

Right to Information: Touchstone for Democracy and Development



Commonwealth Human Rights Initiative
working for the practical realisation of human rights in the countries of the Commonwealth



**TRANSPARENCY
INTERNATIONAL
SRI LANKA**
building a nation of integrity

Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the *practical* realisation of human rights in the countries of the Commonwealth. In 1987, several Commonwealth professional associations founded CHRI. They believed that while the Commonwealth provided member countries a shared set of values and legal principles from which to work and provided a forum within which to promote human rights, there was little focus on the issues of human rights within the Commonwealth.

The objectives of CHRI are to promote awareness of and adherence to the Commonwealth Harare Principles, the Universal Declaration of Human Rights and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

Through its reports and periodic investigations, CHRI continually draws attention to progress and setbacks to human rights in Commonwealth countries. In advocating for approaches and measures to prevent human rights abuses, CHRI addresses the Commonwealth Secretariat, member governments and civil society associations. Through its public education programmes, policy dialogues, comparative research, advocacy and networking, CHRI's approach throughout is to act as a catalyst around its priority issues.

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CHRI Headquarters, New Delhi

B-117, Second Floor
Sarvodaya Enclave
New Delhi - 110 017
INDIA
Tel: +91-11-43180200
Fax: +91-11-2686-4688
E-mail: info@humanrightsinitiative.org
chriafr@africaonline.com.gh

CHRI United Kingdom, London

Institute of Commonwealth Studies
28, Russell Square
London WC1B 5DS
UK
Tel: +44-020-7-862-8857
Fax: +44-020-7-862-8820
E-mail: chri@sas.ac.uk

CHRI Africa, Accra

House No.9, Samora Machel
Street Asylum Down
opposite Beverly Hills Hotel
Near Trust Towers, Accra, Ghana
Tel: +233 302971170
Tel/Fax: +233 302971170
E-mail:

www.humanrightsinitiative.org

Right to Information: Touchstone for Democracy and Development

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Editor (Original version):
Maja Daruwala

Adaptation:
Venkatesh Nayak
Sanchita Bakshi

**Commonwealth Human
Rights Initiative
New Delhi**

**Transparency International
Sri Lanka
Colombo**

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Right to Information: Touchstone for Democracy and Development

"The great democratizing power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task...is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed." Kofi Annan, Secretary-General, United Nations¹

Openness in government is a proven means of promoting meaningful democracy and all round socio-economic development. More than 85 countries have recognised that the right to information is a key mechanism for promoting open government and enacted legislation guaranteeing this right to their citizens. At the dawn of the 21st century none of the countries in the South Asian region had overarching laws requiring government bodies to be transparent in their working. Nine years later, four countries Pakistan (2002), India (2005), Nepal (2007) and Bangladesh (2009) have passed laws with the intent of changing the philosophy and praxis of governance from secrecy to transparency. In 2008 Maldives issued executive orders requiring public authorities to share with citizens, information about their working. Regionally, as members of the South Asian Association for Regional Cooperation, (SAARC) South Asian countries have declared their commitment to openness in the public sphere. The SAARC Social Charter unanimously adopted in 2004 underlines the importance of transparent and accountable conduct of administration in public and private, national and international institutions.²

Sri Lanka took credible steps towards enacting its own information access legislation in 2003. The Cabinet approved a draft Freedom of Information Bill after it was vetted by the Attorney General for its constitutionality.³ Unfortunately the Government failed to introduce the Bill in Parliament and was voted out of power soon after. The Government's preoccupation with the war in the eastern and northern provinces in later years has put the draft legislation on the back burner. In the aftermath of the Boxing-day tsunami, civil society and humanitarian aid organisations have been demanding

transparency in the distribution of funds and materials received in the name of the survivors. If Sri Lanka is to regain its past status in the region as a better performer in terms of economic and human development, democratic governance underpinned by the rule of law is indispensable. Without enabling people access to information as a *right* Sri Lanka will continue to struggle in its quest for robust democracy and equitable development.

A PUBLIC RESOURCE

This is the age of information affluence. Technology, with its capacity for storing, simplifying and communicating information with astonishing speed has, more than ever, put information at the centre of development.

Information is a global resource of unlimited potential for all. Government is a vast storehouse of this resource. The information kept by government holds the memory of the nation and provides a full portrait of its activities, performance and future plans. Government information includes: international agreements; negotiating briefs; policy statements; minutes of discussions with investors, donors and debtors; cabinet deliberations and decisions; parliamentary papers; judicial proceedings; details of government functioning and structure; intra-governmental memos; executive orders; budget estimates and accounts; evaluations of public expenditure; expert advice; recommendations and guidelines; transcripts of departmental meetings; statistical data; reports of task forces, commissions and working groups; social surveys and analyses of health, education and food availability; assessments of demographic and employment trends; analysis of defence preparedness and purchases; maps; studies on natural resource locations and availability; proof of the quality of the environment, water and air pollution; detailed personal records; and much, much more.

Information is a public good like clean air and drinking water. It belongs not to the State, the government of the day or civil servants, but to the people. Officials do not create information for their own benefit alone, but for the benefit of the people they serve, as part of the legitimate and routine discharge of the government's duties. Information is generated with public money by public servants paid out of public funds. As such, it cannot be unreasonably kept from citizens.

“In a government 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... The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.”

Justice KK Mathew, Supreme Court of India⁴

HOARDED BY THE POWERFUL

It is well documented that the majority of people in the Commonwealth live in poverty. Yet the majority of the Commonwealth's citizens are not only materially poor, but also information poor. This deprivation is partly because many are unlettered or do not have ready access to mass communication like newspapers, radio or television. However, in the main, the poverty of information has been created because the large stockpile of valuable information lying with the government is deliberately held away from people. In much the same way as depriving people of food starves physical development, depriving human beings of information robs them of one of the basic means by which they can become all that they should be.

Unfortunately, the assumption that information is secret has always been a major premise of the relationship between rulers and the ruled in the Commonwealth. Government officials and people's representatives have rarely been held accountable for their failure to provide just and pro-poor governance. Colonial authorities owed no duty to subject populations and purposefully used distance to signal their power. A culture of secrecy permeated government systems and practices to withhold information became so embedded that they perpetuated post-independence. In Kenya for example, during the Moi-era fear of the consequences of asking for or giving information culminated in power being consolidated around the presidency to the extent that *serikali* (the Kiswahili word for government) became synonymous with *sirikali* (top secret).⁵

Although a few countries have reformed, most still enthusiastically retain and indeed embrace secrecy as a symbol of supremacy, as if there has been no intervening change from colonial to constitutional governance. Anti-terrorist legislation, criminal defamation laws, overly indulgent contempt and privilege laws, media and privacy regulations and restrictive civil service rules all remain very much on the statute book, ready to swiftly punish any breach of government confidentiality. Former Chief Justice of Zimbabwe, Justice Gubbay, recalls "...a member of Parliament with an interest in ecology was convicted under the [Official Secrets] Act for trying to get a civil servant to disclose the State's plans for setting up a national park in the north-east of the country, plans which had nothing to do with State security. So wide is the ambit of the Act that unauthorised disclosure of the number of cups of tea drunk by civil servants – or even disclosure of the fact that civil servants drink tea each day – would amount to criminal offence."⁶ Unfortunately, most governments still do not accept that the people have an automatic right to access information; nor do they recognise that government has a duty to make sure that information is routinely available to all.

