

Lifting the Veil of Secrecy

Right to Information Regimes in Emerging and Existing Democracies

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Background

One of the legal innovations of the past thirty years has been the use of 'right to information' regimes to deepen democracy and transform governance. Existing democracies and emerging democracies have both embraced legal regimes on the right to information.

While the right to access public information is not a new idea in itself, its widespread use globally, is a recent phenomenon. One of the first countries to adopt a right to information regime was Sweden in 1766. The right is contained in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

In 1989 approximately 11 countries had right to information regimes. Since then approximately 85 other countries have adopted right to information laws. The 2003 United Nations Convention on Corruption, recent jurisprudence from domestic and regional courts, and comments from UN human rights bodies have added to the momentum.

Right to information laws are among a range of legal innovations being used to transform societies that have previously been characterized by ethnic violence or one party rule. Laws on the Declaration of Assets, Bills of Rights, national human rights institutions, truth commissions and ad hoc tribunals are some of the other innovations.

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The Right to Information

A right to information law gives a person a right to demand information from a public body (and in some cases from a private body) without having to say why the information is being sought. Such a right can enhance the transparency of public decision making and decrease the level of arbitrary and ad hoc decision making. It may deepen democracy by facilitating citizen participation in decisions at local, regional and central government levels. A right to information may also help reduce corruption and prevent the abuse of public power. Public power must be used in the public benefit and a right to information regime gives the public the right to monitor the use of public power and resources. Beyond that, a right to information regime has an intrinsic dimension in that these regimes enable citizens to 'just know' about public decisions irrespective of whether they achieve a particular outcome or not.

Although the legal regimes vary there have emerged some core concepts that characterize many of the laws in different parts of the world. In some countries strong legal regimes have resulted in poor implementation. In others, poor laws have mobilized civil society and created a strong demand for information that should be in the public domain.

The number of countries with right to information laws has grown exponentially in the past twenty years. As of February 2014 approximately 102 countries had adopted RTI laws or had actionable constitutional provisions.² Over 60 countries have recognized the right to information as part of their constitution. Among the countries that have adopted laws on the right to information have been China, India, Indonesia, Russia, South Africa and Brazil. In the Asia-Pacific region 16 countries have RTI laws: Australia, Bangladesh, Cook Islands, India, Indonesia, Japan, Kyrgyzstan, Mongolia, Nepal, New Zealand, Pakistan, South Korea, Taiwan, Tajikistan, Thailand, and Uzbekistan. China has actionable RTI regulations.³

A right to information law transforms the nature of governance at a conceptual level. No more is the release of information dependent on government discretion or largesse. Instead members of the public have a **right** to demand information and many legal regimes require government to proactively disclose information periodically. Laws set down the manner in which information can be accessed and the timeframe within which such information must be released. They may stipulate that reasons should be provided where information is denied, and will usually provide an appeal to an

² www.right2info.org

³ For developments in the Asia-Pacific region see the UNESCO publication, 'Freedom of Information: The Right to Know', (2011) available at www.unesco.org/webworld.

independent body in cases where information is denied. A right to information regime can transform the way decisions are taken and the manner in which the basis of those decisions are shared with members of the public.

The right to information has been used in a variety of ways to access information that should be in the public domain. In Sri Lanka it has been used to demand information on agreements to lease public spaces; in Chile it was used to demand information on reforestation projects; in Nepal it was used to monitor the disbursement of disaster relief; and in India it has been used to monitor how local government disbursed public funds. In Brazil the right to information has been used to overturn amnesty laws and in Colombia to found a right of victims of human rights violations to a right to truth.

In a recent case from Nepal, the Supreme Court upheld the right of students to see their marked exam scripts. The students asked for their answer scripts from the university which had turned down the request. They appealed to the National Information Commission which upheld their request. This decision was confirmed by the Supreme Court, with some qualifications.⁴

South Asia

In South Asia right to information laws are found in Bangladesh, India, and Nepal. Pakistan's Access to Information Law was promulgated as a Presidential Decree in 2002 and lacks the legitimacy of a law endorsed by the country's legislature. In October 2011 a Member of Parliament in Pakistan presented a Private Member's Bill on the right to information, but this was not passed. Two provinces, Punjab and Kyber-Pakhtunkhwa, passed provincial RTI laws in 2013.

India has had two laws so far. The Freedom of Information Act was passed in 2002 (although it never came into operation) and the Right to Information Act was passed in 2005.⁵

An early trigger for greater transparency in India was the work of the social movement Mazdoor Kisan Shakti Sangathan (MKSS) in Rajasthan in the 1990s.⁶ Through a campaign that included strikes, protests and public hearings that highlighted the misuse of public funds by local officials, MKSS (Labour Farmer Strength Organisation)

⁴ *Prof. Dr Bhim Raj Adhikari, Registrar and Controller of Examinations, Board of Tribhuvan University v National Information Commission*, Decision of the Supreme Court, 4th May 2011.

