. Finally, the draft Act provides for an appeal either to the Supreme Court or to the Parliamentary Commissioner for Freedom of Information.

Although the draft Act does help to put the issue of freedom of information on the public agenda, it is seriously deficient, falling short of internationally accepted norms on the matter, and is arguably counterproductive. One serious weakness is that the draft Act does not override other legislation restricting access to information; indeed, it has no application to situations covered by other pieces of legislation.

Another problem is that only information affecting the requester is subject to disclosure. This breaches the principle that in a democracy, all information from or concerning the workings of public bodies is of relevance to the public. In the absence of clarification, it appears that the decision as to whether or not the information affects the requester is at the discretion of the public

official to whom the request is addressed, and that the onus of demonstrating this rests with the requester. Leaving such discretion to public officials is clearly unsatisfactory and is likely to lead to abuse of power. Also, the draft Act does not provide for disciplinary action against officials who arbitrarily refuse to provide information to the public.

The Act gives far too much discretion to the Information Minister, and consequently to the government, for setting procedural rules relating to implementation. The requirement that the Information Minister should obtain parliamentary approval for his or her regulations is quite different from a direct enactment by Parliament. Indeed, given current practice, it is likely that such regulations would be adopted by default without much scrutiny. At a minimum, the Act should guarantee fair procedures, and reasonable fees and time limits.

4.7 Conclusion

Access to information in Sri Lanka is severely limited by a number of factors. The legislative framework includes secrecy legislation, as well as laws which restrict the right of the media to report in the public interest. Sri Lanka does not have a freedom of information law or even strong provisions in other laws that facilitate information disclosure. There is some jurisprudence suggesting that a right to freedom of information is included in the fundamental rights provisions of the Constitution, but this is not implemented in practice. The poor legislative framework is exacerbated by the culture of secrecy that still persists in government. Unfortunately, the 1996 statement by the Law Commission, that government treats all information as confidential unless there is a good reason to allow public access, remains true today.

There is a near total absence of independent information about the conflict in Sri Lanka due to censorship, lack of physical access and threats, so that people have to rely on information released by the government, army and LTTE, much of which is propaganda. The lack of independent information makes it nearly impossible for citizens to assess or monitor the situation, to participate in building peace or to help shape their own future.

These problems need urgent attention. The government should take immediate steps to develop a freedom of information law, based on best international practice, in line with the recommendations of the Law Commission, the Committee to advise on the Reform of Laws affecting Media Freedom and Freedom of Expression and advocacy efforts by civil society. At

the same time, laws restricting freedom of expression and information should be repealed or amended to bring them into line with international and constitutional law. Finally, concrete steps should be taken to change the culture of secrecy within government, including through training and senior officials setting a example.