Despite the preamble of the Sri Lankan Constitution declaring that the people are sovereign and the source of the power of government, several laws continue to operate with the objective of sustaining the colonial regime of

secrecy. For example, *The Official Secrets Act* (OSA) enacted in 1955 is closely modelled on a 1911-statute of similar name implemented under the erstwhile colonial regime. The definition of official secrets is very broad and includes all information relating to the defences and armed forces of Sri Lanka within its ambit.⁷ The Establishments Code – a rule book applicable to government servants also prohibits the disclosure of official information to any member of the general public without proper authorisation from the Government.⁸ The *Press Council Law* (No. 5 of 1973) explicitly prohibits the media from publishing decisions of the Cabinet and reiterates the OSA ban on publication of anything that may be termed ‘official secrets’. This law provides for the creation of a Press Council that acts as a media watch dog. In July 2009 the Government chose to revive the Press Council which had been rendered inoperative through a bi-partisan resolution of Parliament seven years ago.⁹ The Government of Sri Lanka has used the Public Security Ordinance of 1945 to make regulations imposing media censorship in order to prevent reportage on the military operations directed against militant groups.¹⁰

A FUNDAMENTAL HUMAN RIGHT

Lack of information denies people the opportunity to develop their potential to the fullest and realise the full range of their human rights. Individual personality, political and social identity and economic capability are all shaped by the information that is available to each person and to society at large. The practice of routinely holding information away from the public creates ‘subjects’ rather than ‘citizens’ and is a violation of their rights. This was recognised by the United Nations at its very inception in 1946, when the General Assembly resolved: “*Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated*”¹¹. Enshrined in the Universal Declaration of Human Rights, the right to information’s status as a legally binding treaty obligation was affirmed in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which 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*”¹². This has placed the right to access information firmly within the body of universal human rights law. Sri Lanka is legally obliged to guarantee this fundamental right for its citizens, having acceded to the ICCPR in 1980.¹³

Safeguarding Basic Human Rights in the event of Disasters¹⁴

Since 1983, hundreds of thousands of Sri Lankans affected by long years of civil war have been forced to leave their homes to live in camps or unfamiliar resettlement areas. The last phase of the conflict which ended in 2009 witnessed large scale displacement of families from the northern parts of the country. As 'internally displaced people' they are dependent on government to protect their basic rights and needs, like food and shelter. However, distribution of relief is often shrouded in secrecy and delays are common. People rely on hearsay to know if they would get food, how much, when and where it would be distributed, and what rules to follow to access it. Lack of a *right* to access information denies them the opportunity to know their rightful entitlements and question the government about its policy on food and relief distribution. Lack of information creates spaces for discrimination and arbitrariness. As the government owes no constitutional or statutory duty to inform people, it cannot be questioned or held accountable for the actions or omissions of its officers.

The Boxing-day tsunami that caused unparalleled devastation along the coastal zone of Sri Lanka in 2004 also resulted in the displacement of thousands of families. The international community has poured in billions of dollars in relief and humanitarian assistance since 2005. Corruption has plagued relief and rehabilitation work with allegations of funds being siphoned off on a massive scale. Transparency International- Sri Lanka and civil society organisations have demanded transparency in the processes of reconstruction of settlements and the rehabilitation of survivors.¹⁵

Right On!

It is important that access to information is recognised as a *right* because it:

- Accords it sufficient importance, as being inherent to democratic functioning and a pre-condition to good governance and the realisation of all other human rights.
- Becomes part of the accepted international obligations of the state. This means that the right to access information attracts the *guarantee of protection* by the state.
- Distances it from being merely an administrative measure by which information is gifted by governments to their people at their discretion since a legally enforceable right cannot be narrowed or ignored at the whim of government.
- Creates a duty-holder on the one hand and a beneficiary of a legal entitlement on the other. Non-disclosure of information is therefore a violation and the beneficiary can seek legal remedy.
- Signals that information belongs to the public and not government. The idea that everything is secret unless there is a strong reason for releasing it is replaced by the idea that all information is available unless there are strong reasons for denying it. The onus is on the duty-holder to prove its case for refusing to disclose documents.
- Sets a higher standard of accountability.
- Gives citizens the legal power to attack the legal and institutional impediments to openness and accountability that still dominate the operations of many governments. It moves the locus of control from the state to the citizen, reinstating the citizen as sovereign.

The right to access information underpins all other human rights. For example, freedom of speech, expression and thought inherently rely on the availability of adequate information to form opinions. The realization of the right to personal safety also requires that people have sufficient information to protect themselves. In Canada, a court has recognised that the right to security creates a corollary right to information about threats to personal safety which would be violated if the police force knew of a threat and failed to provide that information to the threatened individual.¹⁶ The right to food is also often reliant on the right to information. In India for example, people have used access laws to find out about their entitlements to subsidised food grains and to expose the fraudulent diversion of food stuff meant for the poorest of society.¹⁷ Quite simply, the right to information is at the core of the human rights discourse because it enables citizens to more meaningfully exercise their rights, assess when their rights are at risk and determine who is responsible for any violations.

The right to information holds within it the right to seek information, as well as the duty to give information, to store, organise, and make it easily available, and to withhold it only when it is proven that this is in the best public interest. The duty to enable access to information rests with government and encompasses two key aspects: enabling citizens to access information upon request; and proactively disseminating important information.¹⁸

THE STATUS OF THE RIGHT TO INFORMATION IN SRI LANKA

No provision has been made in the Constitution of Sri Lanka for guaranteeing people's access to information from the government. However, judicial pronouncements on occasion have recognised citizens' right to access information as an inherent component of other fundamental rights. In 1984 the Supreme Court held that public discussion was important in a democracy and recognition of the right of a person as the recipient of information is essential for such discussion to be fully realized. The right to receive information was therefore implied in the right to free speech and expression guaranteed under Article 14(1)(a) of the Constitution.¹⁹ A decade later the Supreme Court reviewed this position and held that the right to receive information was actually inherent in the fundamental right to hold opinions and the freedom of thought guaranteed under Article 10 of the Constitution.²⁰ The apex Court reiterated this position two years later when it was called upon to determine the constitutionality of the Broadcasting Authority Bill.²¹ More recently in the celebrated Galle Face Green case, the Supreme Court held that for the right to expression to be meaningful and effective, a person has an 'implicit right' to secure relevant information from a public authority in respect of a matter in the public domain especially where "the public interest in the matter outweigh [sic] the confidentiality that attach [sic] to affairs of State and official communications."²²

Despite these pronouncements citizens cannot easily access information from government bodies. A constitution bill was drafted in 2000 in order to expand the scope of Article 14(1)(a) and allow for the incorporation of the right to seek, receive and impart information in the existing right to freedom of speech and expression.²³ However this proposed amendment has not become law and a regime of officially sanctioned secrecy continues to operate in Sri Lanka. The Government continues to be the arbiter of what citizens will be told about its functioning.

COMMONWEALTH ACTION

To their credit, the members of the Commonwealth, including Sri Lanka, have collectively recognised the fundamental importance of the right to access information on a number of occasions. As far back as 1980, the Commonwealth Law Ministers declared: "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information."²⁴ Policy statements since then have encouraged

member countries to “regard freedom of information as a legal and enforceable right.”²⁵ The Commonwealth Secretariat has even prepared guidelines²⁶ and a model law²⁷ on the subject.