⁵ The Freedom of Information Act of 2002 and the Right to Information Act, No 22 of 2005.

⁶ www.humanrightsinitiative.org

was able to demand greater transparency and accountability and ultimately a right to information law for the state of Rajasthan.⁷ The movement's activism in the 1990s is widely seen as being a launching pad for the National Campaign on People's Right to Information (NCPRI) and the campaign for a national law on the right to information.

Prior to this several judgements of the Indian Supreme Court had recognized that the right to information was implicitly part of the right to free speech and expression contained in Article 19 and also linked the right to information to the right to life contained in Article 21.⁸ So far seven states in India have passed right to information laws.⁹

The right forms part of the constitution of Afghanistan although legislation providing methods of implementation has yet to be passed.

The 1990 constitution making process in Nepal was influenced by the previous experiences of the rest of South Asia and Nepal was the first among South Asian nations to provide constitutional protection to the right.¹⁰ The right to information is now part of the interim constitution of Nepal.¹¹ In 2007 Nepal adopted a Right to Information Law and established a National Information Commission in 2008.¹²

In 2008 the new Maldivian Constitution established a right 'to acquire and impart knowledge, information and learning'.¹³ This was followed by the appointment and

⁷ See Bunker Roy, 'The Power of Information: A Grassroots Organisation in India Defeats Corruption', *D+ C Development and Cooperation*, March/ April 2002, pp 28 – 29, available at <http://www.inwent.org/E+Z/zeitschr/de202-11.htm> (accessed on 3rd April 2012) and Shekar Singh, *The Genesis and Evolution of the RTI Regime in India*, in 'Transparent Governance in South Asia', Background Papers and Proceedings of the Regional Workshop on 'Towards More Open and Transparent Governance in South Asia', April 2010 (New Delhi: Indian Institute of Public Administration, 2011) pp 43 – 78.

⁸ See *State of UP v Raj Narain*, and *S.P. Gupta v President of India* 1982, AIR (SC) 149. www.humanrightinitiative.org.

⁹ Laws were adopted by Tamil Nadu and Goa in 1997; Rajasthan and Karnataka in 2000; Delhi in 2001; Maharashtra and Assam in 2002; and Madhya Pradesh and Jammu and Kashmir in 2003. Draft bills have been prepared by the governments of Kerala and Orissa and an executive code on access to information has been prepared in Uttar Pradesh, see www.humanrightsinitiative.org. See also Rani Advani, 'The Right to Information in India: A Comparative Picture', on file with the author.

¹⁰ See Article 16 of the 1990 Constitution of Nepal.

¹¹ Article 27 of the Interim Constitution of Nepal, 2007.

¹² Taranath Dahal, 'Freedom of Information in Nepal', in 'Transparent Governance in South Asia', Background Papers and Proceedings of the Regional Workshop on 'Towards More Open and Transparent Governance in South Asia', April 2010 (New Delhi: Indian Institute of Public Administration, 2011) pp 134 – 163. See also Tanka Raj Aryal, 'Assessment of Right to Information Law regime in Nepal for Creating Conducive Environment for Effective Implementation' (2011), on file with the author.

¹³ Article 29 of the Constitution of the Maldives.

training of information officers at the several government departments. A Right to Information Bill has been drafted and was tabled in Parliament but not passed.¹⁴

Previously, regulations giving the public the right to access public information and encouraging government departments to share information were adopted after an attempt at passing a law failed to attract the required number of votes in Parliament.¹⁵

Striving for Transparency in Sri Lanka

Much of Sri Lanka's decision making processes are shrouded in secrecy and civil society and the media have for long campaigned for a law on the right to information. Crucial decisions that impact on public life are made behind closed doors and public officers are reluctant to share information on these decisions or the basis for these decisions.

This culture of secrecy is compounded by the state of the media in the country. Major media institutions are state owned and their coverage of events is partial to the ruling regime. Some parts of the independent media engage in investigative reporting and provide alternative views. Yet this is not as effective as it should be. In recent years independent media institutions that have dared to confront the government have been subjected to threats, intimidation and in a few cases their staff has been assassinated. A right to information regime has become more important as the credibility of public institutions has declined and the country has moved increasingly towards centralized decision making and authoritarianism since the end of the war in 2009.¹⁶ Civil society has been preoccupied by issues of post-war reconciliation and the campaign for a RTI law has lost momentum.

