

XIX

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

ADC / Asociación por los
Derechos Civiles

Access to Information: An Instrumental Right for Empowerment



July 2007

ARTICLE 19, 6-8 Amwell Street, London EC1R 1UQ, United Kingdom

Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org <http://www.article19.org>

ADC - Asociación por los Derechos Civiles, Av. Córdoba 795, Piso 8, (C1054AAG) Buenos Aires, Argentina

Tel: +54-11 5236-0555/6/7 y 5238-1805 - Fax: + 54-11 5256-5658 - adc@adc.org.ar - <http://www.adc.org.ar>

ACKNOWLEDGEMENTS

This article was produced by the Buenos Aires-based Asociación por los Derechos Civiles - Association for Civil Rights, (ADC) and ARTICLE 19. It was researched by Rebecca Borne from Yale Law School during her internship at ADC in 2005. ADC staff attorney Micaela Finoli provided ongoing assistance throughout the document. Lauren Ann Hanley has done some important research in relation to some of the FOI examples used here. The text was written by Mariela Belski, the ADC director of the Access to Information programme. Proof reading and editing was done by Sara Buchanan, a freelance consultant, and Francesca Fanucci, ARTICLE 19's Latin America Programme Coordinator.

ENDORSEMENTS

ARTICLE 19 and ADC are grateful to the UK Foreign & Commonwealth Office (FCO) - Global Opportunities Fund (GOF) for its financial support for the research and publication of this project. The views expressed in this publication do not necessarily reflect those of the FCO.

July 2007

ARTICLE 19
Latin America Programme
6-8 Amwell Street
London EC1R 1UQ
United Kingdom

ADC - Asociación por los Derechos Civiles
Av. Córdoba 795, Piso 8
(C1054AAG) Buenos Aires
Argentina

TABLE OF CONTENTS

1. Introduction	5
2. What is the right to access public information?.....	5
3. Why is the right to access public information relevant to our everyday lives?.....	9
4. What are common exceptions to the right to access public information?.....	10
5. Is the right to access public information protected internationally?.....	11
6. What are economic, social and cultural rights?.....	13
7. What must States do to protect the right to access information in practice?....	15
8. How can the right to access public information be exercised to promote and protect economic, social and cultural rights?.....	17
8.1. Awareness.....	18
8.2. Monitoring.....	19
8.3. Litigation.....	20
9. What strategies can be employed by NGOs to realize economic, social and cultural rights?.....	22
9.1. Litigation Strategies.....	24
9.2. Non-Litigation Strategies.....	25
10. CASE STUDIES	26
<i>India (Rights at Work)</i>	26
<i>Thailand (Right to Education)</i>	27
<i>Chile (Right to a Healthy Environment)</i>	27
<i>United States (Right to Welfare Benefits)</i>	28
<i>Romania</i>	28
<i>Armenia</i>	29
<i>South Africa</i>	30
<i>South Africa (The Right to Medicine)</i>	31
<i>Ecuador (Right to Water and Environmental Health)</i>	31
<i>Nigeria (Right to Health and Right to a Clean Environment)</i>	33
<i>India (Right to Food)</i>	33
<i>Uganda (The Right to Education and the Right to Environment)</i>	34
<i>Malaysia (Right to Environment)</i>	35
<i>Argentina (Right to Education)</i>	35
<i>Argentina (Right to Adequate Food)</i>	36

1. INTRODUCTION

Since April 2005 the Association for Civil Rights, jointly with ARTICLE 19, has been developing a two-year project that aims to promote the right of access to information. One of the goals of the project, called “Information for Transparency”, is to provide a set of tools to assist in the practical realization of this right. Towards this end, this article “Access to Information: An Instrumental Right” presents both concepts about the relationship between access to information and social rights, as well as strategies that can be used to realize social rights through the assertion of the right of access to information.

2. What is the right to access public information?

“Freedom of information is a fundamental human right and [...] the touchstone of all freedoms to which the United Nations is consecrated¹.” The right to access public information is the right of every person *to know*: to have access to the information he or she needs to make free choices and to live an autonomous life.

The right to access information held by the State is regulated in several International Human Rights Treaties establishing the right of every person to freedom of opinion and expression, including the right to seek, receive and impart information and ideas.² Its practical application underpins two distinctive principles of a democratic republican system of government: the publicity of acts and the transparency of public administration.³ In this context, information is a tool of democratic control over State institutions, intimately linked to the concept of participatory democracy and respect for fundamental rights. The Inter-American Court of Human Rights has recognized the right of access to information as a fundamental right which States are obliged to guarantee. The Court has also emphasized the importance of this right in enabling citizens to be informed and to exercise their public opinion⁴.

The right to information does not exist in isolation. On the one hand, the right to information can be understood as a member of a larger group of civil and political rights – a component part of the fundamental right to freedom of expression, which requires governments to refrain

¹ UN General Assembly, (1946) Resolution 59 (1), 65th Plenary Meeting, December 14.

² On a regional level, there exist several documents or declarations that establish standards to delineate the concrete application of this right. For example, The *Lima Principles* or the *Chapultelpec Declaration*.

³ Victor Abramovich y Christian Courtis, “*El Acceso a la Información como Derecho*”, en *Anuario de Derecho a la Comunicación*; Año 1 Vol.1 (2000); Editorial Siglo XXI, Buenos Aires, p. 227.

⁴ Corte IDH *La Colegiación Obligatoria de Periodistas* Opinión Consultiva OC-5/85 Serie A, No 5 , del 13 de noviembre de 1985 para. 70.

from interfering with the free flow of information and ideas.⁵ On the other hand, the right to information is also intricately related to and necessary for the protection of all other human rights. In recent years the right to information has received growing attention and treatment in international and regional declarations that have elaborated both its specific content and the *positive* – instead of merely the negative – obligations it imposes on States. The understanding of the right has developed to encompass a concrete and immediate obligation on the part of governments to provide access to information, as well as to refrain from interfering with communication of information necessary to a citizen's ability to make autonomous choices.

In practice, the right to access public information, as purely a negative right, is easily challenged because governments take affirmative actions every day that affect these rights: examples include preventing concentration of ownership in the media; establishing public broadcasting facilities; and supporting a system of intellectual property law that encourages expression by making it profitable.⁶

This enhanced understanding of the right to access public information is illustrated by the growth in government openness in recent years. More than 40 countries now have access to information laws⁷, 26 of which were passed since the fall of the Berlin Wall.⁸ Between 2000 and 2002, over 30 governments either introduced access to or freedom of information acts or actively considered introducing them⁹.

Supporting and encouraging this more robust view of access to information, NGOs have worked to define the scope of the right more concretely. ARTICLE 19, the human rights organisation with a specific mandate and focus on the defence and promotion of freedom of expression and freedom of information worldwide, has drafted the following principles that should underpin any legislation on Freedom of Information¹⁰:

⁵ This view is reflected in the jurisprudence of the European Court of Human Rights, which has ruled that the right to receive information “basically prohibits a government from restricting a person from receiving information that others may wish or may be willing to impart to him.” *Leander v. Sweden*, Judgment of 26 March 1987, Series A. no. 116, para. 74.

⁶ Roberts, Alasdair. “Structural Pluralism and the Right to Information” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, 2002, pp. 36-37.

⁷ Banisar David, (2002). *Freedom of Information and Access to Government Records Around the World 2* Privacy International: London/www.freedominfo.org.

⁸ Blanton Tom (2002) “The world's right to know” *Foreign Policy* July/August 50.

⁹ Calland, Richard. “The Right to Know is the Right to Live” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, 2002, p.xvi.

¹⁰ ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation*, June 1999, available at: www.article19.org/work/regions/latin-america/FOI/english/elements/index.html. These principles were endorsed, *inter alia*, by the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to

- Principle 1 – *Maximum disclosure*: Freedom of information legislation should be guided by the principle of maximum disclosure.
- Principle 2 – *Obligation to publish*: Public bodies should be under an obligation to publish key information
- Principle 3 – *Promotion of open government*: Public bodies must actively promote open government.
- Principle 4 – *Limited scope of exceptions*: Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests.
- Principle 5 – *Processes to facilitate access*: Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.
- Principle 6 – *Costs*: Individuals should not be deterred from making requests for information by excessive costs.
- Principle 7 – *Open meetings*: Meetings of public bodies should be open to the public.
- Principle 8 – *Disclosure takes precedence*: Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.
- Principle 9 – *Protection for whistleblowers*: Individuals who release information on wrongdoing –whistleblowers – must be protected.