The Official Commonwealth – that is, the intergovernmental agencies and meetings – has made some efforts to open itself up to the public, but it has a long way to go. In particular, the Commonwealth Secretariat should lead by example and adopt an explicit and comprehensive policy of maximum disclosure. In the absence of such a policy, the Commonwealth will continue to struggle to rid itself of its reputation for aloof disinterest in communicating with its citizens.

When is Private...Public?

In a world where non-state actors – such as public or private corporations, non-governmental organisations (NGOs), quasi non-government organisations and international institutions – influence the destinies of millions, the ambit of the right to information needs to encompass more than just governments. Some countries have extended the coverage of their laws to some private bodies²⁸, recognising that the issue needs to be “resolved by reference to its role in protecting the fundamental interests of citizens, and not by reference to the provenance or structural characteristics of the institution holding the contested information.”²⁹

As more and more public functions, like provision of health care, supply of water, power and transport, and even prison management, are privatised, people need to be able to get information from the bodies performing these services. Often, agreements between government and service providers do not require them to make information about their activities available. This removes information from the public domain that would otherwise have been covered under access laws. Even where private bodies are not providing public services, their activities need to be open to public scrutiny if they affect people’s rights. For example, the public should be able to access information on a factory’s environmental management policies to ensure the factory is managing toxic waste appropriately and therefore, not diminishing their right to health.

South Africa has pioneered the application of disclosure duties on the private sector under the *Promotion of Access to Information Act 2000*. Section 50 of the Act allows a person access to any record of a private body if that record is “required for the exercise or protection of any rights”. This is a very broad provision.

The Indian *Right to Information Act 2005* also covers private bodies to some extent, as it applies to any “body owned, controlled or substantially financed

directly or indirectly by funds provided by the...Government". This means that if private bodies receive subsidies or concessions from the Government, they may be covered by the law. Innovatively, the Indian Act also permits the public access to "information relating to any private body which can be accessed by a public authority under any other law for the time being in force."³⁰ This means that where a public authority *should* have obtained information under an existing law or bye-law from a private body – for example, an environmental impact report, hazardous waste disposal plan or financial audit – even if it has not received a copy yet, a person can demand access to that report. The public authority will have to exercise its powers to obtain the report from the private body and make a decision regards providing access to the requestor.

The information access laws in Nepal³¹ and Bangladesh³² also place disclosure obligations on organisations in the non-government sector if they are financed by the government or foreign agencies.

LIMITED PROGRESS

There should be no need to remind the Governments of the Commonwealth of which Sri Lanka is a founding member of the importance of the right to information. Yet there is. Over 80 countries now have specific laws that protect the right to access information and many recently crafted constitutions also contain specific provisions guaranteeing the right. At the time of writing, only 15 of 53 Commonwealth nations – Antigua and Barbuda, Australia, Bangladesh, Belize, Canada, India, Jamaica, Malta, New Zealand, Pakistan (Ordinance, not an enactment) South Africa, St Vincent and the Grenadines, Trinidad & Tobago, Uganda and United Kingdom – have instituted legislation guaranteeing the right to information. Of these some contain serious deficiencies. In Uganda although the law has been passed it has not been fully operationalised yet. Few people outside Government had any knowledge of the existence of the information access law in St. Vincent and Grenadines two years after its enactment. In South Asia implementation of the access law in Nepal has not started in right earnest despite the law being more than two years old.

For the most part, open government is notoriously absent in the Commonwealth; governments continue to drag their heels. When forced to react, some have slowly given ground, often refusing to guarantee the right through explicit legislation, delaying as much as possible and where conceding, providing only a limited right. Ghana, Kenya, Malawi, Nigeria, Sierra Leone, Tanzania and Zambia, in Africa; Barbados and Guyana in the Caribbean and Fiji and Papua New Guinea in the Pacific have draft access legislation prepared by either government or civil society under consideration. The movement for access legislation in Nigeria is more than a decade old. Parliament passed the legislation in 2008 but the then President refused to sign it saying that it was

too liberal in nature. Civil society has launched another advocacy campaign to get the Bill passed after a new President was elected. Similarly in Kenya the long drawn campaign for access legislation was frustrated when Parliament failed to pass it before elections. The entire legislative process had to be started afresh after Parliament was reconstituted.

In Sri Lanka efforts to put in place information access legislation began in 1998. In 2003 draft access legislation was prepared by a committee consisting of representatives of government, the media and civil society advocates of transparency. The draft Bill received Cabinet approval for introduction in Parliament. However the dissolution of Parliament in 2004 put the draft Bill on the backburner with successive governments showing little interest in the subject.³³ The Law Commission of Sri Lanka also submitted a draft Freedom of Information Bill in 2003 incorporating some best practices from other jurisdictions.³⁴ There are reports of a revised draft being circulated within closed government circles, but civil society and the media have not had access to this consultative process. As a result of the government's preoccupation with the recently concluded war in the northern and eastern provinces there has been very little movement in recent years towards securing information access legislation in Sri Lanka.

84 Countries that have enacted Right Information Legislation by Region³⁵

Europe		Asia/Pacific	The Americas/ the Caribbean	Africa
Albania	Kosovo	Australia	Antigua & Barbuda	Angola
Armenia	Kyrgyzstan	Bangladesh	Argentina	South Africa
Austria	Latvia	China	Aruba	Uganda
Azerbaijan	Lichtenstein	Cook Islands	Belize	Zimbabwe
Belgium	Lithuania	India	Canada	
Bosnia & Herzegovina	Macedonia	Israel	Cayman Islands	
Bulgaria	Moldova	Japan	Chile	
Croatia	Montenegro	Jordan	Colombia	
Czech Republic	Netherlands	Nepal	Dominican Republic	
Denmark	Norway	New Zealand	Dutch Antilles	
Estonia	Poland	Pakistan	Ecuador	
Finland	Portugal	Philippines	Jamaica	
France	Romania	South Korea	Honduras	
Georgia	Serbia	Taiwan	Mexico	
Germany	Slovakia	Tajikistan	Nicaragua	
Greece	Slovenia	Thailand	Panama	
Hungary	Spain	Uzbekistan	Peru	
Iceland	Sweden		St Vincent & Grenadines	
Ireland	Switzerland		Trinidad & Tobago	
Italy	Turkey		United States of America	
Kazakhstan	Ukraine			
	United Kingdom			

THE KEY TO DEMOCRACY AND DEVELOPMENT

The reluctance of so many member countries to enshrine the right to access information is surprising considering open government offers the key to deepening democracy and quickening development that the Commonwealth including Sri Lanka is so desperately seeking. The right to information lays the foundation upon which to build good governance, transparency, accountability and participation, and to eliminate that scourge upon the poor – corruption. As such, it should be embraced as much by the hard-headed economist as by the high-minded reformer.

Making Participatory Democracy Meaningful

As a member of the United Nations and the Commonwealth, Sri Lanka must comply with the values and principles which underpin both these organisations. In 1999, the United Nations Special Rapporteur on Freedom of Information recognised that “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.”³⁶ Similarly, the 1991 Commonwealth Harare Declaration recognises “the individual’s inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives.”³⁷ However while all members of the Commonwealth have made that commitment to democracy, in many countries the democratic principles of good governance, transparency and accountability are largely absent. The fact is that periodic elections and a functioning bureaucracy do not in themselves ensure that governments are responsive and inclusive. Something more is needed. Access to information is the key for moving from formal to consultative, responsive and participatory democracy.

Power To The People!