A right to information law has been in the pipeline for over twelve years. Around 2001, the Law Commission of Sri Lanka presented a rudimentary draft law on the right to information to the government. Civil society and the media then took up the issue and presented a more detailed draft law. After a concerted campaign by civil society and media institutions the draft law was approved by Cabinet in 2003. As a result of tensions between the then President and Prime Minister, Parliament was dissolved in 2004 before the law could be passed.

¹⁴ Venkatesh Nayak and Sanchita Bakshi, 'Right to Information in Maldives', in 'Transparent Governance in South Asia', Background Papers and Proceedings of the Regional Workshop on 'Towards More Open and Transparent Governance in South Asia', April 2010 (New Delhi: Indian Institute of Public Administration, 2011) p 124 at 129.

¹⁵ *Id.*, at 127.

¹⁶ See Mario Gomez, 'Keeping Rights Alive: Reform and Reconciliation in Post-War Sri Lanka'. (2011) 17 *Asian Yearbook of International Law*, pp 117 – 148.

<http://www.dilafoundation.org/asian-yearbook-of-international-law-2011-vol-17.html>

The Law Commission subsequently took up the issue and presented a revised draft (based largely on the civil society draft law) to the state around April 2006. In May 2011, a Member of Parliament, Karu Jayasuriya presented a Private Member's Bill which was not passed by Parliament. The Bill presented by Karu Jayasuriya was in turn based largely on the Law Commission draft.

The Draft Law

The draft law sought to give citizens a right to access information in the possession, custody or control custody of a public authority subject to certain exceptions. A public authority was defined to include Ministries, departments, public corporations, higher educational institutions, local authorities, companies in which the Government had a majority shareholding, any department or other authority established by a Provincial Council and any body or office established under the Constitution other than the Parliament and the Cabinet of Ministers.

The law also sought to establish a right to reasons: public authorities must furnish reasons to those affected by a decision. Ministers were required to proactively make information available every two years and information on any new projects (over 1M US dollars or LKR 5M) should also be made available to the public and to those affected. The provisions of the freedom of information law were to prevail over any other law and public officers were not to be subjected to any sanction for releasing information. The draft law however, did not address private bodies performing public functions nor did it envisage an urgent application when the life or liberty of a person was at stake.

Exemptions

The law established a general right subject to certain exceptions. Requests for information will be denied in cases where it is necessary to:

- Protect personal privacy;
- Protect the territorial integrity and national security of the state;
- Protect the relations of the state with any other state;
- Protect the life and safety of individuals;
- Preserve confidentiality of certain information;
- Prevent serious prejudice to the economy of Sri Lanka by premature disclosure;
- Protect trade secrets or avoid harm to commercial interests;
- Protect medical secrets or records of any individual;

Retain confidentiality on the basis of a fiduciary relationship;
Prevent grave prejudice to the prevention or detection of crime or the apprehension or prosecution of offenders;
Retain confidentiality with regard to certain information in relation to law enforcement or national security;
Retain the confidentiality of information supplied in confidence by a third party and that party objects to the disclosure;
Avoid being in contempt of court or breaching the privileges of Parliament;
Retain confidentiality with regard to information relating to an examination (including the results of any qualifying examination) conducted by the Department of Examinations or a higher educational institute about which information is required to be kept confidential.¹⁷

Where information is over 10 years old the exemptions will not apply except in specific circumstances. The Freedom of Information Commission to be set up under the law was to be given the power to order disclosure of information where in its opinion public interest in disclosure outweighs any of the interests protected by the above exemptions. Under the draft law public authorities are required to maintain records in a manner consistent with their operational requirements, duly catalogued and indexed. Records are required to be maintained for ten years.

Freedom of Information Commission

The draft law envisaged a Freedom of Information Commission consisting of three members appointed by the President on the recommendation of the Constitutional Council. The Freedom of Information Commission was to supervise the implementation of the law, provide guidelines on fees and when information could be released without fees, guidelines on how information on projects should be released, and engage in the training of public officials. Every public authority was required to appoint at least one Information Officer who will deal with requests for information.

In those cases where a request for official information was refused by an Information Officer, the draft law provided that such person may appeal to the Freedom of Information Commission for review.

¹⁷ See section 4 for a full list of the exemptions.

Proactive Disclosure

The draft law also envisaged a concept of 'proactive disclosure'. The draft law cast responsibilities on Ministers and public authorities to make official information freely and readily available to the public. Every two years, every Minister must publish a report containing information giving details of the functions, activities and duties of the Ministry and of all public authorities under the Ministry, and the norms and procedures followed, in the decision making process of the Ministry. Additionally the Minister had a duty to inform the public about any projects that were to be undertaken by the Ministry.