More recently, while working on the formation of a comprehensive access to information law in Chile, the Open Society Justice Initiative also set forth ten principles which should underpin an access to information regime, presented verbatim below¹¹:

1. *Maximum Openness*. All information held by governments is in principle public, and may only be withheld if there exist legitimate reasons for not disclosing it. The information to which this principle refers includes that generated by public authorities and/or received by them, without being limited to the administrative decisions.

the 2000 session of the United Nations Commission on Human Rights, and referred to by the Commission in its 2000 Resolution on Freedom of Expression.

¹¹ Open Society Justice Initiative, *Principles on the Right of Access to Information in Chile*, December 2004, available at http://www.justiceinitiative.org/db/resource2?res_id=102436, accessed July 21, 2005.

2. *All Public Bodies should be subject to the Access to Information Law.* The right of public access to information should extend to all institutions receiving funding coming from the public funds (taxes) or performing public functions.
3. *Access to Information is a Right for Everyone.* To exercise the right of access to information, it is neither necessary to justify any legal interest, nor to explain the reasons for requesting the information from government. All requests should be treated without discrimination as to the nature or profession of the requestor.
4. *Free Access to Information.* Costs for exercise of the right to information should be kept to an absolute minimum for the requestor, who may be charged only for the reproduction of documents that contain the requested information.
5. *Simple and Speedy Processes.* The process for requesting information should be the least complicated and most efficient possible, and the provision of information should be quick and complete. Delivery of requested information should be either immediately or within the timeframes established by law, which, in any case, should not exceed ten (10) working days.
6. *Exemptions Provisions Should Be Clearly Defined.* The grounds for withholding information should be clearly and specifically established by law with the goal of protecting legitimate interests. The law should establish a harm test and a public interest test which should be applied to all information before its disclosure is denied. The principle of partial access should be applied to all documents containing information that can legitimately be exempted from release.
7. *Independent Regulatory Body.* Decisions to withhold information should be subject to review by an independent body empowered to order compliance with the law and release of information.
8. *Duty to Assist.* Public officials charged with information provision should assist requestors in the formulation of their questions in order to guarantee the exercise and enjoyment of the right of access to information. When the information being sought is held by a different body, these officials should refer requestors to the correct institution.
9. *Proactive Publication of Information.* Every public body should make readily available all information related to its functions and responsibilities without the need for a formal information request. This information should be in clear, plain language, and should be up to date.

10. *Harmonization of Right of Access to Information with other Law.* All laws that limit the right of access to information should be amended or revoked in order to guarantee the principle of maximum openness.

3. Why is the right to access public information relevant to our everyday lives?

Amartya Sen has said that there has never been a famine in a country with a free press and open government.¹² The relationship between information and power is profound. Without information, the people have no power to make choices about their government – no ability to meaningfully participate in the decision-making process, to hold their governments accountable, to thwart corruption, to reduce poverty, or, ultimately, to live in a genuine democracy.

Democracy and Participation:

At the core of a democracy is the ability of the people to *participate*, i.e. to influence the government through openly expressed public opinion. Without access to information, there can be no discussion of a range of available options, no voting in accordance with one's best interests and beliefs, no meaningful public policy discussions, and no informed political debate.¹³

Accountability:

Without access to information, citizens are unable to hold their government accountable. Access to information such as annual reports or policy and legislative reviews allows for the monitoring of government performance. As the government demonstrates its accountability, trust in the government grows, creating a healthy relationship between the government and its citizens.

Anti-Corruption and Economic Effects:

Without access to information, the government lacks transparency, and the people live in a secret society that breeds rumour, conspiracy and corruption. Corruption, in turn, damages economic activity by discouraging both foreign and local investment and deterring foreign aid.¹⁴ Corruption “bites into the moral fiber of society,” and it “takes its greatest toll on the

¹² Sen, Amartya. *Development as Freedom*, New York Knopf 1999, p. 178.

¹³ Calland, Richard and Allison Tilley, ed., *The right to Know, The Right to Live: Access to Information and Socio-Economic Justice*. Open Democracy Advice Centre, 2002.p.xi

¹⁴ *Ibidem*.

poor.”¹⁵ Corruption, according to the World Bank, clearly hinders the ability of the poor to help themselves out of poverty.¹⁶

Development:

The right to access information is a powerful tool that allows the most disadvantaged groups of society to become involved in the development of initiatives that affect them. Lack of information prevents the participation of these groups in their own development by limiting their rights and freedoms and placing them in a position of vulnerability, thereby preventing them from exercising any control over those public policies. Without access to information, a country cannot sufficiently develop. For example, the health of a society depends on information related to clean water and sanitation, vaccines, statistics etc.

4. What are common exceptions to the right to access public information?

International and national laws defining the right to access public information generally provide for some exceptions to the right. They are, most commonly:

- for the respect of the rights or reputations of others;
- for the protection of national security or of public order;
- for the protection of public health or morals.

All of the exceptions above are provided for in the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, the European Convention provides exceptions for preventing the disclosure of information received in confidence and for maintaining the authority and impartiality of the judiciary.¹⁷ The United States Freedom of Information Act also provides exceptions for internal agency personnel rules and practices, invasion of personal privacy, compromising commercial secrets, executive privilege, information explicitly protected by other statutes, information that would compromise criminal investigations and prosecutions, information on the condition of financial institutions, and geological and geophysical information.¹⁸

¹⁵ Camerer, Lala. “Information and the Quest for Global Accountability” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, 2002. pp. 139-140.

¹⁶ *Ibidem*, p.31.

¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 10) Available in: www.hri.org.

¹⁸ United States Freedom of Information Act.

International law prescribes that these exceptions should not be balanced against the right, but should be applied as narrow exceptions to the general rule in favour of the right.¹⁹

In addition to these common exceptions, there is another challenge related to the realization of the right to access public information – a request for information may require an administration to produce information that it does not actually hold.²⁰ In such cases, it is necessary to distinguish between processed data and gross data. Sometimes, a government may only have gross data on a specific issue, and it will be necessary to request that it is processed, as required for example by the Inter-American Convention on Violence Against Women.²¹ Notwithstanding, in many instances the gross data itself is especially important because it is always possible that a government will process gross data in ways that manipulate its results to reflect its policies or actions more favourably.²² For example, gross data is useful in domestic violence cases, because it provides information such as the date and place of occurrence, surrounding circumstances, names and ranks of agents, and judicial intervention. Access to this gross data allows analysis of patterns in occurrence and response by the State.²³

5. Is the right to access public information protected internationally?

As discussed above, the right to access public information is established in three major international documents relevant to Latin America: the American Convention on Human Rights (American Convention) (Article 13)²⁴, the International Covenant on Civil and Political Rights (ICCPR) (Article 19)²⁵ and the American Declaration on the Rights and Duties of Man (American Declaration) (Article 4)²⁶. The first two are treaties, binding on any government who has ratified them, and the third is widely accepted customary law. The treaties have supervisory bodies that require periodic reporting by all states parties.

- American Convention, Article 13 – Freedom of Thought and Expression:

¹⁹ As stated by the European Court, the decision-maker “is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.” *The Sunday Times v. The United Kingdom*, Judgment of 26 Apr. 1979, Series A no. 30, para. 64.

²⁰ Centro de Estudios Legales y Sociales. *La información como herramienta para la protección de los derechos humanos*, 2004. p. 43.

²¹ *Ibidem*.

²² *Ibidem*.

²³ *Ibidem*.

²⁴ Article 13 of the American Convention on Human Rights.

²⁵ Article 19 of the International Covenant on Civil and Political Rights UNGA Res. 2.200 A (XXI), 1966.

²⁶ Article 4 of the American Declaration on the Rights and Duties of Man.

