



Towards a Third Generation of Activism for the Right to Freedom of Information

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“Human rights have shown a remarkable ability to evolve and remain relevant over the last sixty years in a rapidly changing world. If they are to continue to exercise the same influence, they will need to continue to respond and evolve. For activists, the challenge is to uphold the core values of human rights at the same time as they identify where their practice and application must evolve to remain relevant as societies change. This is the test against which a future human rights agenda should be judged. So what’s new?”¹

Introduction

Many of us have experienced it at some time: huge disappointment because a freedom of information law which for years we had advocated ultimately was not passed or got stuck at some level in parliamentary debate or government process. Years of efforts seemingly wasted. Of course, this is not quite the case. No such effort is entirely wasted. But at the time, it does feel fruitless. And frustrating. ARTICLE 19 and its partners experienced such a disappointment in Latin America over the last few years when in Brazil and Argentina the positive signs of the early years of the twenty first century did not ultimately materialise into actual legislation, thus demonstrating the rather unpredictable nature of the political and legislative process and commitment.

There were and are many lessons to be drawn from these (temporary) set backs and with the gusto and energy that ultimately characterises civil society, these can be quickly transformed into learning and strategies for our future work.

This paper attempts to take stock of the recent and past experiences of advocating for the right to freedom of information, and particularly for access to government-held information. By so doing, it also seeks to respond to the challenge raised in the quote

¹ Human Rights Council, p.34

above and apply its call for evolution and relevance to our work on freedom of expression and particularly to our advocacy and strategy for freedom of information.

Introduced by a short reflection on the right itself, this paper reviews some of the key characteristics of the success of the last 20 years as far as the right to freedom of information and freedom of information laws are concerned and it then moves to analyse some of the current trends (the *what's new* part of the above quote). In the last section, the paper draws on the various findings and lessons, potential or real, to propose to initiate a new generation of right to freedom of information activism.

A quick word about naming: a newcomer to the field may be excused for wondering what exactly we are talking about. Is it: right to information (also known as RTI), right to freedom of information (not much used), right to know, freedom of information (also known as FoI), access to information (also known as AtI), transparency, etc? For the purpose of this paper, I have chosen the terms that most literally describe the concepts: The right to freedom of information will be used to describe the right as per article 19 of the UDHR in all its dimensions: to seek, receive and impart information and ideas through any media and regardless of frontiers. This document focuses heavily on the "seeking" component of the right, particularly as it relates to access to government-held information. The laws which allow for this access are referred to as access to government-held information laws, interchangeably with FoI or AtI laws.

1 - Article 19, Universal Declaration of Human Rights (UDHR)

From its outset, the *Universal Declaration of Human Rights* (UDHR), which is 60 years old this year, provided strong protection for freedom of expression. As early as 1946, at its opening session, the UN General Assembly had declared that "*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.*"² Article 19 of the UDHR and of International Covenant for Civil and Political Rights guarantees to everyone "the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The right is recognized in largely similar terms by the main regional human rights treaties.

Quite unusually in the field of human rights, the emphasis in regards to this right has been placed relatively quickly on the positive obligations of the state, and particularly on its duty to fulfil. Traditionally, positive obligations and the duty to fulfil have been among the least understood, and the least served: human rights courts and organisations have tended to concentrate on the negative obligations of the states to respect.

² 14 December 1946.

In the 1995 ground breaking ARTICLE 9 report on the Right to Know³, Sandra Coliver referred to the right to freedom of information as having gone through three main stages of interpretation of the duties imposed on government:

- Duty to respect: Traditionally the right to freedom of information has been understood to be the freedom to receive and impart information free from government interference. In this interpretation, the government is under a negative obligation not to interfere with the communication of information and ideas that others wished to impart. This interpretation, however, does not establish a right to receive any particular kind of information from the government or others⁴.
- Duty to protect: Under this approach, which came to the forefront in the 1990s, it has come to be accepted that governments are under a positive obligation to take steps to prevent individuals or private groups from interfering with the lawful communication of information⁵.
- Duty to fulfil: Finally, the right to information has been increasingly understood as imposing on governments a duty to provide information, including government-held information. For the last ten years or longer, this particular duty has come to dominate the work of many activists, who have advocated for access to government-held information through the adoption of freedom of information (FoI) or access to information (ATI) laws.

The duty imposed on governments to provide information has not always been interpreted in conjunction with article 19 or the right to freedom of expression. For instance, the European Court of Human Rights has been reluctant to introduce an obligation to provide access to information, in the context of Article 10, guaranteeing freedom of expression. Instead, it has linked this positive duty to other rights, particularly the right to privacy and family life or the right to life. Other rights that may further justify the right to information include the right to health and the right to a clean environment (which itself may be construed as falling under the right to life).

In the field of environment, a number of international or regional standards have been enacted over the years which further enshrine the right to information. These have included, for instance, the 1992 Rio Conference (Principle 10), the Council of Europe 1993 Convention on Environmental Liability, and the 1998 Aarhus Convention which includes both a pro-active duty to publish certain information along with everyone's right to access environmental information (the two sides of the same coin also referred to as active and passive access.)