These provisions are an attempt to ensure that official information is available to citizens as and when decisions are made by public bodies. It entrenches further the doctrine of the Public Trust according to which governments hold power in trust for the people and must always act in the interests and on behalf of the people.

Immunity from Legal Action

In order to ensure that the information officers would be free to act impartially, the draft law provided immunity from legal action for granting access to any information. The draft law provided that, notwithstanding any legal or other obligation to which a person may be subjected to by virtue of being employed in a public authority, the disclosure of information permitted to be released under the law should not make such person liable to any punishment. This is particularly important given that some provisions of the Establishments Code, which regulate the terms of employment of public officers, explicitly discourage public officers from sharing information with the public.

Supreme Court Jurisprudence on the Right to Information

While Sri Lanka does not currently have a right to information law, the Supreme Court has held that the right to freedom of speech, expression and publication contained in Article 14 of the Constitution included by implication a right to information.¹⁸ The Court has noted:

¹⁸ *Environmental Foundation v UDA*, (The 'Galle Face' Case), Supreme Court Minutes of 28th November 2005.

... 'freedom of speech and expression including publication' ..., to be meaningful and effective should carry within its scope an implicit **right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain**. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attach to affairs of State and official communications. (Emphasis added)

A public interest organization, the Environmental Foundation Limited (EFL), challenged the purported lease of a 14 acre seaside promenade in Colombo, the 'Galle Face Green', to a private company. The court held that the Urban Development Authority (UDA), in refusing to provide information about the purported lease of 'Galle Face' to the petitioner, had violated the petitioner's right to information.¹⁹

The court also held that the UDA's action was also in violation of the constitutional right to equal protection of the law since its 'bare denial of access to official information' in the absence of specific reasons was an arbitrary exercise of power. In at least two previous cases too, the Supreme Court has echoed this reasoning and upheld the right of access to official information.²⁰

A similar decision was reached by South Korea's Constitutional Court in the *Forests Survey Inspection Request Case*, where the Court held that the right to information is implicit in the right to freedom of speech and press, given that free expression and communication of ideas requires a free formation of ideas as a precondition, and that '*free formation of ideas is in turn made possible by guaranteeing access to sufficient information*'.

The 2000 Draft Constitution included the right to information as an aspect of the freedom of speech and expression.

*Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to express opinions and to seek, receive and impart information and ideas either orally, in writing, in printing, in the form of art or through any other medium.*²¹

¹⁹ Ibid.

²⁰ See *Fernando v. Sri Lanka Broadcasting Corporation* (1983) 2 Sri L.R. 311 and *Heather Mundy v. Central Environmental Authority and Others* SC Appeal 58/03, Supreme Court Minutes of 20th January 2004.

²¹ Article 16(1) of the Draft Constitution of 2000

The Parliamentary Oversight System

The Executive Presidency has marginalized the legislature and made it of limited relevance in the country's scheme of constitutional government. The system of government is so heavily weighted in favour of the President that today Parliament plays only a marginal role both in a *de facto* and *de jure* sense.

There is however, still some space for reviving the vibrancy of the Parliamentary oversight system even in the context of strong Executive Presidency. A strong Parliamentary oversight system could potentially play an important role in enhancing transparency, ensuring that public power is not abused and in delivering accountability.

The Committee on Public Enterprises (COPE) and the Public Accounts Committee (PAC) set up under Standing Orders 125 and 126, are important ways in which Parliament plays its role as the controller of public finance. Parliament has control over public finance and in theory the executive is prohibited from using public funds unless such expenditure has been approved by Parliament. According to the Constitution it is Parliament's role to approve the allocation of funds for projects and services and to supervise and scrutinize the expenditure of such public funds.

COPE and PAC are both member multi-party committees who between themselves share the burden of scrutinizing public finance. Both are key mechanisms for ensuring that public funds are used for a public purpose and are not mismanaged or embezzled. They have wide powers that enable them to summon any person to appear before them and to request to see any documents or record.

The COPE is a 31 member multi-party Parliamentary committee that oversees the functioning of government corporations, boards, authorities, state owned banks and state owned companies and scrutinizes their budgets, accounts, financial procedures and management practices. The 31 member PAC on the other hand, scrutinizes the work of government departments and local authorities. COPE and the PAC in combination enable the legislature to keep track of public expenditure and ensure that public funds are used for a public purpose.

The effective functioning of these two bodies is important if Parliament is to exercise its role as the controller of public finance. Regrettably though the Parliamentary oversight committees have functioned in a deeply politicized way and have seldom performed their role in an independent and credible manner. Where they do operate independently their findings are rarely followed through.

Should Sri Lanka adopt a RTI regime then the 'Establishments Code' (that governs the conduct of public officials) should also be amended and provisions that may prevent public sector employees from disclosing information should be deleted.