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form or art, or through any other medium of one's choice.
 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - (a) respect for the rights and reputations of others; or
 - (b) the protection of national security, public order, or public health or morals.
 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions . . .
- ICCPR, Article 19:
 1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideals of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any another media of his choice.
 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
 - American Declaration, Article 4:
Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

International law can be used to protect access to information in a number of ways. First, individual citizens of states parties can seek remedies through their domestic courts. In some countries, domestic courts can enforce international law directly; in others, international law has been incorporated into national law and is thus enforced indirectly through domestic law. Second, mass popular support from citizens and NGOs can pressure governments to change

laws, policies and practices to comply with international law. Third, individuals can seek remedies directly from the relevant international bodies.²⁷

In addition to the above, international law provides for the right to access public information as it relates to the realization of social, economic and cultural rights. The American Convention (Article 42)²⁸, the San Salvador Protocol (Article 19)²⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 16)³⁰ provide for the right to access periodic governmental information on progress related to economic, social and cultural rights in order to facilitate public examination of policies and stimulate participation among diverse sectors of society. The Inter-American Commission for Human Rights has confirmed that “The dissemination of information about government activities should be as transparent as possible and available to all sections of society.”³¹ In addition, Limburg Principal 76 mentions that the mandatory reporting for the ICESCR should be publicized for public debate and participation every five years.³²

6. WHAT ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

Economic, social and cultural rights (ESCR) are considered positive rights because they generally require some positive action on the part of the government. The primary international treaty governing ESCR is the International Covenant on Economic Social and Cultural Rights. The following are recognized as ESCR: the right to work, the right to social security, the right to adequate food, the right to adequate housing, the right to health, the right to a healthy environment, and the right to education.

The enforcement of ESCR and consequently their justiciability have been questioned not only internationally but also domestically. Despite the interrelationship between ESCR and civil and political rights (hereafter CPR) there is still scepticism regarding the status of the former as real rights. Some scholars and even governments have argued that ESCR are not human rights, and others that they are human rights but are non-justiciable. The differences between

²⁷ Coliver, Sandra. *The Right to Know: Human rights and access to reproductive health information*. Edited for ARTICLE 19, International Centre Against Censorship, 1995, p. 46.

²⁸ Article 42 of the American Convention of Human Rights.

²⁹ San Salvador Protocol. O.A.S. Treaty Series No. 69 (1988), entered into force November 16, 1999.

³⁰ International Covenant on Economic, Social and Cultural Rights adopted 16 Dec. 1966, entered into force 3 Jan. 1976, G.A. Res.2.200 A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 (1967).

³¹ CIDH, *Informe No. 20/99, Cas 11.317, Rodolfo Robles Espinoza e Hijos* (Perú), en CIDH INFORME ANUAL 1998.

³² The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights, UN ESCOR, Commission on Human Rights, Forty-third Session., Agenda Item 8 UN Doc. E/CN. 4/1987/17, Annex (1987).

CPR and ESCR have been used to support such arguments since CPR grant negative rights and thus, impose negative obligations, while ESCR guarantee positive rights and impose positive obligations on states parties. The imposition of positive obligations upon States implies the adoption by governments of programmes to address social policy questions: unlike negative obligations, which are cost-free, positive ones require government expenditure.

It has been also said that ESCR involve policy choices and should not, therefore, be taken care of by judges, who lack expertise and political accountability to deal with them. The idea is that the judiciary should not make decisions that involve positive State obligations, which, at the end, will have important resource implications. However, counter-arguments to this idea point to the fact that judges are actually expected to take into account public policies when deciding a case and that involvement in matters which have important resource implications is already part of their work. Further, when courts adjudicate on CPR they become involved in political issues as well, and if this step beyond purely legal matters is not considered problematic, why should their role in upholding ESCR be questioned?

In this context the enforceability of ESCR has been questioned, suggesting that judges are not well situated to deal with both the determination of social policies and the allocation of resources.³³ For a long time this argument has undermined the validity of ESCR, although in more recent times, sound arguments have demonstrated that ESCR are enforceable and therefore, justiciable.

The UN Committee on Economic, Social and Cultural Rights has affirmed that many elements of ESCR are susceptible to judicial enforcement. Governments' obligations related to ESCR are generally evaluated in light of Article 2.1 of the ICESCR. The article requires that every state party "undertakes to take steps . . . to the maximum of [its] available resources, with a view to achieving progressively the full realization of the right recognized in the ... Covenant."³⁴ Therefore, unlike civil and political rights, which the government generally has an immediate obligation to ensure, ESCR can be achieved more progressively. Increasingly, this obligation is being interpreted to require governments to take some immediate, concrete steps toward implementation, leading over time to a certain degree of progress.³⁵

³³ C. Fabre, *Social Rights Under The Constitution: Government and Decent Life* (Oxford-New York-Oxford University Press, 2000) p. 150.

³⁴ *Supra* N° 29 at article .2.1.

³⁵ P Alston and G Quinn, "The Nature and Scope of States Parties' Obligations in the International Covenant on Economic Social and Cultural Rights", 9 *Human Rights Quarterly* (1987), 164-87; R. Robertson, "Measuring

In *Promoting and Defending Economic, Social and Cultural Rights – A Handbook*, Alan McChesney lays out at least three questions to ask in determining governmental compliance:³⁶

1. “Has the State taken the necessary steps right away to achieve its minimal essential obligations? (For example, the State must ensure that no one dies from hunger – a minimum requirement of the right to food – and it must halt any discrimination in the way the benefits of each Covenant right are distributed.)
2. Does the State lack the ability to take immediate or progressive action because of circumstances beyond its control?
3. Or is the government simply unwilling to try to fulfill its obligations, despite having resources available that would enable it to act positively?”

7. What must States do to protect the right to access information in practice?

As discussed above, the right to access information is not only important in order to be able to participate effectively in an open, public debate about the issues and interests affecting people’s life, but it is also useful to exercise other rights. Moreover, among the varied constitutional rights, freedom of information imposes the most clear-cut obligations on governments.

Article 19 of the ICCPR requires governments to “respect and ensure respect” for the right to access information. As a negative obligation, the government must *respect* the right by not violating it directly through legislation, policies, judicial decisions or actions of its officials or its agents.³⁷ As a positive obligation, the government must take direct, affirmative action, possibly to *protect* the right by preventing others from violating it or to *fulfill* the right via legislation, policies or judicial decisions.³⁸ Therefore, the government must take steps to *prevent* private groups or individuals from interfering with lawful communication of information. Increasingly, governments must also *fulfill* the right by *providing* information in circumstances of particular public interest. For example, in relation to information concerning public health:

State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ to Realizing Economic, Social and Cultural Rights”, 16 *Human Rights Quarterly* (1994), 693-714.

³⁶ Allan Mc Chesney, *Promoting and Defending Economic, Social and Cultural Rights a Handbook*, AAAS, p. 28 (2000).

³⁷ A Eide, “Realization of Social and Economic Rights and the Minimum Threshold Approach”, *Human Rights Law Journal* (1989), pp. 35.

³⁸ *Supra* 35 at 37.

- (1) The government has information that is relevant to the health or private life of a particular individual. This obligation requires immediate implementation.
- (2) A category of people has need for the information to protect their health or their private lives and the government either has it or is in a position to collect it. This obligation allows some discretion regarding what steps to take, but the government must take some steps immediately, and the obligation to take further steps increases over time.³⁹

Increasingly, the obligation of governments to take positive steps to ensure that people are able to exercise their fundamental rights is being asserted. Governments are obliged to provide not only information that must be given upon request, but also information that must be made publicly available without the need for request, including information that would enable the protection and exercise of political rights. This is especially important where illiteracy is high and there is little awareness about rights.⁴⁰

According to Sandra Coliver, there are several government obligations that can be identified in relation to this right. These duties are arguably part of international customary law but also arise from treaty law, and therefore have greater force on States that have ratified the treaties.⁴¹

- Not to prohibit or otherwise interfere with communication of (health-related) information;
- Not to discriminate in providing information;
- To ensure an opportunity for expression of opposing views in public forums such as publicly supported schools and media;
- To ensure that programmes receiving public funds do not withhold information;
- To take steps to prevent private groups or individuals from interfering with the communication of information;
- To take concrete steps toward providing adequate and accessible information, education and counseling necessary for protection and promotion of social rights.⁴²

³⁹ Coliver, Sandra. *The Right to Know: Human rights and access to reproductive health information*. Edited for Article 19, International Centre Against Censorship, 1995, (p. 46) (2nd: GA Res. 59(I) of 14 De. 1946, “*Yearbook of the United Nations 1946-1947* (New York: 1948), 33.