Instead of being dependent on vague suppositions and assumptions, people armed with sound factual information have the confidence to hold those in power to account. Even the most marginalised can act in their own interests when equipped with credible and authentic information. For example, a daily wage earner can ask to inspect the wage register to check if they are being paid what a contractor is claiming on their behalf from the government. A patient’s family can check whether the public health centre run by the government is performing according to the established norms and guidelines. A pensioner can check if personal records held by government are accurate and faithfully record one’s entitlements. A small business can sue for compensation if it discovers that a tender it lost was corruptly awarded to another wealthy and influential bidder. A resident can question the quality of a road being laid in their locality against specifications stated in the government contract. A citizens’ group can examine the viability of a development project because it can access documents that indicate if a project would have a detrimental impact on the environment. Access to information truly empowers people to hold public functionaries accountable for their actions.

Information is often inaccessible even when people exercise the most basic of democratic rights: the right to vote. In the absence of a continuous flow of information that accurately reveals the way ministries function, how politicians are performing and the experience and qualifications of new candidates, elections can end up promoting only narrow political interests, as voters look to tribal, clan, religious or class affiliations as the basis of their choice. Likewise, in the absence of a right to scrutinise the financial details of political party funding – some of it no more than bribes – citizens are unable to ensure that special interest groups do not appoint their representatives simply for personal gain. Better-informed voters mean better-informed choices, more responsive legislators and better governance.

Knowing who you are really voting for³⁸

As in many countries, the election law in India disqualifies people convicted of serious criminal offences from standing for elections but does not bar those indicted and awaiting trial or an appeal. In the 2002 state election in the Indian state of Gujarat, one in every six candidates fielded by major political parties had serious criminal charges pending against them! Twenty five from the ruling party won, and some have even gone on to hold ministerial posts. Alarmed by the number of people with questionable backgrounds entering parliament and state assemblies, a group of enterprising academics applied to the Supreme Court to direct India's Election Commission to change nomination requirements and make it compulsory for candidates to disclose any charges of serious crimes pending against them.

The Supreme Court agreed, finding that the right to information is inherent to democracy and that the voter has a constitutional right to know a candidate's background especially if there are any criminal antecedents. The Election Commission immediately made the necessary changes to the nomination process. However, in a rare show of unanimity, all political parties came together to resist this initiative and the Government passed an Ordinance that effectively nullified the Election Commission's orders. The original petitioners and other citizens' groups immediately challenged the legality of the Ordinance before the Supreme Court, arguing that it diminished their constitutionally guaranteed human rights. Once again, the Court reiterated the sanctity of the voters' right to know and struck down the Ordinance. The Court held that the fundamental right to know could not be restricted in such an unreasonable manner. Now all candidates, at the time of filing their nomination papers, must file an affidavit disclosing if they have been charged with serious crimes, their educational qualifications and the extent of their assets and liabilities. This information must be made widely available through notice boards and the website of the Election Commission.

In Bangladesh, a similar case was filed before the High Court. The Court directed the Election Commission (EC) to ensure disclosure of eight types of

information concerning the property, criminal charges, and educational backgrounds of all election candidates. Vested interests sought to challenge this decision however vigilant supporters have succeeded in vacating the stay granted by a single judge bench. The order of the Court is likely to be implemented during the next elections.

Cementing Trust In Government

Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. This is a crucial aspect of effective governance – without the support and trust of the people, governments will be more likely to face resistance to their policies and programs and implementation will be more difficult. Tellingly, a Commonwealth Foundation study in 1999 which sought the views of some 10,000 citizens in over 47 Commonwealth countries has shown that there is a growing disillusionment of citizens with their governments: “Citizens are suspicious of the motives and intentions of their governments. They feel ignored or even betrayed by their elected representatives. Indeed, they feel suspicious of the very programmes and agencies created to meet the needs they have. They feel neglected, ignored and uncared for.”³⁹ The integrity of governments needs to improve – and be *seen* to improve. Open government and access to information provide a means of achieving both these ends.

A Gandhi’s crusade against corruption in police transfers in India⁴⁰

Shailesh Gandhi, a Right to Information activist based in Mumbai, used Maharashtra’s erstwhile *Right To Information Act 2002* to expose the common practice of political interference in police transfers in the Mumbai Police. The transfer of police officers is a clear violation of Rule 413 of the Police Manual, which prohibits the police from approaching officials from other departments or politicians to press for individual claims. Gandhi requested the number of transfers of police personnel ordered or requested by Members of the State or Central legislatures and Ministers during a two-year period. Gandhi filed a number of further requests, as well as enduring 9 appeals and 11 personal hearings and numerous attempts by the Mumbai Police to delay his requests, before he started to get results. On appeal, the Lok Ayukta – the independent appeal body established under the State Act – eventually ordered release of the documents requests and reprimanded the State and the Police for the delay in supplying the information and ordered both to take action against police officers whose transfers had been recommended by politicians.

The 50-odd pages eventually released by the offices of the Mumbai Police Commissioner and Director-General of Police (DGP) revealed a huge number of transfers being made on flimsy grounds. For example, it was apparent that many transfers had been sought from ‘poor’ postings (railway police or

militant infested areas) to 'lucrative' postings to the cities. Alarming, out of 61 transfer requests reviewed, 58 came from the offices of the Chief Minister and Deputy Chief Minister, many made prior to the State Assembly elections. The DGP received as many as 143 'letters' or 'chits' from ministers, legislators and MPs. Meanwhile the Mumbai Police Commissioner received 139 letters "recommending" intra-city transfers. Gandhi's request for information also revealed that requests for police transfers have also been made by former mayors and District Unit Chiefs of political parties.

Subsequently, the Deputy Commissioner of Police (DCP) issued two circulars which stated that "any violation of Rule 413 will be strictly dealt with". Moreover, while Gandhi was given no names, the DCP informed him that 71 officers and 64 constables were "warned for trying to bring pressure for their transfers and entries have been made in their service books". Thus, the Police Commissioner had finally sent out a strong signal that future violations of Rule 413 would no longer be tolerated. Although Gandhi may not have received all the information he requested, nonetheless his activism exposed a major source of corruption in the local police.

In 2005 the state law was repealed to make way for a stronger access law passed by Parliament. In 2008 Gandhi was appointed Central Information Commissioner to adjudicate information access disputes under the Central law.

Over the years, instability and conflict have resulted in huge setbacks for development in Sri Lanka. Enhancing people's trust in their government goes some way to minimise the likelihood of conflict. Openness and information sharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

Supporting People-Centred Development

At the turn of the century, all members of the Commonwealth came together in their broader membership of the United Nations and pledged their commitment to the Millennium Development Goals (MDGs) – the most comprehensive poverty reduction and development agenda the international community has ever forged. At Coolum in 2002 the Commonwealth Heads of Government made a commitment "to work to eliminate poverty, to promote people-centred and sustainable development, and thus progressively to remove the wide disparities in living standards among us."⁴¹ At Kampala in 2007 the Commonwealth Heads of Government expressed their deep concern over many Commonwealth countries were falling behind the MDG targets and reaffirmed

their commitment to intensify efforts to meet the MDGs and their associate targets.⁴²

Sadly in 2009, poverty continues to remain the hallmark of the Commonwealth. Almost two-thirds of the people living in the Commonwealth still survive on less than US\$2 a day. Half of the 130 million children in the world who do not have access to primary education live in the Commonwealth.⁴³ Two-thirds of HIV/AIDS cases worldwide are found in the Commonwealth of whom 60% are women.⁴⁴ Sub-Saharan Africa and South Asia (home to more than 85% of the Commonwealth) have within them the largest concentrations of hungry people in the world.⁴⁵ With just five years to go to reach the MDG targets, many countries are slipping far behind schedule.