Yet, there are compelling reasons for arguing that the guarantee of freedom of expression includes the right to access information that governments hold. For instance, article 19 of the ICCPR includes freedom to **seek**, receive and impart information and ideas of all

³ ARTICLE 19, *The Right to Know: Human Rights and access to reproductive health information*, edited by Sandra Coliver, 1995

⁴ Sandra Coliver, "The right to information necessary for reproductive health and choice under international law", in ARTICLE 19, 1995, pp.38-82

⁵ Ibid, p.61

kinds⁶. "It is arguable that freedom to receive information prevents public authorities from interrupting the flow of information to individuals and that freedom to impart information applies to communications by individuals. It would then make sense to interpret the inclusion of freedom to seek information, particularly in conjunction with the right to receive it, as placing an obligation on government to provide access to information it holds... To guarantee freedom of expression without including freedom of information would be a formal exercise, denying both effective expression in practice and a key goal which free expression seeks to serve."⁷

The UN Special Rapporteur on Freedom of Opinion and Expression adopted early on such an approach when he stated clearly that the right to access information held by public authorities is protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR): *The Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek, receive and impart information and that this imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems - including film, microfiche, electronic capacities, video and photographs - subject only to such restrictions as referred to in article 19, paragraph 3, of the International Covenant on Civil and Political Rights*⁸. These views were welcomed by the UN Commission on Human Rights, as early as 1999.

Finally, in 2007, the Inter-American Court of Human Rights, in *Claude Reyes vs. Chile*, ruled that freedom of information is a basic human right implicit in the right to freedom of expression⁹. This was a pioneering ruling which marks the first time an international tribunal has confirmed the existence of a full right of access to information held by government and other public bodies¹⁰.

This pioneering ruling still needs to be emulated by other courts and came quite late, compared to the national-level explosion of FoI laws of the last 20 years.

II. The twenty year leap: 62 new countries adopting access to government-held information

One can really only talk of the emergence of a movement and advocacy for access to government-held information (FoI or AtI laws or acts) after World War II, although, as is often pointed out, the Swedish Freedom of the press Act included the principle that government records were by default to be open to the public and granted citizens the right

⁶ Toby Mendel, "Freedom of Information as an internationally protected human right", *American Civil Liberties Union International Civil Liberties Report* (2000, Los Angeles, ACLU)
<http://www.article19.org/pdfs/publications/foi-as-an-international-right.pdf>

⁷ Ibid

⁸ UN Doc. E/CN.4/1999/64, para. 12., quoted by Toby Mendel, op cit.

⁹ For a copy of the brief submitted by NGOs, see: <http://www.article19.org/pdfs/cases/inter-american-court-claude-v.-chile.pdf> For Press release, see: <http://www.article19.org/pdfs/press/inter-american-court-a19-foi-amicus-brief.pdf>

¹⁰ http://www.justiceinitiative.org/db/resource2?res_id=103448

to demand documents from government bodies¹¹. According to Ralph Nader, one of the most vocal FoI activist then and now, and a consumer rights activist first and foremost, the modern freedom of information movement has its roots in the early cold war period and it was the dramatic evidence of lying and official misconduct emerging out of the Vietnam war and the US “Watergate” scandal that mobilized a generation to demand freedom of information and open government laws across the United States¹². From the 1950s to the early 1980s, 9 countries adopted FoI laws or Access to Information Acts¹³, although not always as a result of the agitation of specific movement or campaigning by civil society. Yet, this 30 year period may be considered as the birth of advocacy for access to government-held information¹⁴.

For FoI, the following twenty years have been nothing short of exceptional. For example, there has been an explosion of FoI or AtoI laws, adopted in several parts of the world whose primary objective is to strengthen the transparency of governments by ensuring people have access to publicly held information. In 1987 there were 13 countries with FoI laws, compared to 75 twenty years just ten years later in 2007.

Much has been written already on the factors responsible for this explosion but it may be worth recalling a few of these¹⁵.

- The democratization leap of the 1990s, particularly in Eastern and Central Europe and in Latin America, included the enactment of a number of new laws or policies, reflecting the newly elected governments’ commitment to democracy and human rights. Research in Southeast Asia has also shown that dramatic changes in information access resulted from the fall of authoritarian regimes, with the exception of India where state legislation on access to information was the result of grass-root agitation¹⁶. *“In the 1990s a wave of UN Summits also sought to place issues of democracy, justice and rights on the development agenda. In the context of the worldwide process of democratic consolidation that characterized the decade,... issues of democracy, rights and justice were both revitalized and radicalized in this process, as social movements used the language of rights to press governments for social reforms. If the 1990s were an extraordinary period for international policy making and standard setting, they also saw substantial legal and political changes at the national level. These were most evident in post-authoritarian states”*¹⁷.

¹¹ David Banisar, op cit., 2006, p.18

¹² Statement of Ralph Nader before FOIndiana, September 21, 1996

¹³ Dave Banisar, Freedom of Information around the world, 2006, pp.18-19

¹⁴ The right to access information was included in the 1766 Swedish Freedom of the press Act, and mentioned in the 1789 French Declaration of Human rights.

¹⁵ It should be recalled that article 19 of the UDHR/ICCPR had most probably a limited influence on this explosion, at least as far as the first ten of this 20 years period is concerned. (See section 1)

¹⁶ Sheila Corroneo, “Fighting for the right to know – Access to information in Southeast Asia” PCII, 2001, p.10

¹⁷[http://www.unrisd.org/80256B3C005BB128/\(httpProjects\)/5F7EC3623063C8D180256B5D00440321?OpenDocument](http://www.unrisd.org/80256B3C005BB128/(httpProjects)/5F7EC3623063C8D180256B5D00440321?OpenDocument)