⁴⁰ Jagwanth, Saras. “The Right to Information as a Leverage Right” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, 2002, p.7.

⁴¹ Coliver, Sandra. *The Right to Know: Human rights and access to reproductive health information*. Edited for ARTICLE 19, International Centre Against Censorship, 1995.

(p. 46) (2nd: GA Res. 59(I) of 14 De. 1946, “*Yearbook of the United Nations 1946-1947* (New York: 1948), 328.

⁴² *Ibidem*, at 328.

8. How can the right to access public information be exercised to promote and protect economic, social and cultural rights?

The right to access information is not only a right in itself, but a tool for exercising other rights. That is to say, if for example, a citizen wishes to know if the State is developing policies to counter discrimination in access to education, it is necessary to have access to certain information related to those policies. In order to know if the government is developing a campaign that aims to prevent certain illnesses, it is necessary to know how public health policies are being implemented. In other words, we need information to monitor the delivery of political commitments to uphold our fundamental rights.⁴³

The interaction of the right to information and social rights can be highly instructive of a government's attitude towards the realization of human rights in general. States should allow individuals access to information that may have an impact on their life, which will allow them to exercise other rights. Information is important for learning about the existence and protection of social rights. Individuals should know about public policies and measures that the government has taken in relation to these rights, in order to control the development of such policies. They should also be aware of the content of said policies, so as to analyse how measures are considered in the budget and how budgetary commitments are delivered. On the contrary, the failure to provide information or access to certain information constitutes a violation of obligations that the State agreed to fulfill.

The UN Committee of Economic, Social and Cultural Rights (CESCR), has stated for example in its General Comment No. 14 paragraph 11 and in relation to the right to health, that information should be accessible. This includes the right to seek, receive and impart information and ideas concerning health issues.⁴⁴ Moreover, States have the obligation to submit reports on measures that they have adopted and the progress made in achieving obligations assumed in the ICESCR. In its General Comment No. 3, the Committee pointed out that States should take a minimum core of obligations to ensure the satisfaction of at least the minimum essential levels of each of the ESCR. If the State fails to meet that minimum core based on a lack of resources, it has to demonstrate that efforts have been made to use all the resources that were at its disposal.⁴⁵ General Comment No 1 paragraph 3 establishes that States should ‘...monitor the actual situation with respect to each of the rights on a regular

⁴³ Saba Roberto, “Derechos Sociales, Políticas Públicas y Acceso a la Información” , Serie de Seminarios Salud y Política Publica, Centro de Estudios de Estado y Sociedad (CEDES), Seminario VII; 2004.

⁴⁴ General Comment No. 14 UN E/C.12/2000/4. para. 3 and 11.

⁴⁵ General Comment No. 3 UN Doc E/1991/23 para 10.

basis and are thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory.... The fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged'.⁴⁶ Paragraph 4 adds that one of the objectives of the reporting process '...is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken'.⁴⁷ This means that the State should have available information in relation to ESCR even, when its realization is to be achieved progressively.

In *The Right to Know, The Right to Live*, Saras Jagwanth provides a meaningful summary of how the right to access public information is related to other rights:⁴⁸

- It is a component part of other rights (e.g. free expression, administrative justice, and the right to fair trial);
- It gives effect to and protects rights (e.g. clean environment);
- It assists in the enforcement of rights (e.g. right to equality); and
- It prevents further violations by opening up activity to constant scrutiny.

In addition, there is a positive duty under international law to provide information for both facilitating the exercise of other rights and effectively monitoring their achievement.⁴⁹

8.1. Awareness

The right to access public information about one's economic, social and cultural rights is not only *related* to these rights – it is a *precondition* for their realization. Without information about the scope and content of their rights to health, housing or work, citizens are unable to determine whether their rights are being respected. International law recognizes this connection. For example, the World Health Organization Constitution provides for policies of promotion, information and education for health as part of States' obligations.⁵⁰ Another example is the Brundtland Report⁵¹, which, in relation to the right to a healthy environment,

⁴⁶ General Comment No. 1 UN E/1989/22, para. 2.

⁴⁷ General Comment No. 1 UN E/1989/22, para. 4.

⁴⁸ Jagwanth, Saras. "The Right to Information as a Leverage Right" in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, p 13.

⁴⁹ *Ibidem*.

⁵⁰ Constitution of the World Health Organization, *Basic Documents*, Official Document No. 240 (Washington, 1991). The Constitution of WHO was adopted at the International Health Conference held in 1946 in New York, where it was signed by the representatives of sixty-one states, p.283.

⁵¹ In 1983, the UN General Assembly created the World Commission on Environment and Development (WCED), chaired by Norwegian Prime Minister Gro Harlem Brundtland. In December 1987, the WCED published the Brundtland Report p.288.

recommends that governments recognize the right of individuals to know and have access to information about their environment and natural resources.⁵²

Some rights, such as the right to education, require increased popularization through, for example, community-based education and awareness activities, especially among women and school-aged children.

Here follow three examples that illustrate the link between access to information and other rights – the right to a fair trial, to a healthy environment, and the right to the security of the person.

- Right to a fair trial. In *Shabalala v. Attorney-General of the Transvaal*,⁵³ the South African Constitutional Court held that fair trial rights must be read together with the right to information, and “in the broad context of a legal culture of accountability and transparency.” It found that a right to a fair trial includes the right to access public dockets and other information held by the State.
- Right to a healthy environment, privacy and family life. In *Guerra and Others v. Italy*,⁵⁴ the European Court of Human Rights held that not providing information that would have allowed residents to assess the risks of living near a chemical plant was a violation of Article 8 of the ECHR. Article 8 protects the right to privacy and family life. In *McGinley and Egan v. United Kingdom* the same Court held that Article 8’s right to family life required the government to have an effective and accessible procedure for providing information regarding government involvement in nuclear testing.
- Right to security of the person. In Canada, a court found that the police force was under an obligation to provide information regarding threats to public safety under the right to security of the person.⁵⁵

8.2. Monitoring

The right to access public information is also vital to monitoring the achievement of all ESCR. The reporting requirement every five years under the ICESCR is most effective when States parties provide meaningful information about the achievements and measures taken. International guidelines indicate that reporting should include not only data but also

⁵² Cited in Lloyd Timberlake, “Freedom of Information on the Environment,” *Index on Censorship* (London: Writers and Scholars International) 18, nos. 6 and 7 (1983): 7.

⁵³ 2000 (12) BCLR 1696 (CC).

⁵⁴ 26 Eur H.R. Rep 357.

⁵⁵ *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (1998), 49 O.R. (3d) 487 (G.D.).

meaningful analysis to evaluate trends and demonstrate whether the State is fulfilling its obligation under the ICESCR.⁵⁶

Information is vital at the more local level as well. For example, to evaluate the extent to which the right to education is realized, it is necessary to have access to literacy rates, enrollment rates, commuting times, dropout rates, and budgets, not only in the aggregate but disaggregated by gender, social class, geographic centers (urban, rural), religion and ethnicity.⁵⁷ These factors should be measured over time using trend analysis of key indicators and benchmarks.

8.3. Litigation

Information is often critical to the ability to effectively litigate ESCR. For example, it is difficult to prove the existence of discrimination in equality claims when discrimination is denied or unconscious, without concrete evidence.

In particular, in cases involving positive obligations, relevant statistics about the effect of a policy or injuries suffered have been the deciding factors in a case.⁵⁸ Information is especially crucial in environmental and health cases, when factors such as air and water quality, emissions and their effects on individuals can be quantitatively measured.

The Centre on Housing Rights and Evictions, an NGO based in The Netherlands, published a 2003 report entitled *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, featuring 21 case studies of ESC rights litigation. Throughout the case studies, the interdependent relationship between access to information and the realization of ESC rights is revealed.

- In India, in a 2001 case advocating for the right-to-food, a court order stipulated that the government must publicize to families living below the poverty line, their right to grain, so as to ensure that all eligible families were covered by the right.⁵⁹
- In the Philippines, in the struggle against the privatization of electricity, Cookie Diokno of the Free Legal Assistance Group noted that what the human rights groups lack is evidence that the companies, when raising their prices, are acting as a cartel. She also noted the general need for economists, accountants, and other technical analysts to verify the information being used, and cited an example of a water

⁵⁶ General Comment 1 *Reporting by States Parties* UN Doc E/1989/22.