Much of the failure of poverty reduction and development strategies to date can be attributed to the fact that, for years, they have been designed behind closed doors by governments who consulted with 'experts' but shut out the very people who were supposed to benefit. Poor people and women in particular are often completely excluded from decision-making processes. Even a parliamentarian in Ghana complained that the interim Poverty Reduction Strategy Paper required by the World Bank, as well as crucial decisions to take advantage of the Highly Indebted Poor Country Initiative which will affect government policy directions for years to come, were not even referred to Parliament at large.⁴⁶ Too often, donors have been complicit in keeping development planning processes closed. Multilateral institutions, such as the World Bank and the International Monetary Fund, are now beginning to open up following pressure from civil society groups, but much more work still needs to be done.

Despite Sri Lanka belonging to the medium human development bracket many people in Sri Lanka are faced with poverty. According to the UNDP's 2008 Human Development Report, Sri Lanka ranks 99th out of the 177 countries surveyed in relation to the overall Human Development Index.⁴⁷ It has slipped six notches since 2005 when it occupied the 93rd position – a sharp fall in a short period of time indeed. While Sri Lanka remains at the top of the list of South Asian countries, ahead of India by 29 places, poverty levels have remained at over one-fifth of the population for some time.⁴⁸ Sri Lanka's gross national income per capita was calculated at US\$1,300- well above the average for South Asia (US\$590) and Low Income Countries (US\$540).⁴⁹ Yet 22.7% of the population lives below the national poverty line, confined to mainly rural areas.⁵⁰ The problem of poverty has exacerbated due to the displacement of thousands of families during the ethnic conflict. Likewise, women, who battle discrimination, and high levels of violence including domestic and sexual violence⁵¹, continue to be under-represented and their contribution to development undervalued. Women, particularly those of Tamil descent, remain largely marginalised, despite government promises to ameliorate their status.

Plugging leaks by opening up the system⁵²

Corruption and waste of government funds can be particularly detrimental to the effective provision of public services. In particular, public health and education systems have often suffered from under-investment and/or chronic leakages of the little funding they receive, because their beneficiaries are so often the voiceless poor. This is especially troubling for countries in South Asia where governments spend less and less on social development. It is essential that at least this funding is properly spent. Access to information about budgets and expenditure can be a key mechanism for ensuring accountability of funds. A case in Uganda provides a good example of how the right to information was used to crack down on corruption in a developing country's education system.

Despite increased expenditure on education in Uganda in the 1990s, an expenditure tracking survey revealed that during a five-year period 87% of all funds meant for primary schools in Uganda went into the pockets of bureaucrats while enrolment remained less than 50%. Astonished by these findings, the national government began giving details about monthly transfers of grants to districts through newspapers and the radio in a bid to curb the siphoning of funds. At the other end, primary schools were required to post public notices on receipt of all funds. Parents therefore had access to this information and were in a position to monitor the educational grant programme and demand accountability at the local government level. In five years, the diversion of funds dropped phenomenally from 80% to 20% and enrolment more than doubled from 3.6 million to 6.9 million children. Schools with access to newspapers were able to increase their flow of funds by 12 percentage points over other schools. Information dissemination, though a simple and inexpensive policy action, enforced greater accountability in local government and ensured proper use of the taxpayer's money.

Facilitating Equitable Economic Growth

Countries in South Asia are increasingly relying on free markets to quicken development. But markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. Foreign and local investors need to be able to rely on the routine availability of timely and accurate information about government policies, the operation of regulatory authorities and financial institutions and the criteria used to award tenders, provide licences and give credit. Easy access to fulsome information that is not mired in bureaucratic processes creates long-term investor confidence in the local economic environment. A guaranteed right to information lays the foundation for market-friendly good governance principles of transparency and accountability, which in turn encourage strong growth.

Notably not merely economic growth, but also economic equity is promoted by access to information. It is essential that government economic policies work to reduce the growing gap between rich and poor. Additionally, the benefits of globalisation must be shared more widely and its focus channelled for the elimination of poverty and human deprivation. Liberating information from government increases economic opportunity for the less powerful as much as for the big player. A worker can access information about labour regulations and their entitlements, a businessperson can find out about licensing requirements, taxation and trade regulations; and farmers can get hold of land records, market trend analysis and pricing information.

Tackling Corruption

A guaranteed right to access information is an essential and practical antidote to corruption, which is a serious problem in Sri Lanka. Corruption destroys the rule of law and creates a mutually supporting class of overlords who need secrecy to hide their dark deeds in dark places. In the worst instances, it has led to the 'criminalisation of politics' and 'the politicisation of criminals', turning elections into futile exercises which merely legitimise bad governance and bad governors.

Corruption is leaching away the economic lifeblood of many societies. The World Bank estimates that corruption can reduce a country's growth rate by 0.5 to 1.0 percentage points per year. The need to give 'speed money', 'grease' or 'baksheesh' in return for public services or rightful entitlements amounts to an additional illegal tax. Corruption is especially severe on the poor, who are least capable of paying the extra costs associated with bribery and fraud or surviving the embezzlement of scarce public resources.

In 2008 Transparency International ranked Sri Lanka the 92nd most corrupt amongst 180 countries surveyed for people's perception about corruption, nine places behind India.⁵³ The justice system in the country has been found to be weak in combating corruption. Transparency International's 2007

report on Judicial Corruption found that “corruption is one outcome of Sri Lanka’s cowed judiciary.”⁵⁴ Corruption has also severely undermined the provision of humanitarian aid in Sri Lanka. The devastating Boxing-day tsunami that hit Sri Lanka in 2004 allowed corrupt officials to profit from the provision of aid while affected people remained homeless.⁵⁵ The ability of those who have been affected by the tsunami or the internal conflict or both “to recognize instances of corruption largely depended on their access to information regarding their entitlements.”⁵⁶ Clearly, corruption has affected the quality of life in Sri Lanka and weakened the effectiveness of the most routine functions of the State. The right to information is a proven tool to contain corruption in the areas of public service delivery. Throwing light on the practices of service-delivery institutions can help ordinary people to expose even the most entrenched corrupt practices and ensure that their most basic entitlements are met.

It is not coincidental that countries perceived to have the most corrupt governments also have the lowest levels of development or that countries with access to information laws are also perceived to be the least corrupt. The right to access information acts as a source of light to be shone on the murky deals and shady transactions that litter corrupt governments. It enables civil society and especially the media to peel back the layers of bureaucratic red tape and political sleight of hand and get to the ‘hard facts.’