International Standards and Regional Jurisprudence

The right is contained in both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The jurisprudence of regional human rights mechanisms and a recent general comment from the Human Rights Committee have provided a strong impetus to the global recognition of the right.

In a 2011 General Comment the UN Human Rights Committee set up under the International Covenant on Civil and Political Rights (ICCPR), explored in detail the components of the right to information as contained in Article 19 of the Covenant.²² According to the Human Rights Committee, Article 19 included 'a right of access to information held by public bodies' and was a right that could be asserted by everyone, including non-citizens.²³

The right was applicable against all public bodies, including the legislature and the judiciary and could extend to private bodies exercising public functions.²⁴ Restrictions on the right must be 'provided by law' and must be to protect the rights or reputations of others, national security, public order, or public health or morals. They must meet the tests of necessity and proportionality.²⁵

National security is one of the major reasons why states refuse to release information and the Comment calls upon governments not to 'suppress or withhold from the public information of legitimate public interest that does not harm national security' and to refrain from prosecuting journalists, researchers, environmental activists, human rights defenders, or others, for disseminating such information.²⁶

The General Comment asked governments to proactively disclose information that is of public interest and to provide for clear and accessible procedures for the public to gain

²² Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 21st July 2011. The ICCPR was binding on 167 countries as of January 2012.

²³ Id, para 7.

²⁴ Id. para 7.

²⁵ See Article 19(3) of the Covenant on Civil and Political Rights.

²⁶ General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34., 21st July 2011, para 30.

access to such information. Appeals against refusals to provide information or a lack of response should be part of these procedures.

In the landmark judgement of *Claude Reyes v Chile* the Inter-American Court of Human Rights held that the government of Chile had violated the right to information of the three petitioners.²⁷ The Chilean state had refused to provide information to Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero, members of the Terram Foundation, a Chilean environmental NGO. The applicants had sought information from the Foreign Investment Committee on the forestry company Trillium and the Río Condor Project, a deforestation project to be executed in Chile's Region XII that 'could be prejudicial to the environment and to the sustainable development of Chile.' An appeal to the Chilean Supreme Court was dismissed.

A petition was first filed with the Inter-American Commission of Human Rights and the Commission held in favour of the applicants. The Commission held that Article 13 of the American Convention, which included the freedom to seek, receive, and impart information included a right to access government-held information.

According to the Commission refusal to provide information had occurred without the State 'providing any valid justification under Chilean law' and the applicants were 'not granted an effective judicial remedy to contest a violation of the right of access to information'.

In July 2005 the Commission referred the case to the Inter-American Court and they were supported by several public interest petitioners who filed *amicus curiae* briefs. The Court confirmed the Commission's decision and the Inter-American Court became the first international tribunal to recognize a basic right of access to government information as an element of the right to freedom of expression.²⁸

The Court held that any restrictions on the right to information should comply with the requirements of Article 13.2 of the American Convention on Human Rights. The presumption was that all state held information should be public, subject to limited exceptions. The Court said that states must adopt a legal framework that gives effect to the right of access to information, and must reform secrecy laws and practices.

The Court observed that:

²⁷ *Claude Reyes v Chile*, Judgement of the Inter-American Court of Human Rights of 19th September 2006 (Merits, Reparations and Costs), on file with the author.

²⁸ See www.Right2Info.org (accessed 25th March 2012).

... by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it....²⁹

The Court asked Chile to train public officials on the rules and standards that govern public access to information. The case had other important consequences. Former President Lagos repealed several secrecy regulations and his successor, President Michele Bachelet, adopted an access to information law. It has also served as a model for subsequent cases on the right to information in a number of South American states.³⁰

Truth Seeking and the Right to Information

In January 2008, Gyanendra Raj Aran, supported by the Freedom Forum Litigation Support Unit, filed an application under the Right to Information Act against the Defence Ministry, requesting official and digital copies of the details of deaths of Nepalese Army personnel during the Maoist insurgency. The application was not entertained by the Army and no information was disclosed.³¹

In 2010, in the case of *Gomes Lund v Brazil (Araguaia)* the Inter-American Court held that the right to the truth is related to the ‘the right to seek and receive information enshrined in Article 13’ of the American Convention on Human Rights.³² Families of ‘the disappeared’ in Brazil brought a case in the Inter-American Commission seeking information on the fate of their relations after a violent uprising in that country. The

²⁹ Para 77.

³⁰ See www.Right2Info.org (accessed 25th March 2012).

³¹ Taranath Dahal, ‘Freedom of Information in Nepal’, in ‘Transparent Governance in South Asia’, Background Papers and Proceedings of the Regional Workshop on ‘Towards More Open and Transparent Governance in South Asia’, April 2010 (New Delhi: Indian Institute of Public Administration, 2011) p 134 at 140.