ENDNOTES

267. Recommendation 1 of the Law Commission Report on Freedom of Information, 20 November 1996. See Annex VIII.
268. See *Hettiarachchi v. Mahaweli Authority*, S.C. 131/2000.
269. See, for example, a case filed against the Samurdhi Authority of Sri Lanka in which it was alleged that the Samurdhi programme favoured supporters of the ruling political coalition. C.A. Application No. 972/2000.
270. S.C. Application No 884/99.
271. 2000 SAELR Vol. 7(2) 1.
272. *Ibid.*, per Amerasinghe, JSC, pp. 50-61.
273. No. 48 of 1979.
274. See Article 15(7)
275. Article 19(2) of the Indian Constitution.
276. *Hewamanne v. Manik de Silva* (1983) 1 Sri L.R. 1.
277. Per Patanjali Shastri, J., in *Romesh Thappar v. State of Madras* (1950) S.C. 27.
278. *Joseph Perera v. The Attorney-General* (1992) 1 Sri L.R. 199, at pp. 222-225.
279. See Article 121(1).
280. Pursuant to Article 122 of the Constitution.
281. Challenges to this certification were filed by the Centre for Policy Alternatives and Rohan Edrisinha but the Supreme Court refused to petitioners' request to lay down guidelines for the certification of Bills as urgent in the national interest, stating that it was a matter for the discretion of the Cabinet of Ministers. See *In Re The Consumer Protection Authority Bill*, S.C. Special determination No. 5 of 2001.
282. The Constitution identifies several constitutional provisions which have this added protection. See Article 83.
283. Article 126 (1) and (2) of the Constitution.
284. See *Edirisuriya v. Navaratneam* (1985) 1 Sri L.R. 100; *Gamethige v. Siriwardene* (1988) 1 Sri L.R. 38; cf. *Siriwardene v. Rodrigo* (1986) 1 Sri L.R. 384 and *Namasivayam v. Gunawardene* (1989) 1 Sri L.R. 394.
285. *Somawathie v. Weerasinghe* (1990) 2 Sri L.R. 121; see also *Visuvalingam v. Liyanage* F.D.R. (2) 529.
286. Article 126(4) of the Constitution.
287. (1984) 2 Sri L.R. 123.
288. (1996) 1 Sri L.R. 157.
289. *Stanley v. Georgia*, 394 US 557 (1969).
290. Note 21, p. 179.
291. *Gamini Athukoral "Sirikotha" and Ors v. Attorney-General*, 5 May 1997, S.D. Nos. 1-15/97 (SC).
292. Section 7(1).
293. Section 7(2).
294. Section 27(1).
295. See Article 155(2) of the Constitution and Section 7 of the Ordinance.
296. Published in the Gazette Extraordinary No. 1030/28, 5 June 1998.

297. Emergency (Miscellaneous Provisions and Powers) Regulation, No. 1 of 2000.
 298. *Leader Publications Ltd. v. Ariya Rubasinghe and Ors.*, 30 June 2000, S.C. (F/R) No. 362/2000.
 299. Published in the Gazette Extraordinary No. 1012/16 of 27 January 1998.
 300. *Sri Lanka: State of Human Rights 1998* (Law and Society Trust), p. 115.
 301. The Report of this monitoring exercise is to be published shortly.
 302. Section 2.8, p. 5 of the Report.
 303. Section 9.11, p. 20 of the Report.
 304. ARTICLE 19, London, 1996.
 305. Pp. 21-23 of the Report.
 306. Section 12.6, p. 27 of the Report.
 307. Recommendation 2.
 308. Recommendation 3.
 309. Final Word, Law Commission, Report on Freedom of Information.
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ANNEX VIII

RECOMMENDATIONS OF THE SRI LANKA LAW COMMISSION

310. The current administrative policy appears to be that all information in the possession of the government is secret unless there is good reason to allow public access. This policy is no longer acceptable in view of the reasons adduced above.
311. On the other hand, law reform which allowed for the principle that all information in hands of the government should be accessible to the public unless there is good reason to make it secret would also be inappropriate.
312. While we should progressively advance towards the establishment of an open access to information regime at a future date, Sri Lanka should currently adopt a regime that clearly defined what information was secret and establish guidelines in respect of the exercise of discretion by government officials for giving access to other information.
313. The right of access to information in the custody, control or possession of the government should be limited to those who are or are likely to be affected by decisions made, proceedings taken and acts performed under statute law. The question of allowing access to other government information should at this stage be left to the discretion of relevant Ministers under whom the government agency concerned functions. That discretion should not be exercised by the Minister on a case by

case basis, but on a general basis. Case by case decision should be taken by the head of the agency concerned.