- The growth in number and impact of civil society actors: There is absolutely no doubt that civil society has been instrumental in advocating for and ensuring that FoI laws are adopted. *“There are numerous individual freedom of information pioneers within government throughout the world. But government leaders as a group do not favor FoI laws because it is not in their interest to do so. The picture is totally inverted for civil society... Civil society has played a significant role in the passage of FoI legislation in Central and Eastern Europe as well as in Latin America¹⁸.”*
- Another dimension of human right protection which clearly saw major positive changes during that period and has most certainly had an impact on RTI, including FoI laws, is that of the fight against impunity. The profile of the principle of universal jurisdiction grew considerably. Several international courts were established to sanction war crimes and crimes against humanity, including the International Criminal Tribunals for the Former Yugoslavia (1993) and Rwanda (1994). The Rome Treaty was adopted in 1998 then led to the creation of the International Criminal Court (ICC) in 2002¹⁹. *“Other approaches designed to reduce impunity and achieve ‘transitional justice’ emerged during the period. Remarkable efforts were made in South Africa, Guatemala, Peru, Mexico, Morocco and several other countries to put past abuses on public record, enable victims to tell their stories and allow perpetrators to acknowledge crimes they committed²⁰.”* The experiences with secrecy both in the Soviet bloc and under Latin American dictatorship and the call for the right to memory and the right to know also fed the movement and call for transparency, the right to information and FoI laws.
- Major catastrophes whose impact was multiplied due to the absence of information are also said to have played a role in strengthening awareness about the importance of information, making it one of the central pieces of many campaigns around the world (along with reparations): *“Chernobyl and earlier nuclear accidents and the spread of AIDS throughout the world have contributed to the realization that full freedom of information is not a luxury but may be literally a matter of life and death. The denial of information vital to health, such as arises from the dumping of unlabelled pesticides and pharmaceuticals in the developing world, for example, is censorship to be opposed just as much as the more classic manifestations of censorship in book banning, radio jamming or the destruction of printing presses.”*
- Finally, and probably most importantly, increasing international pressure and emphasis on corruption and good governance have played a major role in this 20 year explosion, coupled with the growth of regional instruments and regional membership which made transparency a criteria for membership. The anti-corruption and transparency movements, led by civil society but also international institutions such as the World Bank, played a major role in strengthening the call

¹⁸ John Ackerman and Irma Sandoval-Ballestros, “The Global Explosion of Freedom of Information Law”, *Administrative Law review*, Vol.58, No.1, Winter 2006

¹⁹ See International Human Rights Council, “*Catching the wind*”, 2007, http://www.ichrp.org/files/reports/4/133_Final_for_web.pdf

²⁰ *Ibid*, p. 12

for access to publicly-held information and increasingly to privately-held one as well.

There is therefore not just one movement, but many *movements*, such as the transparency movement, good governance movement, openness movement, access to information movement, which have come together to advocate for similar outcomes. The multitude of actors, origins and their approaches is not a problem, at least for now. Indeed, this diversity partly explains the successes recorded over the last twenty years, as far as freedom of information laws are concerned.

FoI laws are not the only element to right to freedom of information. Others include stronger protection of freedom of the media and overall guarantees for freedom of expression, coupled with greater means of accessing information, including through stronger legal protection, technical changes or access to education and literacy. On these as well, the indicators show that there has been great improvement, some of it taking pretty revolutionary forms such as the Internet, mobile phones, satellite television, digital television, all of which have impacted greatly on people's capacity to access information.

So all is well. The progress of the recent past has been forwards and upwards. Therefore we should continue working and advocating in more or less the same ways, right?

Well, not quite...

In the introduction, I made reference to some of the difficulties we have experienced in a number of countries. This is but one, among a number of challenges we experience to securing the right to freedom of information, including access to government-held information. Some of these challenges may be characterised as "external" or contextual; others are internal and structural.

III – Challenges to the right to freedom of information, including access to government-held information

1. Large disparities across continents

Across Africa and the Middle East, only a handful of countries have adopted FoI laws. These are also the two continents where the fewest changes are evident in terms of governmental respect and protection for freedom of the press or freedom of expression. This is, of course, not to say that no change has occurred. For these two regions, like the rest of the world, have experienced, and particularly so the Middle East, the IT revolution, the multiplication of independent media outlets, satellite televisions, etc. Nevertheless, activists for access to government-held information now face a number of countries that have shown greater resistance to the 1990s democratisation boom than have others, thus auguring for difficult change ahead, particularly given that the global environment may not be as conducive to the realisation of the right to freedom of information as it had been in the earlier years.

2. Counter-terrorism and national security

The so called “War on Terror” and this decade’s associated pursuit of tougher national security, are and will be driving forces behind national and international FoI and RtI policies. As of now, the impact on access to information is uncertain. With the exception of the USA, there is as of yet little evidence that national security concerns have resulted in increased security-based restrictions to access to government-held information²¹. It is also true to say there has also been no marked difference in the rate of adoption of FoI laws since the events of 9/11. So these indicators do not suggest a setback to or a regression as far as formal access to freedom of information is concerned – namely in the adoption of FoI law.

However, the right to freedom of information, as highlighted earlier, entails more than one particular law or one particular type of information. Whenever media is censored, the right to information is violated. From that perspective, many observers and activists across the world have highlighted the negative impact of security and counter-terrorism measures on civil liberties, the media and political expression²² suggesting an overall setback as far as the protection of freedom of expression is concerned.