³² *Gomes Lund v Brazil (Araguaia)* Judgement of the Inter-American Court of Human Rights of 24th November 2010.

Inter-American Court held that Brazil's amnesty law was 'incompatible with the American Convention and void of any legal effects.' The Court affirmed its previous interpretation of the right to truth about gross human rights violations which it derived from Articles 8 (duty to investigate grave violations) and 25 (judicial protection of rights) of the American Convention.³³

The Colombian Constitutional Court has highlighted the link between the right to access public information and the right of victims to know the truth of human rights violations.³⁴ Citing from the Commission on Human Rights report on Argentina the Colombian Constitutional Court endorsed the view that:

*Every society has the inalienable right to know the truth of what happened, and the reasons and circumstances in which aberrant crimes were committed, in order to prevent such acts from occurring again in the future ...*³⁵

To the Court the right to know the truth included the right of the victims of human rights violations to know the truth of the circumstances pertaining to such violations and in the case of death or disappearance, to knowledge about the fate of the victim.

For South Asian societies such as Nepal and Sri Lanka that have been through extraordinary periods of violence, this jurisprudence is of special relevance. Establishing a right to truth, and the consequent right to reparation, through the more established right to access public information, can be a significant step forward, should the courts of these countries adopt such an interpretation.³⁶

Impact on Democracy

Two studies of the impact of the right to information in India were conducted between 2008 and 2009, both of which reached similar conclusions. One was a government initiated study and the other a civil society study.³⁷ The studies concluded that between

³³ See www.Right2Info.org (accessed 25th March 2012)

³⁴ Colombian Constitutional Court, Judgement C – 872/03, 30th September 2003, on file with the author.

³⁵ Id. p 32.

³⁶ See the discussion on the Right to Truth in Eduardo Gonzalez and Howard Varney (Eds.) 'Truth Seeking: Elements of Creating an Effective Truth Commission' (International Center for Transitional Justice, 2013).

³⁷ See Shekar Singh, 'The Genesis and Evolution of the RTI Regime in India', pp 74 – 76. See also Commonwealth Human Rights Initiative, 'Compliance with The Right to Information Act: A Survey', (New Delhi: 2009), which

50 - 60 % of the applicants got the information they sought and for many it resulted in their objectives being met. Both studies concluded that awareness about the right to information especially among rural populations and women, was lacking. According to the civil society survey approximately two million applications for information were filed between October 2005 and March 2008, of which approximately 400,000 were from rural areas indicating that the law was used by diverse social segments.³⁸ Both studies showed that the law was being used primarily by men.

Both studies highlighted the fact that applicants, especially those from the rural areas were subjected to harassment from public information officers and in many cases the applicants had to visit the office more than once to obtain information. Applicants were discouraged from filing applications, threatened and physically attacked.³⁹ The need to better manage information and to provide better training for public officers also came out in the studies.⁴⁰

While the law stipulates penalties for information not provided within 30 days, many applicants had to wait months and very rarely were penalties imposed.⁴¹

Keeping RTI alive in South Africa

South Africa at one moment was the beacon of transition and institutional reform. Highly participatory processes of change, innovative constitutional and legal concepts and a vibrant Constitutional Court made it the model for other societies emerging out of violence and oppression.

South Africa's original legal regime on the right to information was a model. It contained a strong constitutional provision that provided a right to access to any information held by the state and to any information held by another person and that was required for the exercise or protection of other any right.⁴²

looked at the implementation of the Right to Information Act in the Panchmahals district in the state of Gujarat. Available at www.humanrightsinitiative.org, accessed on 4th April 2012.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ See also Vikas Jha, Society for Participatory research in Asia (PRIA), 'Evidence-Based Research Mobilising Action for Policy-Influencing in Two Provinces: Policy Changes under the Right to Information Act in India' (March 2010), on file with the author, that examines the impact of the RTI Act and the space for change in Bihar and Uttar Pradesh.

⁴¹ Ibid.

⁴² Section 32 of the Constitution of South Africa (1996).

The constitution went to state that 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 Promotion of Access to Information Act (PAIA) was passed by the South African Parliament in 2000.⁴³

At the current moment though, South Africa is on the verge of enacting a 'Protection of State Information' law that will restrict access to certain types of classified information. The proposed law has caused a huge public outcry and resulted in a strong civil society campaign seeking a revision of the new law.⁴⁴

The ostensible objective is to protect the national security interests of the South African state and to protect sensitive information. However, the proposed law gives wide powers to the state to classify information including matters relating to state security, economic growth, scientific achievements and diplomacy. If the bill becomes law it will make the possession and publication of protected information a criminal offence and enable the imposition of stiff penal sanctions on those who publish such information. The South African National Assembly passed the Bill in November 2011 and the country's upper house, the National Council of Provinces approved it with some amendments in November 2012. The amended bill was approved by the National Assembly in April 2013. The implementation of the law has been delayed because of strong public protests and in September 2013 President Zuma refused to sign the bill and sent it back to the National Assembly for review.