The Right to Information and Transparency⁵⁷ – A Clear Correlation

Transparency International's Annual Corruption Perceptions Index surveys the degree of corruption in a country as perceived by business people and risk analysts. In 2008, of the ten countries scoring best in Transparency International's annual Corruption Perceptions Index, no fewer than nine had effective legislation enabling the public to see government files. Of the ten countries perceived to be the worst in terms of corruption, none had a functioning access to information regime.⁵⁸

Rank	Country	RTI Act	Rank	Country	RTI Act
1	Denmark	Access to Public Administration Files Act 1970	171	Congo, Democratic Republic	No
1	New Zealand	Official Information Act 1982	171	Equatorial Guinea	No
1	Sweden	Freedom of the Press Act 1766	173	Chad	No
4	Singapore	No	173	Guinea	No
5	Finland	Act on the Openness of Government Activities 1951	173	Sudan	No
5	Switzerland	Freedom of Information Law 2004	176	Afghanistan	No
7	Iceland	Information Act 1986	177	Haiti	No
7	Netherlands	Wet openbaarheid van bestuur 1978	178	Iraq	No
9	Australia	Freedom of Information Act 1982	178	Myanmar	No
9	Canada	Access to Information Act 1982	180	Somalia	No

While in 2006 the Sri Lankan Government made the move to join the Asian Development Bank/Organisation for Economic Co-operation and Development (OECD) Asia-Pacific Anti-Corruption Initiative,⁵⁹ unfortunately the Government has failed to implement an effective programme to prevent corruption, or make any serious effort to crack down on corrupt officials. The lack of a right to information law in Sri Lanka has meant that the Government has been free to repeat the mistakes of the past and continue to run the country in a closed manner with little accountability.

Exposing Corruption in India's Food Ration Distribution System⁶⁰

Parivartan, a Delhi-based NGO, waged a two-year campaign to combat rampant corruption which was preventing the proper distribution of food rations to the poor. The Government of India spends Rs 26,000 crore annually on food subsidies to 6.5 crore people living below the poverty line. The system works by providing highly subsidised food rations to poor people who must present their ration card at privately run ration shops under the Public Distribution System (PDS).

In March 2003, using the Delhi *Right to Information Act 2000*, Parivartan applied for four months worth of records of all shops in the district of Sundernagari. When Parivartan's request for records was refused, they took their case to the appellate authority under the Act who in June 2003 ordered the release of records. However, it was only in late September 2003 that Parivartan volunteers were given a date to inspect the records of the ration shop dealers. In a shocking postscript to this small victory, they were harassed and physically threatened by shop keepers. The terrorising of applicants for information also resulted in some withdrawals of requests for ration records.

Eventually in late October 2003, the information was made available to the applicants. Following an audit of the records, Parivartan found that out of a total of 182 families their volunteers interviewed, 142 did not receive a single grain of wheat during the month of June 2003. 167 families did not receive a single grain of rice. Out of a total of 4650 kgs of wheat supposed to have been distributed to the people, only 595 kgs had actually been received. The remaining 87% found its way to the black market. Out of a total of 1820 kgs of rice supposed to have been distributed as per daily sales registers, only 110 kgs was received by the people, which meant 94% was siphoned off.

After continued pressure, the Delhi Government finally ordered for a comprehensive review of the PDS. From February 2005, dramatic changes were evidenced in Sundarnagari, with rations provided on time and for the right price. The Chief Minister also assured Parivartan that across the entire territory of Delhi, ration records would be regularly opened up for public inspection, at least once a month. Corruption has notably reduced as a result of the impressive efforts of Parivartan and their supporters.

Bolstering Media Capacity

In robust democracies, the media acts as a watchdog, scrutinising the powerful and exposing mismanagement and corruption. It is also the foremost means of distributing information; where illiteracy is widespread, radio and television have become vital communication links. Sri Lanka has 13 national newspapers and 15 local newspapers in circulation, as well as more than 10 TV channels. . Unfortunately, the media's power to reach the masses has often been

perceived as a threat by closed governments, which have carefully regulated private ownership of the press and attempted to curb the media's ability to gather news, investigate and inform. It has been reported that "at least 20 Sri Lankan journalists have fled after receiving death threats and 14 have been killed since the beginning of the military campaign to crush the Tamil Tiger rebels in 2006."⁶¹

Despite having a once vibrant media sector, Sri Lanka has developed a reputation as one of the most dangerous places in Asia for journalists. Journalists worldwide have called on the Sri Lankan Government to "stop the war on journalists."⁶² Reporters Without Borders have reported that already two journalists have been killed and three imprisoned during the first half of 2009. Sri Lanka has been ranked 165th out of 173 countries in their worldwide index of press freedom.⁶³

Where the media is hemmed in by regulation or is unable to get reliable information held by governments and other powerful interests, it cannot fulfil its role to the best of its abilities. Journalists are left to depend on leaks and luck or to rely on press releases and voluntary disclosures provided by the very people they are seeking to investigate. Lack of access to information also leaves reporters open to government allegations that their stories are inaccurate and reliant on rumour and half-truths instead of facts. A sound access regime provides a framework within which the media can seek, receive and impart essential information accurately and is as much in the interests of government as it is of the people.

Exposing Flaws in India's Billion Rupee Employment Guarantee Scheme⁶⁴

Even schemes which are intended for the benefit of the poorest of the poor are often simply used as opportunities for greedy bureaucrats, people's representatives and contractors to literally steal food from the mouths of the needy. This was demonstrated recently when the *Indian Express* newspaper used the new national Right to Information Act to uncover a scam by Public Works Department to defraud poor workers under the State Employment Guarantee Scheme (EGS) in Maharashtra. The EGS guarantees at least 100 days of employment to one member of every one of the poorest households in the State.

The *Indian Express* obtained muster rolls, which listed salary payments under the EGS to employees who had supposedly worked on the construction of a local road. Records showed that payments had been made to 'phantom' workers, many of whom had died long before the dates listed for the salary payments! The scam exposed a serious lack of accountability in the local administration of the Scheme. The expose by the *Indian Express* created a major stir in Government circles and forced the Minister responsible for EGS to order a major investigation into the scam.

BUT RESISTANCE PERSISTS

Despite the obvious benefits of open government for democracy and people-centred development, bureaucrats and politicians unused to opening themselves to scrutiny continue to offer many justifications for not allowing citizens to access information as of right. Sri Lankan political and bureaucratic establishment is no different – but none of their arguments are compelling.

Officials argue that access to information on policy development would inhibit decision-making, because the threat of public scrutiny would curb free and frank discussions, inhibit the candour of advice and therefore seriously hamper the smooth running of government. Sadly, the area of official decision-making – how criteria are applied, assessments made, contracts awarded, applications rejected, budgets prepared, or benefits distributed, whose advice counts and whose is ignored – is traditionally an area prone to bias and abuse of power. In Sri Lanka, government rules and regulations have prohibited officials from disclosing information, while a culture of secrecy within the bureaucracy has led to poor record management practices.

Without the possibility of disclosure, there is little possibility of checking these tendencies. Conversely, just the threat of disclosure can often improve the quality of government decision-making. A 1995 report of the Australian Law Reform Commission found that: “the Freedom of Information Act has focused decision-makers’ minds on the need to base decisions on relevant factors and to record the decision-making process. The knowledge that decisions and processes are open to scrutiny imposes a constant discipline on the public sector”⁶⁵. Doing public business in public also ensures that honest public servants are protected from harassment and are less liable to succumb to extraneous influences.

It is possible that the Government is wary that open government will result in the disclosure of sensitive high-level communications between senior officials or even with other states. Many officials would argue that it is not in the public interest to disclose information that would weaken them in the eyes of the world, especially in the area of national security, foreign relations or negotiations with international financial institutions. While there may be value in protecting these interests, access laws can easily be crafted to do so. What they will not do though, is protect officials from inconvenient disclosure or criticism that could affect the electoral fortunes of ruling regimes or cause embarrassment to individual government leaders or bureaucrats. Perhaps it is actually a fear of the latter that is at the heart of the Government’s resistance to openness.