State secrecy laws historically and traditionally have constituted the most frequent reasons for preventing access to information and censorship. As such, the increasing importance of national security is likely to pose a significant problem in improving access to information. As highlighted by Dave Banisar, *“in many Commonwealth countries, the original British colonial-era Official Secrets Act remain in effect. In Eastern Europe and Central Asia, Soviet-era policies remain little changed. In Central Europe, nations joining NATO have adopted Classified Information laws replacing the Soviet-era laws with ones that are little better and undermine newly adopted freedom of information policies. Once a bastion of openness, the “War on Terrorism” has led to new restrictions on access to information in the United States. The conflict has become pronounced in the past several years. State leaders or senior ministers in Finland, Estonia and Latvia were forced to resign due to misuse or mishandling of state secrets. In Romania, India, Pakistan, Denmark, the UK and Switzerland, members of the media have been charged with violating secrets acts by publishing information about government activities. In the US, court cases on whistleblowers, illegal surveillance, and the sending of a Canadian citizen to Syria where he was tortured have been stopped due to the imposition of state secrets²³”*

3. Overall Setback:

The evidence tends to suggest that the environment for freedom of the press and other forms of expression has become more cautious, curtailed, and constrained, while self-censorship is said to be on the increase. Freedom House 2007 report shows reversals in one fifth of the world’s countries, particularly in South Asia, but also in the former Soviet Union, the Middle East and North Africa, and Sub-Sahara Africa. Nearly four times as many countries showed significant declines during the year as registered improvements.

²¹ David Banisar, Privacy International, personal communication, April 2008

²² See for instance, WAN, May 3rd, 2007 action. See also Freedom House Press Freedom Annual Report, 2007.

²³ Privacy International, op cit, p.30

The 2007 results marked the second consecutive year in which the survey registered a decline, representing the first 2 year setback in the last fifteen²⁴. ARTICLE 19, along with other freedom of expression organisations has noted as well a growing intolerance for certain forms of beliefs, protest or, dissent, intolerance which may or may not yet be backed by laws. Global indicators on freedom of the media are showing that the positive trends of the 1990s are now reversing back²⁵.

This highlights a rather peculiar situation, whereby protection and respect for FoE (including right to freedom of information) are on the decline, while *fulfillment* of the right to freedom of information does not seem to have been negatively affected by the overall trend. Or rather the rate of adoption of the laws required for the fulfillment of this right does not appear so far to have been negatively affected. But it is one thing to pass a law, it is another to implement it and to put it to good use.

Indeed, the other challenges – internal or structural, for lack of a better word - do particularly highlight the importance of the distinction.

4. Are FoI laws doing their job?

The impact of FoI laws on the right to freedom of information is not straight forward. It is logical, and certainly intuitive, to expect a law to strengthen respect for, and enforcement of, a right. Most activists (including ARTICLE 19) have argued that a law on access to information is better than a constitutional guarantee or instance. According to an OSI study, governments were more likely to respect an individual's right to request information and were more likely to deliver the information requested wherever there were freedom of information laws than in countries without such a law. At the same time, the data and methodology underlying these assertions are mixed at best. For instance, the indicators for South Africa (with a particularly progressive law) were worse than those for countries without a law. In fact, the results are so ambivalent that a recent study published in the *Administrative Law Review* concluded that the data implied that FoI laws are not doing their job²⁶.

As ARTICLE 19 and many other organizations have experienced and highlighted, there are a number of conditions that need to be met for these laws to play a meaningful role as far as access to government-held information is concerned. There is evidence that they may constitute a potentially effective tool at the hands of an educated elite interested in extending the realm of government openness and transparency and tackling government secrecy. But even in their greatest user-friendly format (such as in Mexico), these laws need some kind of mediators (civil society or journalists most of the time) to ensure that the right of the general public, and particularly the most vulnerable populations, to government-held information, is meaningfully realized. They need to be used and understood by members of the public, civil society, journalists, the private sector, and they need to be implemented by trained and committed public service, etc.

²⁴ See Arch Puddington, "Freedom in retreat: is the tide turning?" Freedom House, 2008

²⁵ Freedom House

²⁶ Ackerman and Sandoval, *Administrative Law Review*, 2006, p.126

ARTICLE 19's work in countries across the world has not highlighted so far the existence of major differences in terms of securing access to public interest information between countries with FoI laws and those without.

The snapshots provided below do not do justice to the richness of the data and analyses provided in the various studies. They seek to highlight a few, among many, findings.

In a 2005 study comparing the extent to which media accessed government-held information in **Armenia, Georgia and Azerbaijan**²⁷, we assumed that the lack of legal guarantees for the right of access to information in Azerbaijan meant that Azerbaijan was further behind the other two States - a correct conclusion because legal protection must remain a key indicator of a government's commitment to human rights. At the same time, though, the survey conducted with journalists in all three countries concluded that in all three States the media have little access to various types of information (including information on the state of environment, healthcare, budget, education, contact information of public bodies, and national security-related issues). The survey findings suggest greater understanding of the concept of freedom of information in Georgia than in the other two countries. But the survey and other monitoring projects show that many institutions have not established the necessary mechanisms or institutional practices to satisfy the public's right to know, despite the public officials being fully aware of their duty to release information.

Most worrying though is the finding that after a 'boom' of media liberalisation in the early nineties, governments in all three countries have reasserted their control more recently over the information sector: they have been running State-owned media as their 'mouthpiece', and hindering the development of independent broadcast media. Altogether, this results in the general public in all three countries being ill-informed, largely excluded from decision-making processes and policy debates. As a result the population is unable to make informed choices during elections. Public bodies have levels of power and control that are open to abuse, and they are largely unaccountable for malpractices and infringements of human rights.

In **Mexico**, where the FoI law is often considered to be one of the best and most progressive in the world, implementation of access to information remains poor, with only a very small minority actively exercising their right to know. ARTICLE 19 has pointed out on several occasions the role of the government in securing effective implementation through proactively promoting and guaranteeing access to information. In the context of deep social inequality, poverty and disease that prevails in Central America in general and Mexico in particular, it is especially important to promote freedom of information as a way for overcoming these social disadvantages. Information regarding public health matters, social development policies and domestic violence must be spread by the government and mass media through special campaigns designed to promote access to information across all communities²⁸.