The national security exception is probably the most contested exception. While most regimes have a general clause that permits access to public information, it can be refused if it jeopardizes a country's national security interests. How a legal regime draws the ambit of this exception is crucial in ensuring that an appropriate balance is struck between a state's legitimate interest and the public's right to know. Access to information can prevent government abuse and reduce corruption. At the same time diplomacy, intelligence gathering and military activities require a level of secrecy. Striking an appropriate balance between the two is a challenge given the deference that courts have historically provided when the 'national security card' has been played by the state. In South Asia national security has been used as tool to engage in a variety of human rights violations and a denial of basic rights. It should not be used in a similar way to prevent access to information that should be in the public domain.

⁴³ See Richard Calland, 'Turning Right to Information Law into a Living Reality: Access to Information and the Imperative of Effective Implementation', (2003), on file with the author.

⁴⁴ See www.r2k.org.za

The Hungarian legislation on the right to information has an interesting provision that permits the Commissioner for Data Protection and Freedom of Information to recommend that information that has been 'classified' by the state on grounds of national security be made public in part or in whole. The entity that has classified such information can accept the Commissioner's recommendation or seek the intervention of court to overrule the Commissioner's recommendation.⁴⁵

Deepening Democracy

Democracy is enhanced where the reasons and the basis for public decisions are in the public domain. Democracy is deepened where the state explains why one option was preferred over the other. Democracy is deepened where the public engage and participate in the formulation of public policy.

The right to information is about giving people the right to pierce the often opaque tiers of governance. It is about allowing people to learn more about the basis of government decisions and the reason why one option was preferred over the other. It is about using that information to challenge the different levels of government and seeking to prevent an abuse of public power and a misuse of public resources.

The public have a right to know about national, regional and local budgets; development strategies and national action plans; agreements with multilateral institutions; plans for infrastructure development; the expenditure of government Ministers, departments and other institutions; procurement decisions, including procurement for defence and national security; how public resources are being used for responding to public crises; and about other decisions that impact on public life.

In a few areas which pertain to national security, the prosecution of crimes, personal privacy or diplomacy, the public interest may be advanced by confidentiality and secrecy and in which case, it may be justified to withhold such information from the public. However, even in these cases there will be situations in which the public interest will be enhanced by disclosure of the information. As a general rule, public decisions should be accessible to the public and only in rare exceptions should information be withheld.

⁴⁵ Laszlo Majtenyi, (Former Data Protection & Freedom of Information Commissioner, Hungary), 'Freedom of Information – Experiences from Eastern Europe', p 10, http://www.osce.org/documents?keys=Freedom+of+Information+%E2%80%93+Experiences+from+Eastern+Europe+Dr.+L%C3%A1szl%C3%B3+MAJT%C3%89NYI+&document_type=All

The public also have a right to know about private sector decisions that impact on the general public. The private sector should be encouraged to communicate openly and transparently with all its stakeholders, including the wider community, on key decisions that impact on the public interest. Similarly professional associations and regulatory bodies should also make their decisions transparent since many of those decisions have an impact on the public.

The right to information can strengthen the rule of law. At the same time it will best flourish in those societies that already uphold the rule of law and those societies where independent commissions and courts exist. Transparency is a key aspect of the rule of law. Secrecy generates suspicion while openness generates trust, promotes credibility and enhances public confidence. A right to information regime that is enforced by an independent Information Commission and supported by an independent court system can generate a culture of transparency within government and private entities where the public is willing to activate its processes on a regular basis.

Strengthening Right to Information Regimes

The enactment of a law through a process of consultation with civil society is a necessary first step. The conversion of that law into practice is the more difficult challenge. Experiences with right to information regimes in different parts of the world, and the political context in several transitional societies, suggest three specific challenges:

1. The National Security Exception

National security has been used as a cover for a range of different abuses. It is important that the national security exception be interpreted narrowly so that relevant information can remain in the public domain. Courts in Commonwealth countries have tended to side with the state when the state plays the 'national security' card. In sensitive cases courts should be permitted to see the information that the state claims in sensitive and decide whether that information should be in the public domain.

The Tshwane Principles on National Security and the Right to Information address the question of how to ensure public access to government information without jeopardizing legitimate efforts to protect people from national security threats.