⁵⁷ Circle of Rights: Economic, Social & Cultural Rights Activism: A Training Resource. International Human Rights Internship Program and Asian Forum for Human Rights and Development, p. 309 (2000).

⁵⁸ The Centre on Housing Rights and Development. *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, (2003), p.25.

⁵⁹ *Ibidem*, p. 36.

company who presented an inaccurate discount rate for loan repayment, stating it was 18% when it was actually 5%.⁶⁰

- In Argentina, Victor Abramovich, former director of the Argentina-based Center for Legal and Social Studies (CELS), noted that in its case against the government for the right to a vaccine for haemorrhagic fever, the public information from the Ministry of Health regarding the vaccine, its effectiveness, and the political policies was the most relevant data to solve the case. The information served as the State's recognition of the fact that a vaccine was the only way to effectively address the epidemic, and rather than have a policy debate in court, CELS needed instead to transform an already-made political decision into a legal obligation.⁶¹
- In Canada, in advocating for substantive equality rights for the poor, Bruce Porter, Director of the Social Rights Advocacy Centre, stressed that concreteness is critical. Therefore, if welfare benefits are being cut, activists should bring specific evidence demonstrating families' financial inflow and outflow and how many homes will be lost as a result.⁶²
- In Ecuador, one of three approaches used in cases combating water pollution was the right to information and to participate in the oversight and decisions related to the oil industry.⁶³ The NGOs also utilized ILO Convention 169⁶⁴, which calls for transparency and participation before the undertaking of major projects that will affect indigenous groups.⁶⁵
- In Nigeria, in a case against the exploitation of oil reserves by Shell Oil, part of the court decision stated that the government must provide information on environmental and health risks to the people in addition to social impact assessments, in the future.⁶⁶
- In Portugal, in a case against child labour before the European Committee on Social Rights, the principal argument was that Portugal was not doing enough to enforce its anti-child labour legislation, including that the government's statistics were flawed and understated the problem.⁶⁷

⁶⁰ *Supra* N° 57 at 53.

⁶¹ *Supra* N° 57 at 63.

⁶² *Supra* N° 57 at 74.

⁶³ *Supra* N° 57 at 83.

⁶⁴ Convention No.169 of the International Labour Organisation, the *Indigenous and Tribal People's Convention*, 27 June 1989, in force 5 September 1991, (1989), 28 ILM 1382.

⁶⁵ *Supra* N° 57 at 82.

⁶⁶ *Supra* N° 57 at 120.

⁶⁷ *Supra* N° 57 at 140.

- In eviction cases against the Dominican Republic brought before the UN Committee on ESCR in 1990, the level of detail in the information provided to the Committee proved extremely effective. The Committee's Concluding Observations (in its first ever ruling against a State), included the individual names of people affected by the evictions based on an NGO's fact-finding mission in the slums which provided testimonial and photographic evidence of the State's violations.⁶⁸

9. What strategies can be employed by NGOs to realize economic, social and cultural rights?

Some countries, such as Argentina or South Africa, have incorporated international human rights treaties within their constitutions as well as some judicial tools such as the writ of individual and collective *Amparo*, which allow not only individuals but also groups to invoke the constitutional provision to obtain relief when their social rights are violated. Therefore, the non-compliance of the State with their international obligations will indicate the violation not only of the international commitment assumed but also of the constitution.

Taking Van Hoof's approach,⁶⁹ if it is possible to identify which international obligations a state has assumed domestically, then we will be able to see how the State behaves in relation to those obligations, and whether its actions or inactions are upholding or violating ESCR. Thereafter, we can make use of existing legal mechanisms to demand their enforcement and justiciability. As discussed earlier in relation to ESCR, the UN has developed a three-tier system of obligations in order to help identify the duties imposed on a State.⁷⁰ The trilogy recognizes the obligation to respect; protect; and fulfill. The obligation to respect is the negative obligation that requires States to refrain from doing something while the obligations to protect and fulfill are the positive obligations that require States to take measures to protect the rights of individuals within the State.

- ***Obligation to respect:***

The obligation to respect is the so-called negative obligation since it is related to what the State should not do. Eide has defined it as the obligation '...that requires the State ... to abstain from doing anything that violates the integrity of the individual or infringes on his

⁶⁸ *Supra* N° 57 at 160.

⁶⁹ G.J.H van Hoof, 'The legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some traditional Views', in P. Alston and K. Tomasesvski (ed.), *The right to Food* (Netherlands, Martins Nijhoff Publishers, 1982), p. 97.

⁷⁰ See C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' in (1992) (141-No1) *University of Pennsylvania Law Review*, pp. 3-147.

or her freedom...'.⁷¹ 'Although this duty of restraint upon States closely resembles the obligations generally associated with civil and political rights, it is also intimately a part of [ESCR] as well'.⁷² 'Respect' implies also the non-regression in the enjoyment of ESCR that individuals have been currently enjoying. In this sense, the State should not adopt any measure that may worsen the enjoyment of [ESCR].⁷³ This obligation also implies that States should refrain from interfering with social rights by any practice, policy or legal measure that could violate ESCR.

- ***Obligation to protect:***

The obligation to protect is the positive obligation of the State to prevent human rights' violations by third parties. The State has a positive duty, which is to prevent certain rights from being violated by private actors. According to Van Hoof the obligation to protect requires the State to take measures in order to prevent individuals or groups from violating human rights. In this context '...the State must respect human rights limitations and constraints within its scope of action, but it is also obliged to be active in its role as protector and provider'.⁷⁴ The State should adopt legislative measures and other measures to fulfill this obligation.

- ***Obligation to fulfil:***

The obligation to fulfil requires the most proactive and programmatic action on the part of the State. According to Eide this obligation requires the State to take the appropriate measures in order to provide '...for each person within its jurisdiction opportunities to obtain satisfaction of ... needs, [such as food, health, housing, education etc], which cannot be secured by personal efforts'.⁷⁵ Thus, the failure of the State to take those positive interventions could result in ESCR violations, for example if the State omits to provide measures that tend to reduce infant mortality, or to provide free compulsory primary education, or to prevent children from exploitation or if it omits to take the appropriate measures to guarantee access to medical health services.

⁷¹ A. Eide, 'The New International Economic Order and the Promotion of Human Rights' , UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987.

⁷² V.Dankwa et al., 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' in (1998) (20) Human Rights Quarterly, pp. 705-730.

⁷³ The Committee stated in its General Comment No. 3 paragraph 9 that '...any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the right provided for the Covenant and in the context of the full use of the maximum available resources'. UN Doc E/1991/23 para.9.

⁷⁴ *Supra* N° 68 at 106.

⁷⁵ A. Eide 'Realization of Social and Economic Rights The Minimum Threshold Approach': in (1989) (43) International Commission of Jurist. p 42.

Under the obligations imposed by article 2 (1) of the ICESCR, state parties are required to take steps, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant.⁷⁶ ‘The progressive realization imposes the obligation on States to move as expeditiously and effectively as possible towards the goal of realizing fully [ESCR], and as an obligation, exists independently of any increase in available resources’.⁷⁷ However, the condition to achieve progressively the positive obligations assumed by the State, according to Article 2(1) of the ICESCR, does not impede individuals from using judicial strategies in order to effectively evaluate if the State has taken the appropriate measures, since the Committee of Economic, Social and Cultural Rights, has recognized by its General Comment No.3 that some obligations are of immediate effect.⁷⁸

On the one hand, States should guarantee that relevant rights will be exercised without discrimination (article 2.2 ICESCR) and on the other, States should take steps which are not inherently qualified or limited by other considerations (article 2.1 of the ICESCR). Thus, ‘...while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time’.⁷⁹ As the General Comment states, such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.⁸⁰ Additionally, ‘...state parties have an obligation to begin immediately to take steps towards the full realization of the rights contained in the Covenant, [in this respect they] shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures...in order to fulfill their obligations under the Covenant...’.⁸¹

9.1. Litigation Strategies

In this context, the failure of the government to take measures or remove obstacles, or to implement a right required by the Covenant without delay, or to deliberately retard the progressive realization of a right, can be legally challenged in order to assess the level of fulfilment of the obligations assumed by the State. In such cases, information is relevant not only to measure the level of fulfilment of ESCR, but to challenge the extent to which the State has taken the appropriate measures towards the progressive achievement of ESCR. If

⁷⁶ International Covenant on Economic, Social and Cultural Rights adopted 16 Dec. 1966, entered into force 3 Jan. 1976, G.A. Res.2.200 A (XXI), UN Doc. A/6316 (1966), 993 UNTS 3, reprinted in 6 ILM 360 (1967).