²⁷ ARTICLE 19, *Under lock and key: Freedom of information and the media in Armenia, Azerbaijan, and Georgia*, London, 2005, See particularly chapters 5 and 6, pp.70-126

²⁸ See ARTICLE 19, Right to Know Day 2007, <http://www.article19.org/pdfs/press/international-right-to-know-day-2007.pdf>. See also, ARTICLE 19, International Women's Day 2008, <http://www.article19.org/pdfs/press/int-women-s-day.pdf>

In **Peru**, which also has an FoI law, ARTICLE 19 undertook a project into access to sexual and reproductive health information with two national organizations. The project included an in-depth research and study which found that there had been improvement in access to information on reproductive and sexual health, including some procedural improvements facilitating greater access, but also a cultural change towards greater openness²⁹. Public servants were overall keener to respond to requests. However the unreliability and inaccuracy of information thus provided meant that many civil society representatives began to challenge the very idea of making information requests; why, they asked, should they waste their time chasing information that they knew would be misleading, incorrect, or so out-of-date that it was of no practical use to them at all³⁰? The subsequent evaluation of the project highlighted the lack of capacity within the health ministers as one of the main impediments to accessing information: As one of the women we interviewed said, the conditions for a free flow of information do not exist. That is not only because of a lack of political will on the part of some officials but because of the characteristics of the State itself. It allocates few resources to the organisation of information and the disorganisation of the State itself leads to instability and untimely changes, which in turn results in a lack of continuity in the implementation of policies and programmes. The evaluators recommended putting greater emphasis on the public service and building its capacity to respond to requests, and on the actual use made of the information received.

In both Mexico and Peru, ARTICLE 19's and its partners' work showed that public information on reproductive health, including on such issue as women's access to abortion, has been badly disseminated. For instance, the vast majority of women in both countries do not know they may be legally entitled to an abortion while the medical professions are deterred from practicing them and delivering the care to which women are legally entitled. In view of the local government's failure to properly inform the population (and the doctors) about their right to abortion, ARTICLE 19 Mexico and its partners are now preparing a public information campaign about the recently passed abortion law, with the view of ensuring the people's right to know and empower them.

In **Brazil**, where there is no FoI law, ARTICLE 19 sought to strengthen awareness and understanding of RTI amongst a broader network of actors. We realised that civil servants and officials within the public educational system in the State of Sao Paulo were not actively participating in the debate on public policies. Part of the problem were legal provisions dating back from the time of dictatorship that prevented professors from talking to the media and to freely express themselves about "internal matters", and speak publicly in negative/critical terms on the public authorities. All these provision were limiting professor's right to freedom of expression and inhibiting whistle blowing in relation to many irregularities; those provisions were also violating people's right to receive information on public educational policies from a primary source: civil servants working in the area. By getting involved in this whole issue and presenting it as a FoE

²⁹ ARTICLE 19, Flora Tristan and IPYS *Time for change: Change: Promoting and Protecting Access to Information and Reproductive and Sexual Health Rights in Peru*, ARTICLE 19, London, 2006, p100

³⁰ Ibid, p.107

and FoI problem, ARTICLE 19 caught the attention of groups and organizations working on education - very strong and outspoken new partners – and secured their commitment to passing an FoI law, including the commitment of one of the most powerful unions in the state, the public professors union.

ARTICLE 19 Brazil has also focused on involving in our pro-RTI campaign, groups working on communication rights, particularly interested in the democratization of communications and advocating against media concentration. We demonstrated that improved transparency could facilitate their work, because irregularities would become clearer and easier to identify and they could later question such irregularities before the courts, as well as shame the government for not monitoring broadcasters' compliance with relevant legislation. A campaign for transparency in broadcasting licensing was launched and we have been using information requests and lawsuits to make sure that the minimum legal provisions already in place (and which could address lack of pluralism and diversity) are fully applied.

In Brazil the government has been voluntarily setting up pro-active disclosure obligations. But because these were not accompanied by training and capacity building programs with civil servants in charge of disclosing info, the data provided is virtually inaccessible to a non-expert.

In **Malaysia** (without a law at the time of ARTICLE 19 project but with a number of FoI provisions), government-held environmental information provided to local communities has often proved to be wholly insufficient, when not simply inaccurate³¹. Communities and activists relied on informal means to access information (personal relationship with civil servants, media and internet). Some public departments though, have been more pro-active than others in releasing information. For instance, the Department of Irrigation and Drainage has been praised by local NGOs for conducting thorough research and making it available to the public. Campaigners against the Sungai Selangor Dam, for example, found statistics on water through the Internet, buried in a section of the Public Works Department website. The Broga committee also cited the Internet as an important source of information. New technologies have been essential in building campaigns, building contacts with national and international NGOs and in disseminating information. One of the earliest success stories in the use of the Internet was the SOS Selangor campaign, which networked with the International Rivers Network, Friends of the Earth Japan and others to help put international pressure on the Malaysian government to halt its dam building programme and to access information on water supply and demand projections.

In **Ukraine**, the population is said to be more informed about pollutants and other issues that can negatively impact their health than they were at the time of Chernobyl. However, civil society organizations there are convinced that insufficient in-depth environmental information is made available. Further, such information is disseminated primarily only when environmental emergencies occur. The interviews conducted by the

³¹ ARTICLE 19 and CIJ, A Haze of Secrecy: Access to Environmental Information in Malaysia, 2007, <http://www.article19.org/pdfs/publications/malaysia-a-haze-of-secrecy.pdf>

A19/EcoPravo research team demonstrates particularly well that that when people are deprived of information, fear and uncertainty grow, leading to high stress levels as well as misinformed and therefore counterproductive coping strategies. Affected people also have a psychological need to know who was responsible for an accident and that effective measures have been taken to avoid similar incidents in the future. The implementation of the provisions regarding access to environmental information suffers from many weaknesses, including lack of sufficient resources and trained personnel, or insufficient proactive disclosure. The current legislation does not require public bodies to produce and proactively publish many types of information. But even for those types of information where this is required, there are problems with the delivery of information, including sporadic and non-systematic implementation and long delays in producing reports, meaning that information finally available is usually outdated by the time it is published³². Other problems include frequent withdrawing of information without any reason and the use of "secrecy stamps" preventing access.