314. Much of the details have been left to regulations making the rule making process more flexible and readily adaptable to changing situations. Regulations will have to cover issues relating to fees for searching and copying, language of access, transfer of information requests, mandatory time limits for compliance, review procedures etc.
315. The commission has also developed a number of exceptions under which information that might otherwise be accessed may be denied. These include the all-important "defense and foreign policy" exceptions. Other exceptions include "privacy", "law enforcement", "finance and taxation".
316. The draft Act provides for the Act to apply to all government Departments, Corporations, Statutory Boards, Provincial Councils, Provincial Agencies and Local Authorities. However, the draft also provides for the Minister in charge of the subject of information to exempt an institution by Gazette notification, where such an exemption is necessary in the public interest.
317. The Commission decided to recommend an enforcement regime that allows the Supreme Court to review denials of access or inadequate access. However, where denial and restriction of access is due to the "intra-agency memoranda" exceptions, the Law Commission feels that a more informal review should be allowed through the Parliamentary Commissioner for Administration (Ombudsman) or other appropriate authority.

CHAPTER 5 - RECOMMENDATIONS

5.1 Recommendations to Governments

Governments should:

- immediately introduce an administrative or executive order to put in place an interim right to information regime, including a right to access information held by public authorities and an obligation to publish *suo motu*, pending the development of legislation giving effect to

this right; this order should ensure that broad categories of information are automatically subject to disclosure;

- initiate a broad, open consultative process to develop legislation giving effect to the right to information which is consistent with international standards and the best comparative practice, including the establishment of an independent oversight body; in the case of India, this should include widely publicising the Freedom of Information Bill, 2000, and amending it in line with international standards and submissions to the Standing Committee;
- introduce training for civil servants at all levels on the right to information and practical means to address the culture of secrecy and, once legislation is passed, implementation of that legislation;
- undertake a comprehensive programme of public education on the right to information and, once legislation is passed, on the exercise of that right under the law;
- develop and support appropriate systems for the dissemination of information to all members of society, taking into account culture, education, wealth and other differences;
- take all necessary measures to ensure that public bodies have adequate record-keeping and information dissemination systems, including through the use of appropriate information technology;
- promote the adoption of a regional protocol on the free flow of information in South Asia;
- repeal or amend all secrecy legislation, including Official Secrets Acts, to bring it into line with international and constitutional standards and to ensure that this legislation does not unduly restrict the public's right to know;
- review all laws and official practices which restrict freedom of expression to ensure that they are consistent with international and constitutional standards; in particular, all laws imposing special content restrictions on the media, or licensing requirements on the print media, should be repealed;
- ensure that all attacks on, or threats against, journalists and others seeking to exercise their right to freedom of expression are investigated and that those responsible are brought to justice;
- divest themselves of ownership of newspapers and transform all State broadcasters into independent public service broadcasters; and
- establish an independent body to oversee regulation of private broadcasters.

5.2 Recommendations to Civil Society

Civil society actors (national, regional and international) should:

- actively lobby legislators, the international community and other decision-makers with a view to promoting the adoption of right to information legislation and the introduction of the other measures stipulated in the recommendations to governments (above);
- integrate the right to information as an element of their work in all areas, including the environment, basic needs, fundamental rights, displacement, local issues, conflict resolution and participation;
- develop and apply innovative and effective methods of producing, accessing, disseminating and using information;
- monitor implementation of the right to information in practice and publicise any issues and problem areas.

5.3 Recommendations to the Business Community

The business community should:

- participate in the campaign for the adoption of right to information legislation and for the introduction of the other government measures stipulated above;
- adopt information disclosure policies and practices, and transparent procedures in their own work; and
- contribute actively, including through technical and economic support, to establishing better systems for information generation, storage and dissemination.

5.4 Recommendations to the International Community

The international community should:

- ensure that States and intergovernmental organisations respect international standards regarding the right to information – such as the Commonwealth Freedom of Information Principles and standards set out by the UN Special Rapporteur on Freedom of Opinion and Expression – including by adopting progressive right to information legislation and/or policies;

- further develop the body of standard-setting work regarding the right to information, including in relation to the disclosure obligations of governments, the private sector and intergovernmental bodies including the UN, the World Bank and WTO; and
 - insist on transparency and sharing of information in their dealings with governments and intergovernmental organisations.
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