⁷⁷ S.Leckie, ‘*The justiciability of Housing Rights*’, in SIM Special 18 p. 35-76.

⁷⁸ UN Doc E/1991/23 General Comment No. 3.

⁷⁹ *Ibidem*, para. 2.

⁸⁰ *Ibidem*.

⁸¹ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights in UN Doc E/CN.4/1987/17 para, 16 -17.

individuals can identify clearly that the State has failed in taking the appropriate measures or in fulfilling its ESCR obligations and in so doing violated certain ESCR, the court can instruct the government in relation to necessary measures to fulfill its legal obligations.

Whether cases are won or not, the public can benefit from the very nature of legal proceedings in that they allow for scrutiny of public policies and practices.

Litigation can be intended to achieve limited concrete goals or can be used to obtain practical advantages, raising public consciousness of the merits of a case and building up political pressure in support of it. Moreover, litigation has an added value since it can attempt to reassert constitutional priorities and to maintain and influence policy formulation when other channels of communication are being closed.

Social rights litigation tends to concentrate on large scale violations of rights, since there is an inherent group component to the enjoyment of these rights. The judiciary is used to denounce social concerns and to highlight violations created by the political and social systems, with the idea of creating change in the political attitude and pressing for a correction of social injustices.⁸² On the other hand, it tries to generate a high degree of participation, with unprecedented exposure of cases to public opinion.

9.2. Non-Litigation Strategies

Non-litigation strategies such as public awareness campaigns, social mobilization, advocacy, and submission of *amicus curiae* briefs are important complements to litigation. They serve to sensitize the judiciary to the claims of advocates by demonstrating that the litigants have public support. They also add to the legitimacy of judicial decisions and make it more likely that they will be enforced and maintained over time.⁸³ At the national level, NGOs should urge compliance with international obligations by mobilizing mass support to call for reform of laws, policies or practices to comply with international obligations and by petitioning courts and administrative agencies to enforce the obligations.⁸⁴ At the international level, NGOs should call on international bodies that monitor compliance to take the necessary steps to do so effectively.⁸⁵

⁸² D. Feldman 'Public Interest litigation and Constitutional Theory' in (1992) (55) *Modern Law Review*, p 72.

⁸³ *Supra* No. 57 at 25.

⁸⁴ Coliver, Sandra. *The Right to Know: Human rights and access to reproductive health information*. Edited for ARTICLE 19, International Centre Against Censorship, 1995, p. 348.

⁸⁵ *Ibidem*, 349.

CASE STUDIES

India (Rights at Work)

Mazdoor Kisan Shakti Sangathan (MKSS) is a grassroots organization based in Rajasthan, a poor State in western India. Poor farm and rural laborers were being denied the minimum wage and not receiving entitlements from poverty alleviation schemes. In order to be paid, laborers on the public payroll who build roads, canals, buildings, schools, etc., sign daily logs called muster rolls. People were aware that local officials had engaged in corruption, but it was impossible to prove it without access to the muster rolls. MKSS began to demand access to the muster rolls from local bodies and were met with strong resistance, including claims by the local authorities that the muster rolls were “secret documents.” However, MKSS countered this resistance with local rallies, hunger strikes, and sit-ins.

In 1994, MKSS began to organize public hearings (*Jun Sunwayi*), to which it invited villagers, government officials, and neutral moderators such as a journalist, lawyer or academic. Usually, however, government officials did not participate, and on occasion they tried to squash the hearings by threatening violence. The muster rolls were read aloud, and villagers stood up and pointed out discrepancies, such as the names of two people appearing the same day and the inclusion of the names of dead people and people who have left the village. In one instance, villagers pointed out that construction work recorded in official documents related to a canal that had never actually been built.

The public hearings gave the people a platform from which to be heard and helped to tip the balance of power in favor of the people, allowing them to hold their government accountable for its actions. In some instances, corrupt officials who had accepted bribes returned the money after being exposed in the hearings.

Until these public hearings, the right to information in the region was considered an elite urban preoccupation, perhaps useful in the “intellectual arena and not on the street corners.”⁸⁶ But the hearings caught the imagination of lawyers, journalists and social activists and allowed MKSS to play the role of an auditor, demonstrating that social action exposes corruption. Even though it has rarely led to criminal action against corruption, the campaign did lead to the government of Rajasthan enacting legislation on the right to information.

⁸⁶ “The Right to Know, The Right to Live: People’s Struggle in Rajasthan and the Right to Information,” July 1996, Mazdoor Kisan Shakti Sangathan, Rajasthan, India.

Thailand (Right to Education)⁸⁷

In 1998, a parent whose child was not admitted to a well-regarded state-funded primary school, Kasetsart Demonstration School, invoked the right to information to make public the secret admissions process. The admissions process for the school, whose student body was comprised largely of *dek sen*, or children from elite families, included an entrance exam. The Official Information Commission ruled that the entrance tests of the 120 admitted students were public information. Once disclosed, it was found that 38 students who had failed the test had been admitted through bribery – payments made to the school by their parents. The concerned parent then filed suit, and a governmental legal advisory body, finding in favour of the parent, held that the equality clause of Thailand’s Constitution had been violated. It also required all state-funded schools to abandon corrupt and discriminatory policies.

Chile (Right to a Healthy Environment)⁸⁸

In 1998, Terram Foundation, a Chilean environmental NGO, requested information from the Chilean Foreign Investment Committee about a major logging undertaking, the Condor River Project. The NGO sought information on the environmental track record of the company behind the project. Its claim was refused by the Supreme Court of Chile, and the NGO brought the case *In Claude Reyes and Others v. Chile* before the Inter-American Commission (IAC). In March 2005 the Inter-American Commission decided in favour of the Applicants, recognizing a general right of access to government information under Article 13 of the American Convention. On October 2006 the Court affirmed the Commission’s decision recognizing the right of access to information as an element of the right to freedom of expression. “The Court held that any restrictions on the right of access should comply with the requirements of Article 13.2 of the Convention, the presumption being that all state-held information should be public, subject to limited exceptions. States are required to adopt a legal framework that gives effect to the right of access, and to reform secrecy laws and practices. The Court also ordered Chile to train public officials on the rules and standards that govern public access to information”.⁸⁹

⁸⁷ “Global Trends on the Right to Information: A Survey of South Asia,” published by Article 19, the Centre for Policy Alternatives, Sri Lanka, the Commonwealth Human Rights Initiative (CHRI) in Delhi, and the Human Rights Commission of Pakistan).

⁸⁸ Inter-American Court Case: *Claude vs. Chile* available in <http://www.corteidh.or.cr> Accessed February 20, 2007.

⁸⁹ Open Society Justice Initiative, *Litigation Dockets*, January 2007 available in www.justiceinitiative.org Accessed February 20, 2007.

United States (Right to Welfare Benefits)⁹⁰

“In my home.” This is what Horace Gee, an 87-year-old resident of Wisconsin in the United States, said when asked where he wanted to spend the last years of his life. But he was poor and disabled, and he could not afford the daily care and medication supervision that living at home would have required. The government provided for this care through a welfare programme called Medical Assistance (MA), but only in an impersonal institution, not in his home. A “special” welfare programme under MA did provide for such care within the home, but it had a waiting list of thousands and Horace would have had to wait for years. Thus, he was to be placed in a nursing care facility because that was the only option for survival the government was offering him.

However, Horace filed suit, his attorneys arguing that MA is an entitlement program, and if he were eligible for MA, he should have also been immediately eligible for the “special” benefits. The state argued that they did not have the funding. Horace’s attorneys submitted requests under the federal Freedom of Information Act and state of Wisconsin open records law, for information held by both the federal government and the state agency. With this information, they showed fallacy in the state’s arguments. Horace won the case, received his home care benefits and realized his wish to live his last years at home.