Concerns are sometimes raised about breaching privacy rights or damaging important commercial interests. But there is no special mystique attached to these communications. Indeed, it is increasingly recognised that the mere fact

that something is certified as politically or commercially 'sensitive' is not enough to keep it out of the public eye. Transparency in the public interest is increasingly preferred to secrecy in the private.

The War On Terror: A War On Information?

In the wake of 'the war on terror', the impetus to rewrite access laws has gathered momentum. Developed and developing countries alike have been quick to introduce draconian anti-terrorist laws or strengthen existing ones to give sweeping powers to government agencies. An outstanding feature is the curbs imposed on access to public information.

In Bangladesh, the Government in December 2005 said that it was planning to introduce a new anti-terror law in order to crack down on increasing militant and criminal violence.⁶⁶ However, this has increased fears among the media and journalists, already the target of political attacks, that an anti-terror law will be used to reduce the media's already limited ability to access public information. In Canada, a new law empowers the Minister of Justice to conceal all information related to terrorism and gives the Minister overriding powers to terminate any investigation launched by the Information Commissioner.⁶⁷

National security and the need to protect the public from harm are of course important considerations for any government – and for citizens too. But the temptation to expand protective provisions to stifle all disclosures is a matter of profound concern. Nations must remain steadfast in their commitment to open government and not give in to knee-jerk instincts to claw back hard won rights at the first sign of danger, citing 'security considerations'. To continue this dangerous trend allows the mere threat of terror to realise the very objectives of the terrorists.

Much of the debate over the sensitivity of disclosure is only valid in relation to a very narrow selection of information held by government. In reality, the bulk of government-held information does not fall into sensitive categories where real harm may be caused by its release. Much that is requested by the public is either about personal matters or is uncontroversial: what a person's welfare entitlements are; how government insurance schemes calculate the cost of their premiums; what additives are permissible in food; and so on. In any case, well-drafted access laws inevitably provide for exemptions for certain types of sensitive information, allow for the balancing of competing interests in difficult cases and permit external adjudication where there is a dispute. For example, while it may not be in the national interest to know where a squadron of new aircraft is to be deployed, there is no reason why, merely because the defence department is involved, citizens should not be given copies of the purchase agreement and information on how much an air force jet cost, who is being paid a commission, of what amount and on what terms.

Officials, particularly in developing countries like Sri Lanka, will often argue that guaranteed access to information is a luxury that must await better times.

This ignores the truth that access to information is, in fact, a fundamental precondition for development and democracy. Cash-strapped countries also argue that the cost of managing and disseminating information is an insurmountable barrier to open government. While this argument may initially appear to have some merit, especially in developing countries where government often struggle just to feed the populations, it is actually seriously flawed as good record-keeping is in any case a basic duty of government. It also overlooks the amount that governments already spend on creating systems of secrecy and distributing their own propaganda. For example, in the mid-1990s it was estimated that the Freedom of Information Act in Victoria, a state of Australia, cost about \$3 million to administer, compared to the \$75 million spent each year by government departments distributing their own glossy brochures.⁶⁸ The costs to private business and individuals of paying bribes to access everyday information can also not be ignored. Expenditure incurred in opening up government is more than offset by the many benefits – economic and social – that result from greater openness. Adequate information regimes are a long-term investment, which not only pay for themselves many times over, but also generate more wealth for the country as a whole.

Old Habits Die Hard

Resistance to change is not limited to countries new to the notion of providing information as a right, but remains strong in countries that have had access laws on the books for decades. In a review of Canada's *Access to Information Act*, the Information Commissioner ruefully reported that, despite their law being over 20 years old, "there remains a deep nostalgia in the bureaucracy for the days when officials controlled information and the spin of the message. Officials have not given up the fight to weaken the law, but they have come to realize that the only effective strategy left to them is to rewrite the law"⁶⁹. Such a strategy is in train and it prompted the Information Commissioner to submit a Special Report to Parliament waving a flag of concern about the government's proposals to rewrite the Act.

* * *

Knowledge is too valuable a common good to be a monopoly of the few. In this interconnected information age, the combination of technology and easy availability of know-how – coupled with guaranteed access to information – offers unprecedented opportunities for the radical overhaul of governance. Shared equitably and managed to the best advantage of all, information offers a short cut to development and democracy. The means are available, but sadly the will is often not. This must change.

***S P Gupta v President of India and Others, 1981*⁷⁰**

While deciding on a batch of writ petitions filed by several advocates in India on the twin issues of transfer of judges and the appointment of additional judges in High Courts, the Supreme Court re-emphasised the value of the citizens' right to information.

In 1981 the then Law Minister of the Government of India, acting upon the recommendations of the States Reorganisation Commission, the then Law Commission and several Bar Associations, issued a circular to the Chief Justices of various High Courts regards transfer of additional judges to High Courts other than those where they had been originally appointed. This transfer policy was visualised in order to combat the development of "narrow parochial tendencies bred by caste, kinship and other local links and affiliations" in the higher judiciary. Several advocates filed public interest litigation suits in various High Courts challenging this circular on the ground that it interfered with the independence of the judiciary. Senior advocate V M Tarkunde filed another writ petition in the Delhi High Court around the same time challenging the short term reappointment of three additional judges. He also challenged the circular of the Law Ministry. The petitioners requested the Supreme Court to call for the correspondence conducted between the Law Minister, the Chief Justice of the Delhi High court and the Chief Justice of India in relation to the appointment of the additional judges. The Solicitor General of India claimed government privilege over the documents and argued against disclosure because:

the documents in question formed part of the advice tendered by the Council of Ministers to the President and hence by reason of Article 74(2) of the Indian Constitution⁷¹ the Court was precluded from ordering their disclosure and looking into them; and the documents in question were protected against disclosure under Section 123 of the *Indian Evidence Act*⁷² because their disclosure would injure public interest.

The Court rejected the first argument by stating that the correspondence with the Chief Justices may be referred to in the advice tendered by the Council of Ministers but that does not make those documents a part and parcel of that advice. The protection of privilege under Article 74(2) is available only for the specific advice tendered by the Council but such privilege cannot be claimed for documents that form the material basis on which such advice was given.

Reflecting upon the democratic form of government adopted by India in 1950, the Court observed as follows:

"Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be

governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy..."⁷³ [emphasis supplied]

Noting that the current trend on the planet was to move from representative democracy towards more participatory democracy, the Court observed as follows:

"The demand for openness in the government is based principally on two reasons. It is now widely accepted that democracy, does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a moralities content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies; so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government--an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an open government where there is full access to information in regard to the functioning of the government..."⁷⁴ [emphasis supplied]

The Court contrasted the practice of secrecy with the philosophy of open government and observed as follows:

"It is axiomatic that every action of the government must be actuated by public interest but even so we find cases, though not many, where governmental action is taken not for public good but for personal gain or other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures... At times, there are also instances of misuse or abuse of authority on the part of the executive. Now, if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means, of information available to the public there would be greater exposure of the functioning of government and it would help to assure the people a better and more efficient administration. There can be little doubt that' exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government is clean government and a powerful safeguard against political and administrative aberration and inefficiency..."⁷⁵ [emphasis

supplied]

The Court reiterated its earlier pronouncement that every citizen had the right to know every act of every public functionary and said that this right was implied in the right to free speech and expression guaranteed by the Constitution.⁷⁶

*"This is the new democratic culture of an open society towards which every liberal democracy is evolving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosure 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..."*⁷⁷ [emphasis supplied]

The Court rejected the Government's claim of privilege from disclosing the unpublished correspondence under the *Indian Evidence Act* by giving the following reasons:

Even though the head of the department or even the Minister may file an affidavit claiming immunity from disclosure of certain unofficial documents in the public interest, it is well settled that the court has residual powers to nevertheless call for the documents and examine them. The court is not bound by the statement made by the minister or the head of the department in the affidavit. While the head of the department concerned was competent to make a judgement on whether the disclosure of unpublished official records would harm the nation or the public service, he/she is not competent to decide what was in the public interest as that is the job of the courts. The court retains the power to balance the injury to the State or the public service against the risk of injustice, before reaching its decision on whether to disclose the document publicly or not.