As in Malaysia, NGOs are an important source of environmental information. They provide specialised services, offering advice on environmental issues to the general public. NGOs also gather relevant information from members of the public who contact them for advice. They disseminate the information through the media and their own publications. The Internet was also an important means of disseminating information in Ukraine, and public bodies now have websites. However, two related problems remain. Firstly, overall only a small section of the population has access to the Internet. Secondly, the information on public websites is often overly general. The improvement and regular update of Internet sites (including, for example, the publication of reports and the results of EIAs) and the creation of readily accessible databases would improve access to information and reduce the need to lodge requests.

In **Bangladesh**, a recently launched A19 project is seeking to strengthen access to information in the context of disaster response and climate changes. Our initial study conducted in Bagurna, Barishal and Bagerhat areas sought to investigate why had cyclone Sidr resulted in so many deaths, despite the availability of media attention, campaigns, warning-message dissemination, etc. Some of our preliminary findings highlighted the difficulties inherent in communicating early-warning and warning messages, such as the fact that many people were not convinced that a disaster was on the way, because a calamity predicted some times before had actually not occurred. Some of our recommendations included that none should be excluded from receiving and sharing information and journalists should be given full rights to access government information related to disaster preparedness and management. Others highlighted many different aspects of the government's obligation to respect and fulfil the right to information. For instance, researchers recommended that possessing radio sets should be made mandatory for people living in disaster-prone areas and fishing trawlers. If needed, they may be given easy access to credit to buy radio sets. There should also be regular survey to know the prevailing and changing patterns of peoples' perceptions of and attitudes towards

³² ARTICLE 19 and EcoPravo, *For Internal use Only: Is Post-Chernobyl Ukraine ready for Access to Environmental Information?* ARTICLE 19, 2008, <http://www.article19.org/pdfs/publications/ukraine-foi-report.pdf>

climate change related messages. Altogether, the preliminary study demonstrated the range and scope of governmental duties in relation to article 19 of the UDHR and others (in this case, for instance, the right to life)³³.

IV - Towards a Third Generation of Right to Freedom of Information Activism?

FoI laws constitute an essential and necessary mean to the right to freedom of information but not a sufficient condition, and certainly not the end. These laws however, cannot be regarded as the magic answer to the realization of the right to information. To recap:

- Article 19 of the UDHR sees no barrier or separation between the right to seek and receive and the right to impart information (with the former loosely associated with freedom of information and the later with freedom of expression): they are sides of the same coin, and most importantly they need each other to be true to their underlying values and if they are to be fully realized. They cannot be divorced, conceptually or legally.
- At the same time, the rights or legal guarantees that give rise to the right to information and particularly to government-held information are multiple, such as the right to health, right to a clean environment, right to life, etc. This is an important quality of the right to freedom of information, in that it may be called upon by a variety of actors, through a number of means, and for several purposes.
- Effective implementation of FoI laws requires a genuine commitment on the part of all levels of governments and public services to be transparent and opening up to scrutiny, adequate resourcing, improved records and information management systems and infrastructure and education for the public and State bodies on their rights and obligations under the law. Civil societies, researchers and academics, and the media need to make use of them if they are to play their role of strengthening transparency, including on most sensitive issues.
- The evidence regarding the impact of FoI laws on the right to freedom of information is, at best, mixed and at worse, indicates they have little to no impact.
- Many countries without FoI laws may have FoI guarantees or FoI provisions in other laws which can be put to use to strengthen access to information.
- Information about matters of general public interest is far more widely available now than it was 20 or 10 years ago. Yet, for the majority of the world population, this is not due to the existence or implementation of an FoI law. One may also legitimately question whether access to such information is due to governments taking active steps to inform its citizenry, or whether, in fact, the right to know,

³³ Shameem Reza, In search of Effective Information Dissemination Strategies for Reducing Climate Risks in Bangladesh: Lessons Learnt from Cyclone Sidr, ARTICLE 19 and MMC, Unpublished report, 20 January 2008.

where it is fulfilled, owes far more to media, civil society organisations and the Internet than to an active policy and commitment of public disclosure and campaigns on matters of public interest³⁴.

- Many FoI laws, and certainly the newest ones, include obligations to publish or pro-active disclosure. Some include fairly long list of information which the governments must produce and disseminate. The Internet is often the privileged medium for providing information to the public. However, despite the rise in affordable and global information technologies, vulnerable groups and disadvantaged communities remain too often excluded from information flows, both as users and givers of information. If current trends continue, a number of groups will be increasingly marginalised from vital access to information, and from the means to express themselves.
- In many countries around the world, FoI campaign will not be successful among civil servants if they know the state is simply not ready to provide info. Civil servants may believe that, if a law is passed, they will be the ones held accountable, despite the fact that the conditions are not there to actually allow them to act in accordance with the law and provide info as requested. Before trying to convince civil servants of the benefits of RTI, issues such as filing systems and unnecessary bureaucracy in administrative proceedings must be addressed. The involvement of archiving professionals and associations is very important as of the early days of any pro-FoI campaign.
- Impoverished communities do not trust the state and are not convinced that access to State-held info could improve their participation in decision-making. Proving the contrary in countries with low literacy and formal education and extreme inequality rates may be difficult to accomplish.
- How is the information communicated is almost as important as whether the information is made available.
- Pro-active disclosure can not be *pro-forma*. A hundred tables of raw data will not improve an average person's knowledge of an issue. Those in charge of providing information should be aware of this. Pro-active disclosure should follow an assessment of what kind of info is needed and in which format; language used can not be technical; etc...Building a system of pro-active disclosure should be an exercise that involves civil society and civil servants, all trying to meaningfully provide information that can be read, reviewed and actually used by citizens.
- The current international and national context is not conducive to greater respect and protection for the right to freedom of information. Particularly worrying are existing restrictions on freedom of the media and freedom of expression and data