These Principles were drafted by 22 civil society organizations and academic centres, facilitated by the Open Society Justice Initiative, in order to provide guidance to those engaged in drafting, revising, or implementing relevant laws and policies.

Based on international and national law and practices, and more than two years of consultation around the world with government actors, the security sector and civil society, they set out concrete guidelines on the appropriate limits of secrecy, protections for whistleblowers, the parameters of the public's right to information about human rights violations and other issues.

Summary of the Tshwane Principles

1. The public has a right of access to government information, including information from private entities that perform public functions or receive public funds. (Principle 1)
2. It is up to the government to prove the necessity of restrictions on the right to information. (Principle 4)
3. Governments may legitimately withhold information in narrowly defined areas, such as defence plans, weapons development, and the operations and sources used by intelligence services. Also, they may withhold confidential information supplied by foreign governments that is linked to national security matters. (Principle 9)
4. But governments should never withhold information concerning violations of international human rights and humanitarian law, including information about the circumstances and perpetrators of torture and crimes against humanity, and the location of secret prisons. This includes information about past abuses under previous regimes, and any information they hold regarding violations committed by their own agents or by others. (Principle 10A)
5. The public has a right to know about systems of surveillance, and the procedures for authorizing them. (Principle 10E)
6. No government entity may be exempt from disclosure requirements, including security sector and intelligence authorities. The public also has a right to know

about the existence of all security sector entities, the laws and regulations that govern them, and their budgets. (Principles 5 and 10C)

7. Whistleblowers in the public sector should not face retaliation if the public interest in the information disclosed outweighs the public interest in secrecy. But they should have first made a reasonable effort to address the issue through official complaint mechanisms, provided that an effective mechanism exists. (Principles 40, 41 and 43)
8. Criminal action against those who leak information should be considered only if the information poses a 'real and identifiable risk of causing significant harm' that overrides the public interest in disclosure. (Principles 43 and 46)
9. Journalists and others who do not work for the government should not be prosecuted for receiving, possessing or disclosing classified information to the public, or for conspiracy or other crimes based on their seeking or accessing classified information. (Principle 47)
10. Journalists and others who do not work for the government should not be forced to reveal a confidential source or other unpublished information in a leaked investigation. (Principle 48)
11. Public access to judicial processes is essential: 'invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes.' Media and the public should be permitted to challenge any limitation on public access to judicial processes. (Principle 28)
12. Governments should not be permitted to keep state secrets or other information confidential that prevents victims of human rights violations from seeking or obtaining a remedy for their violation. (Principle 30)
13. There should be independent oversight bodies for the security sector, and the bodies should be able to access all information needed for effective oversight. (Principles 6, 31-33)
14. Information should be classified only as long as necessary, and never indefinitely. Laws should govern the maximum permissible period of classification. (Principle 16)

15. There should be clear procedures for requesting declassification, with priority procedures for the declassification of information of public interest. (Principle 17)

2. Private Actors

Some regimes cover private actors, others do not. There are at least three types of private actors that should be covered by a legal regime:

- A. Any private actor performing a public function, whether it be a function previously performed by the state, or other function of a public nature.
- B. Where information from a private actor is required to exercise or protect other rights. For example, in the case of a private factory producing toxic waste, information on how such waste is being managed should be in the public domain.
- C. Regulators supervising public utilities and other regulatory bodies such as associations of doctors, accountants, and lawyers that supervise the conduct of its members.

3. Should the right be extended to cover Parliament and the Courts?

Some legal regimes are comprehensive and extend the right to information held by national and provincial legislatures and the courts. There is little to suggest that the functions that legislatures and courts perform should exclude them from the ambit of a right to information regime. Both institutions perform public functions and greater transparency on the part of both these institutions is likely to enhance public confidence in their work. International standards suggest that both these institutions should be covered by right to information regimes.

Making the law work

Most laws that deepen democracy and enhance rights require constant vigilance and activism on the part of the public. A right to information regime will not work unless the public demand information and make use of the processes that are part of the legal regime. This would also entail building public awareness, training the public sector, designing effective methods of information storage, digitization and retrieval, and the strengthening of independent Information Commissions.

There are other legal innovations such as public interest litigation (PIL) that have also facilitated citizen participation in government decision making. PIL has enabled citizens to challenge government decisions and has required state institutions to justify choices in policy in a court of law. A right to information regime can achieve similar objectives and can enhance transparency and participation, reduce abuse and deepen democracy. Where both elites and non-elites make use of right to information laws transparency and democracy are enhanced.

Governance should be seen as a collaborative effort between the institutions of the state and the public. Right to information regimes strengthen collaboration processes between the state and the public. A model of governance that is founded on a principle of collaboration and partnership is likely to be sustainable and widely acceptable. It will empower both the governed and the governors.