*"Whenever an objection to the disclosure of a document under Section 123 is raised, two questions fall for the determination of the court, namely, whether the document relates to affairs of State and whether its disclosure would, in the particular case before the court, be injurious to public interest. The court in reaching its decision on these two questions has to balance two competing aspects of public interest, because the document being one relating to affairs of State, its disclosure would cause some injury to the interest of the State or the proper functioning of the public service and on the other hand if it is not disclosed, the non-disclosure would thwart the administration of justice by keeping back from the court a material document. There are two aspects of public interest clashing with each other out of which the court has to decide which predominates..."*⁷⁸ [emphasis supplied]

"If the court comes to the conclusion that, on the balance, the disclosure of the

document would cause greater injury to public interest than its non-disclosure, the court would uphold the objection and not allow the document to be disclosed but if, on the other hand, the court finds that the balance between competing public interests lies the other way, the court would order the disclosure of the document. This balancing between two competing aspects of public interest has to be performed by the court even where an objection to the disclosure of the document is taken on the ground that it belongs to a class of documents which are protected irrespective of their contents, because there is no absolute immunity for documents belonging to such class...”⁷⁹ [emphasis supplied]

“Where the State is a party to an action in which disclosure of a document is sought by the opposite party, it is possible that the decision to withhold the document may be influenced by the apprehension that such disclosure may adversely affect the head of the department or the department itself or the minister or even the Government or that it may provoke public criticism or censure in the legislature or in the press, but it is essential that such considerations should be totally kept out in reaching the decision whether or not to disclose the document. So also the effect of the document on the ultimate course of the litigation whether its disclosure would hurt the State in its defence should have no relevance in making a claim for immunity against disclosure. The sole and only consideration must be whether the disclosure of the document would be detrimental to public interest in the particular case before the Court...” [emphasis supplied].

The ratio contained in this judgement regards the appointment and transfer of additional judges was subsequently overturned by a nine judge bench of the Supreme Court.⁸⁰ However the pronouncements of the Court on the value and significance of open government and the crucial role of the people’s right to information in a participatory democracy have since been reiterated in several decisions of the Supreme Court and the High Courts in India.

Notes

- ¹ Annan, K. (1997) *Address to the World Bank conference "Global Knowledge '97"*, Toronto, Canada, on June 22: <http://www.ctcnet.org/kannan.html> as on 21 August, 2009.
- ² Article II.2.xvi, SAARC Social Charter, website of SAARC Secretariat, <http://www.saarc-sec.org/main.php?id=13> : as on 21 August, 2009.
- ³ <http://www.freedominfo.org/news/2003.htm> as on 21 August, 2009.
- ⁴ Justice KK Mathew in *State of UP v Raj Narain*, AIR 1975 SC 865. See also: *Indian Express Newspapers (Bombay) Pvt Ltd v India*, (1985) 1 SCC 641; *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay Pvt Ltd*, AIR (1989) SC 190; *Union of India v. Assn. for Democratic Reforms*, (2002) 5 SCC 294, 313.
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⁷¹ Article 74 reads as follows:

"74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice:

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court."

⁷² Section 123 reads as follows:

"123. Evidence as to affairs of State.— No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

⁷³ Para 63.

⁷⁴ Para 64.

⁷⁵ Para 65.

⁷⁶ *State of Uttar Pradesh v Raj Narain*, AIR 1975 SC865 : In this judgement Justice Mathew observed as follows:

"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..."

⁷⁷ Para 66.

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About our partner

Friedrich-Naumann-Stiftung für die Freiheit

The Friedrich-Naumann-Stiftung für die Freiheit is the foundation for liberal politics. It was founded in 1958 by, amongst others, Theodor Heuss, the first German Federal President after World War II. The Foundation currently works in some sixty different countries around the world – to promote ideas on liberty and strategies for freedom. Our instruments are civic education, political consultancy and political dialogue.

The Friedrich-Naumann-Stiftung für die Freiheit lends its expertise for endeavours to consolidate and strengthen freedom, democracy, market economy and the rule of law. As the only liberal organization of its kind world-wide, the Foundation facilitates to lay the groundwork for a future in freedom that bears responsibility for the coming generations.

Within South Asia, with its strong tradition of tolerance and love for freedom, with its growing middle classes which increasingly assert themselves, and with its liberalizing economies, the Foundation works with numerous partner organizations to strengthen the structures of democracy, the rule of law, and the economic preconditions for social development and a life in dignity.

Friedrich Naumann
STIFTUNG **FÜR DIE FREIHEIT**

Transparency International – Sri Lanka

Transparency International (TI) is the global civil society organization leading the fight against corruption. Through more than 100 chapters worldwide and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it.

Transparency International Sri Lanka (TISL) started operations in 2002. It functions as an autonomous chapter of TI with its own local strategies and priorities.

CHRI Programmes

CHRI's work is based on the belief that for human rights, genuine democracy and development to become a reality in people's lives, there must be high standards and functional mechanisms for accountability and participation within the Commonwealth and its member countries. Accordingly, in addition to a broad human rights advocacy programme, CHRI advocates access to information and access to justice. It does this through research, publications, workshops, information dissemination and advocacy.

Human Rights Advocacy

CHRI makes regular submissions to official Commonwealth bodies and member governments. From time to time CHRI conducts fact finding missions and since 1995, has sent missions to Nigeria, Zambia, Fiji Islands and Sierra Leone. CHRI also coordinates the Commonwealth Human Rights Network, which brings together diverse groups to build their collective power to advocate for human rights. CHRI's Media Unit also ensures that human rights issues are in the public consciousness.

Access to Information

CHRI catalyses civil society and governments to take action, acts as a hub of technical expertise in support of strong legislation, and assists partners with implementation of good practice. CHRI works collaboratively with local groups and officials, building government and civil society capacity as well as advocating with policy-makers. CHRI is active in South Asia, most recently supporting the successful campaign for a national law in India; provides legal drafting support and inputs in Africa; and in the Pacific, works with regional and national organisations to catalyse interest in access legislation.

Access to Justice

Police Reforms: In too many countries the police are seen as oppressive instruments of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that police act as upholders of the rule of law rather than as instruments of the current regime. In India, CHRI's programme aims at mobilising public support for police reform. In East Africa and Ghana, CHRI is examining police accountability issues and political interference.

Prison Reforms: CHRI's work is focused on increasing transparency of a traditionally closed system and exposing malpractice. A major area is focused on highlighting failures of the legal system that result in terrible overcrowding and unconscionably long pre-trial detention and prison overstay, and engaging in interventions to ease this. Another area of concentration is aimed at reviving the prison oversight systems that have completely failed. We believe that attention to these areas will bring improvements to the administration of prisons as well as have a knock on effect on the administration of justice overall.