³⁴ Of course, for the public to be informed by and through the media or internet presupposes that governments have not sought to censor and prevent these medium from imparting the information – clearly a crucial step in ensuring the public right to know.

on impunity, coupled with the increasing use of, or reference to, national security to curtail freedom of expression.

- Politics is particularly complex and unpredictable in countries where democracy is recent and not yet consolidated. The passing of a law may require considerable political leverage, public recognition, and substantial resources.
- The right to freedom of information may be protected and respected in the absence of an FoI law. It may not be fulfilled, but evidence so far does raise question as to whether the existence of a FoI law actually means that the right is fulfilled. The existence of an FoI law or of FoI provisions without a corresponding duty to respect the freedom of the media to impart information, does not amount to the right to freedom of information being protected, respected or fulfilled. On that front, the worse case is probably that of Zimbabwe and its Access to Information and Protection of Privacy Act, used mostly to suppress the media.
- The governments of the countries that have not passed access to information laws over the last twenty years (the democratization leap) may be particularly reluctant to do so and it may take more efforts and time to convince them.

These difficulties and challenges have triggered an important soul searching exercise amongst activists and a useful rethinking of some aspects of our “sacred approach” to campaigning for the right to freedom of information or the right to access public information. Some key questions emerging are:

1. Are we, on balance, investing too much effort in advocating for FoI laws? Given the resources available to most NGOs in our field, should we continue *prioritising* the adoption of FoI laws in order to secure respect for the right to access to government-held information?
2. Should we consider other options which might trigger greater access to government held information and greater respect and fulfillment for the right to freedom of information, particularly in difficult national contexts? For instance, should we *prioritise* making use of existing provisions or guarantees as a way of raising awareness of the right to seek information and demonstrating its use for social change?
3. If we prioritise the adoption of an access to governmental information law, and given the conditions required for a law to be meaningful, what kind of strategy can we develop that integrates this knowledge and realization from the first steps onwards? In other words, how do we integrate meaningful implementation in the adoption advocacy?
4. What is required for a *culture* of transparency to be realised? Civil society is known for leading on major cultural changes processes throughout the world. Could we not adapt these strategies to bureaucracy and public services?
5. Is access to government-held information the priority in view of the accelerated privatization of public services and national resources in the vast majority of

- countries around the world? Should we not place equal energy in ensuring access to information held by private bodies which perform public functions? What does this require, in addition to the inclusion of this principle in future or existing laws?
6. Should we focus or at least invest equal energy in reforming state secrecy and/or privacy laws and practices which are routinely used to censor and/or deny access to information?
 7. How can we strengthen the number and impact of pro-active disclosures to ensure that those that most need it receive information of public interest?
 8. What kind of steps is required to transform information into actions and empowerment?

The answers to these and many other critical key questions should inform the next generation of activism for the right to freedom of information and particularly access to government-held information.

In December 2006, ARTICLE 19 and its Latin American partners met in Argentina to consider answers to such questions and to review the impact so far of our work on access to government-held information and particularly whether and how our efforts to date had strengthened people's access to economic, or social rights.

The discussion resulted in the first draft of what I later called the "third generation" of right to freedom of information activism. Since then, building on the outcomes of its other RTI projects, ARTICLE 19 has identified in a number of findings relevant to this next generation of activism.

As we evolve our activism to remain relevant as societies change we could consider the recommendations that follow and others:

1. We should always insist that the right to freedom of information is an international human right, grounded in international human rights standards, and that it includes as well access to government-held information. Too many governments, legislators or civil society still ignore the fact that the right to freedom of information and access to government-held information is a human right. They still believe that this is a concession from the government to the people. The absence of a FoI law does not mean that the government is not under an international obligation to provide information.
2. Advocacy for the right to freedom of information, including access to government-held information, should begin with, and focus on, the end-users and beneficiaries of information: what kind of information do *they* need? And in which format? For which purpose?
3. International standards on the right to freedom of information, constitutional guarantees, FoI laws and/or other FoI provisions should be used to address existing and real information problems which may result in violations of other rights, such as right to life, right to health, etc.