Romania⁹¹

In July 2004, the Romanian Press reported that the government had issued a secret order requiring all executive agencies to obtain the Prime Minister’s prior approval for all advertising contracts. Subsequently, the Open Society Justice Initiative and the Center for Independent Journalism, who were researching the abuse of government advertising as a means of interference with media freedom in Romania, filed an information request to learn of the content of the order. The Prime Minister’s Office did not reply and thus, the challenging organisations filed a complaint in the Bucharest Municipal Court. In October 2004, the Court directed the government to provide the requested information. A new government was elected in 2005 and agreed to settle the case and provide all available information.

⁹⁰ Neuman, Laura. “Using Freedom of Information Laws to Enforce Welfare Benefits Rights in the United States” in *The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*, Calland, Richard and Allison Tilley, ed. Open Democracy Advice Centre, 2002. (p. 62).

⁹¹ Open Society Justice Initiative website available at <http://www.justiceinitiative.org>, accessed July 21, 2005.

Armenia

In October 2001, Gagik Kirakosyan, a resident of the Shengavit community of Yerevan city sought help from the “Freedom of Information Centre”, regarding the apartment building he inhabited. The slope of the sewage system for the building was causing the basement to fill with water. Consequently, the building faced risk of destruction. The inhabitants had applied for public officials to rectify the situation over the course of two years, but they had not received a concrete response. They had first applied to the head of the district municipality who asked the chief of the third district department of “Water and Sewage” to present a proposed solution to the issue. No action was taken. Next the inhabitants wrote a letter to the Yerevan City mayor, but this letter remained unanswered. Finally, the inhabitants applied to the Republic of Armenia Prime Minister. At the same time, the FOI Centre applied to the mayor to resolve the problem, stressing that by not responding to the inhabitants the municipality was violating the law, particularly Article 6 which listed procedural requirements for handling residents’ suggestions, appeals and complaints.

This story was broadcast on “Ayb-Fe” news on A1+ TV, thus giving broad publicity to the violation of the Shengavit community’s right to receive information, and causing the complaint to reach the appropriate body.⁹²

Two members of the Association of Investigative Journalists of Armenia were investigating non-metal ore deposit exploitation and thus addressed a letter to the Head of the State Customs Committee on October 9, 2001 requesting the following information: 1) Which organizations exploiting non-metal ore deposits exported their product; 2) What was the volume of production that had been exported by the specified organizations from 1997 until present; 3) How much export tax (in total) had been paid for the mentioned products from 1997 until present. The Deputy Head of the Committee refused the request, claiming the information was an official secret under the Customs Code. In November 2001, the journalists filed a lawsuit against the Head of the Committee, claiming government violations of numerous domestic and international law obligations.

The journalists’ claim was denied at the first two hearings, however, in December of 2001, the Court of Appeal ordered the Committee to answer two of the three questions. The Committee provided answers to all three.⁹³

⁹² Freedom of Information Center-Association of Investigative Journalists of Armenia website.

⁹³ *Association of Investigative Journalists v. State Customs Committee Under the Government of Armenia.*

South Africa

A South African National Defense Force (SANDF) officer requested access to records regarding his home loan from Nedbank Limited, one of South Africa's largest banks. The Bank refused and the SANDF Officer appealed to the Johannesburg High Court in 2003. This was a groundbreaking application in relation to the Promotion of Access to Information Act. Nedbank defended their refusal, claiming that allowing the officer access to his personal information would harm the bank's commercial or financial interests. The Open Democracy Advice Centre took up this case as they believed it was in the public interest for financial institutions to release information regarding the provision of home loans. Ultimately, such disclosure promotes fair lending practices and increases public confidence in the decision-making of financial institutions.

However, the application was later withdrawn from the High Court after Nedbank disclosed the relevant information to the SANDF officer. They conceded that the disclosure would not harm the bank.⁹⁴

In 2002, the Pretoria Court decided the first major case involving the interpretation of the Promotion of Access to Information Act. During 1998-2001, the South African government acquired the Strategic Defence Package at about R30,3 Billion. Allegations of impropriety and a large amount of public criticism surrounded the Arms Deal. The Auditor-General first performed a high level review, but public dissatisfaction continued and so a joint commission was appointed to investigate the propriety of the entire SDP. Parliament accepted the Commission's investigative report.

CCII Systems Ltd., a private company that supplies specialised software and computer systems for defence applications, brought an application under the Act for access to information obtained by the Commission. The company alleged that it had been unlawfully excluded as a supplier of defence sub-systems to the South African Navy. The applicant argued that it had not been selected as a result of political pressure or some impropriety and that a review of certain reports would reveal that this was the case. Judge Hartzenberg ordered the Auditor-General to provide the applicant with a variety of documents relating to the Arms Deal.

ODAC successfully intervened in the case. The Centre's research showed that prior to this judgment, many government officials did not know about the access to information legislation

⁹⁴ *Pretorius v. Nedbank* available at: <http://www.opendemocracy.org.za/cases.html> Accessed May 28 2007.

and had not begun to implement the legislation. Therefore, this was an important decision for South Africa.⁹⁵

South Africa (The Right to Medicine)⁹⁶

In South Africa, civil society groups have used health rights litigation to challenge government and corporate pricing policies for HIV/AIDS drugs. In *Minister of Health v. TAC (2002)*, the Treatment Action Campaign argued that the health ministries should be required to provide all HIV-positive pregnant women with drugs such as AZT or Nevirapine, in order to prevent transmission of HIV to the children during delivery. At the time, the State endorsed a policy not to provide Nevirapine at hospitals and clinics, except what was required for research, and the Ministry had ordered doctors not to prescribe it.

The government had alleged that it did not have sufficient resources to support the proposed policy. However, the litigation process provided the transparency required to disable this argument. The court found that because the government did not have a plan, there would never be resources: “*The plan creates the necessity to find the resources*”. Furthermore, while TAC introduced an array of evidence to demonstrate the safety, efficacy, cost-savings and human benefits of the drug, the government’s documents showed that they could not find a single expert to support them. Furthermore, nine provincial health officials put forth affidavits regarding available resources. A comparison of these documents revealed a strong likelihood of dishonesty since the documents were so similar that they appeared to be derived from a template. The affidavits included outlandish statements such as “outside the pilot sites, there is no capacity or ability to provide this intervention”.

The court ruled that the State must act reasonably to provide access to constitutional socio-economic rights on a progressive basis. They found that the current policy was not reasonable and directed the Government to act immediately, to provide nevirapine in hospitals and clinics. The broader impact of the decision was increased public awareness of the justiciability of socio-economic rights.

Ecuador (Right to Water and Environmental Health)⁹⁷

The indigenous people of Ecuador had been struggling with the problem of oil pollution for a decade when, in 1993, the Centre for Economic and Social Rights joined a team of lawyers

⁹⁵ *CCII Systems Ltd. v South Africa*, High Court of South Africa, Case #4636/2002.

⁹⁶ *Supra* No 58 at 105.

⁹⁷ *Supra* No 58 at 80.

and health officials to investigate damage caused by Texaco Oil Company in the Amazon. They found that the indigenous people lacked the scientific knowledge, rights-awareness and institutional leverage to defend themselves and their environment. In fact, the new Constitution gave the indigenous groups many rights, and the International Labour Convention insisted on transparency and participation before a major project affecting indigenous groups got under way. The Centre worked with local and international groups to educate the indigenous populations and Congress about constitutional rights and oil project impacts. They also worked with local media, encouraging them to raise awareness of the issues. Generally, the Centre in combination with other groups assisted political mobilization and the initiation of various legal actions.

In 1994, the Centre published a report that showed an increased risk of cancer from exposure to oil and a legal analysis demonstrating human rights violations by the Ecuadorian government. The report alleged that since the State oil company, PetroEcuador, was contaminating the water, the government was violating the people's right to life, right to health and right to environment. The government was doing the same by failing to regulate private corporations. Furthermore, the report alleged government violations of the rights to information and participation in decisions pertaining to the oil industry, according to the ILO Convention 169, the *Rio Declaration on Environment and Development* and other human rights instruments. This was one of the first economic and social rights reports to deal with issues of health and environmental care and aided other groups with their legal arguments.

The Centre and a small indigenous community brought a case on the right to participation. The oil companies' tactic was to divide the communities and negotiate with them separately. In the ARCO case, the court ruled that the companies could not negotiate separately without going through the National Indigenous Federation. This case was groundbreaking.

Public education and information access had an important impact in Ecuador, facilitating social awareness, mobility and litigation. Information about the right to health gave indigenous groups a foundation with which to challenge government and corporate actions. Current legislation provides for stronger oversight of the oil industry and public regulatory agencies are more effective.

Nigeria (Right to Health and Right to a Clean Environment)⁹⁸

A consortium consisting of a subsidiary of Shell Oil Company and the State-owned Nigerian National Petroleum Company were exploiting Ogoniland oil reserves causing extreme environmental degradation and health problems amongst the population. Furthermore, Nigerian security forces had destroyed villages and attacked villagers in response to the Ogoni people's non-violent campaign opposing the destruction of their environment. In 1996, the Nigerian NGO SERAC (Social and Economic Rights Action Centre) and the U.S.-based Center for Economic and Social Rights (CESR) filed a petition with the African Commission on Human and People's Rights alleging human rights violations by the Nigerian government. The Commission ruled that the government had a right to produce oil, but only in a manner consistent with the protection of human rights. It is international opinion that all human rights engage at least four types of duties – to respect, protect, promote, fulfill. This involves not interfering with individuals' access to rights, preventing others from interfering with these rights, and a positive obligation to use machinery to move toward the actual realization of these rights. In this case, the government had violated the Article 16 right to health and the Article 24 right to a clean environment, since it had failed to prevent pollution and ecological degradation. On a practical level, compliance with these articles would have required the government to order independent scientific assessments prior to development and to monitor such activities. Furthermore, the government should have provided information to affected communities and allowed them a meaningful opportunity to be heard and participate in the decisions.

The Commission ordered the government to cease its current behaviour, investigate and compensate for attacks on the Ogoni people. In the future, the government would need to conduct environmental and social impact assessments, and provide information on health and environmental risks.

India (Right to Food)⁹⁹

In Delhi, India, a local NGO named Parivartan used Right to Information legislation to access information which revealed that almost 90% of food intended for distribution to impoverished citizens under the Indian Public Distribution System (PDS), was being siphoned off by corrupt ration dealers. The Delhi Right to Information Act enabled the NGO to attain the sales

⁹⁸ *SERAC and CESR v. Nigeria* Decision: [http:// www.cesr.org/publications.htm](http://www.cesr.org/publications.htm)

⁹⁹ The Right to Information: Strengthening Democracy and Development. Paper presented by Fiji Ombudsman, Walter Rigamoto at the 22nd Australasian and Pacific Region Ombudsmen Conference).

and stock records regarding distribution of wheat, rice and kerosene during June 2003. This information was widely disseminated and residents were shocked to discover that rations had been siphoned off in their names. The ration dealers had maintained they were not receiving stocks from the government when in actuality they were selling the rations on the black market. Parivartan workers went from house to house to verify the sales registers and found during the month of June out of a total of 182 families interviewed, 142 received no wheat and 167 no rice. Access to the proper documentation allowed the NGO to confront corrupt officials. Later, the NGO interviewed 82 families and all reported that they were receiving their full entitlements at proper prices.

Uganda (The right to Education and the right to Environment)

In Uganda, the right to access information was used to ensure certain development funds for primary schools reached their intended beneficiaries. An expenditure tracking survey revealed that funds were going to corrupt bureaucrats rather than the schools. Subsequently, the Ugandan government began advertising grant payments, while schools posted notices upon receiving funds. These minor changes and the ability to access information enabled parents to ensure accountability at the local level. In five years, corruption dropped from 80% to 20% and enrolment more than doubled.¹⁰⁰

Environmental NGO Greenwatch Ltd successfully appealed to the Uganda High Court for access to the Power Purchase Agreement and implementation agreements for a multimillion dollar dam project which the Ugandan government and the World Bank had previously declined to release. Greenwatch used the open government clause, Article 41 of the Ugandan constitution to gain access to the documentation. The government first denied the existence of the documents and later argued that their release would threaten national security. In November 2002, the Court rejected these arguments and stated that these were public documents and that as long as they were in the government's possession, the public could access them. Subsequently, the International River Network analysed the documents and concluded that "Ugandans will pay hundreds of millions of dollars in excessive power payments if the World-Bank-funded Bujagali dam project proceeds according to plan". Later, funding for the dams was suspended. This case set a precedent that will help Ugandans exercise their right to information in the future.¹⁰¹

¹⁰⁰ Transparency International Kenya (2004) Adili Newsletter #58: FOI in Kenya -The Value of the Right to Information).

¹⁰¹ Transparency International Kenya (2004) Adili Newsletter #58: FOI in Kenya -The Value of the Right to

Malaysia (Right to Environment)¹⁰²

In July 2002, residents around Kampung Bohol in Puchong, Selangor, learned that the government intended to build an RM1.5 billion thermal incinerator in their area. Concerned about the possibility of toxic emissions, and impacts on health and the environment, the residents built an action committee to investigate the issue. They reviewed available documentation including an Environmental Assessment Report and discovered a number of discrepancies. They commenced an education, advocacy and signature campaign to oppose the Puchong Incinerator Project. While the committee met with the appropriate government officials over many months, they felt their concerns were not sufficiently addressed. The lack of media coverage on the issue led to suspicions of political pressure for a news blackout, particularly since the Minister was the member of the Malaysian Chinese Association, a segment of which controlled a number of newspapers. The newspapers denied that this was the case.

Opposition MP Teresa Kok brought up the issue in the Dewan Rakyat but deputy Housing and Local Government Minister Peter Chin Fah Kui replied that the Science, Technology and Environment Minister had handled it. Chin said the community had developed a “not in my backyard” mentality, but that they would adjust once the plant was operational.

Puchong residents intended to demonstrate their discontent in the November 2004 general election if the plant was not relocated. In November 2002, government sources told *Malaysiakini* that the plant would be relocated to Broga, Selangor. Broga residents have since launched their own campaign to oppose the project.

Argentina (Right to Education)

The NGO Association for Civil Rights requested information from the Ministry of Education concerning secondary education. They wanted to know the number of students attending high schools during 2005 and the number of students that successfully completed each school during that year. The Ministry of Education failed in its obligation to provide access to the information requested. The NGO filed a lawsuit against the Ministry, maintaining that the requested information was very important for helping people make an informed decision about the development of education policy. It also noted that access to public information is an essential component of the right to education and essential for the effective monitoring of governmental activity in the area of public education.

Information.

¹⁰² Malaysiakini Reports available on <http://www.malaysiakini.com>

Argentina (Right to Adequate Food)

The Argentine-based Center for Legal and Social Studies (CELS) requested the Ministry of Health provide all the information it possessed about undernourished children, but the Ministry failed to respond. In its lawsuit, the NGO argued that the information was a fundamental tool for evaluating the situation of undernourishment and malnutrition in the country and therefore evaluating the government's compliance with its constitutional obligation to take measures for the nourishment and health of children. CELS argued that the right to nourishment and health cannot be fulfilled unless nourishment and health are made accessible to the population. In addition, it stated that one of the essential elements to realize the right to nourishment and health is obtaining access to information related to the measures the government has taken in relation to this right, since the denial of the right of access to public information, the right to health, and the right to nourishment is not only the violation of a national obligation but also an international one.

‘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 all frontiers.’

Article 19 of the Universal Declaration of Human Rights



ARTICLE 19
6-8 Amwell Street
London EC1R 1UQ
United Kingdom
Tel: +44 20 7278 9292
Fax: +44 20 7278 7660
Email: info@article19.org
Web: <http://www.article19.org>

© ARTICLE 19, July 2007 •



ADC - Asociación por los Derechos Civiles
Av. Córdoba 795, Piso 8
(C1054AAG) Buenos Aires
Argentina
Tel: +54-11 5236-0555/6/7 y 5238-1805
Fax: + 54-11) 5256-5658
E-mail: adc@adc.org.ar
Web: <http://www.adc.org.ar>

© ADC - Asociación por los Derechos Civiles,
July 2007 •