4. Promoting FoI is not about legislation, it is about a change in culture: both amongst civil servants and government officials (improved openness), but also among civil society (improved monitoring and participation, enhanced political involvement).
5. We should broaden the network of actors involved in the right to freedom of information advocacy and access to government-held information. We must reach out to grass root organisations, those working on a range of non-FoI issues, the private sector, etc. We need to link FoI with the practice of human rights and development more systematically.
6. We need to consider working at the *origin* of the information-gathering process – how, where and when is information collected, processed and filed. All evidence so far in many parts of the world highlight the poverty of the information collected and imparted. We need to strengthen the capacity within public services to collect proper data, or else continue collecting ourselves as many NGOS around the world have started doing.
7. Civil society is a major provider of information in many parts of the world. This is unlikely to change. We need to strengthen our own capacities to collect, process, file, and impart information and donors need to be supporting NGOs in these exercises.
8. Our campaigns for the right to freedom of information and access to government-held information must include a stronger, possibly prioritised, focus on pro-active disclosure . We should seek to increase the actual instances of such disclosures and their effectiveness. The vast majority of people around the world rely on information that is distributed and accessed for free and easily. Governments should launch information campaigns on issues of particularly important or urgent national interest, making use of all avenues possible. How is the information imparted is almost as important as whether the information is made accessible.
9. We should explore a range of avenues pertaining to access to government-held information: these include of course passing a national/federal level law on freedom of information. But we should also consider alternative options if the national context is not amenable, such as advocating for the adoption of state and/or municipal laws on access to information, and for the inclusion of access to information provisions in the variety of laws on the environment, health, etc.
10. Similarly, we should make use of, and test, all legal avenues to access information, including those at municipal and state level, or FoI provisions enshrined in non-FoI related laws (e.g. health, environment, education, etc.). This is the approach adopted in Argentina or Brazil for instance by ARTICLE 19, ADC and others, or in Malaysia under the access to environmental information provisions.
11. A crucial objective of RTI activism should include strengthening the culture of transparency, improved awareness and use of the right to freedom of information. Laws run the risk of becoming a “dead text”³⁵ if there are no sufficient demands and push factors for their implementation.

³⁵ This is how some laws are referred to for instance in Brazil. This is quite common there because post dictatorship governments tried to build legitimacy by simply adopting an adequate and even progressive legal framework in some areas of law, without much attention to their actual implementation.

12. Monitoring a government's respect for the right to freedom of information includes monitoring the adoption and implementation of FoI laws if they exist, as well as all the related laws which impact on the right to freedom of information, such as: media, state secrecy, whistleblower and/or privacy laws and others. Consecutively, a campaign on the right to access information should include campaigning against the various laws and practices that prevent access to information and/or calling for their amendments.
13. The right to freedom of information should be presented as something practical, and useful to people's life, work and needs. Projects need to see very clearly the benefits that RTI can bring them in order to get involved.
14. We should explore the development of pro-poor or pro-empowerment FoI laws, procedures, culture: if we were to design an information regime targeting those that are most information-starved, what will be its main components?

ANNEX ONE

ARTICLE 19 KEY BENCHMARKS

- ARTICLE 19 was set up in 1987, and from its very origin, its founders insisted that *“the right to be informed is equally a feature of freedom of expression. Chernobyl and earlier nuclear accidents and the spread of AIDS throughout the world have contributed to the realization that full freedom of information is not a luxury but may be literally a matter of life and death. The denial of information vital to health, such as arises from the dumping of unlabelled pesticides and pharmaceuticals in the developing world, for example, is censorship to be opposed just as much as the more classic manifestations of censorship in book banning, radio jamming or the destruction of printing presses.”*
- In 1987, ARTICLE 19 was particularly concerned with the situation in the UK where it was disclosed that the government had suppressed information for 30 years about the effects of serious fire at a nuclear reactor at Windscale, in the Soviet Union which had blacked out information on Chernobyl, in Israel, where Mordechai Vanunu was charged with treason.
- In 1989, A19 successfully challenged the Polish government on their withholding of information on housing, industrial pollution and foreign debt, classified as “Official Secrets”. Such information was subsequently declassified.
- In 1991, ARTICLE 19 submitted a statement to the European Court of Human Rights in the case of *Open Door Counselling and Dublin Well Women Center vs. Ireland* where it argued against the state’s right to withhold information from its citizens about health care facilities, in this case abortion. The Court concluded that the Irish court’s order violated the right to freedom of information.
- In 1993, ARTICLE 19 published *Malawi’s past: the right to truth*, where the organisation set out its position on the right to truth, which it considered to be guaranteed by article 19 of the UDHR.
- In 1995, A19 published *Right to Know: Human Rights and Access to Reproductive Health Information*, which has become a reference work for campaigners on health’s issues around the world.
- In June 1999, ARTICLE 19 published, *The Public’s Right to Know: Principles on Freedom of Information Legislation*, setting out a number of standards in this area, drawn from international and comparative national practice. A primary goal of this document was to help promote progressive and effective freedom of information legislation, particularly in those countries currently developing such laws. The ARTICLE 19 Principles have already been endorsed by a number of individuals and bodies and it is hoped that the UN Special Rapporteur on Freedom of Opinion and Expression recommended them to the UN Commission on Human Rights at its 2000 session.
- In 2002, ARTICLE 19 researched and published its review of RTI campaigning in Eastern and Central Europe, *“Promoting practical access to democracy: A survey of freedom of information in Eastern and Central Europe”* where it insists on the need of an assertive campaign to to maintain pressure on government to get

- legislation passed, but also to educate the general public about the significance of the right to access information.
- From 2001 onwards, ARTICLE 19 has been testing in real context its cutting edge research and publications. One of the first such projects was conducted in Peru on the impact of access to information law on sexual and reproductive health rights in Peru. The approach was subsequently applied in Mexico with young women and men and then extended to access to information on public services and to the corporate sector. Other projects have included Russia, Malaysia and Ukraine, on the right to access environmental information; in Brazil, to strengthen poor communities' access to public information to improve government transparency, Abkhazia, to promote the development of consultative and responsive people-centred decision-making, with a focus on issues of particular relevance to women, in Bangladesh on access to information in the context of disaster prevention.

Some of the publications have included the following:

- Freedom of Information: Humanitarian Disasters and Information Rights; 1 May 2005 <http://www.article19.org/pdfs/publications/freedom-of-information-humanitarian-disasters.pdf>
- South Caucasus: Under Lock and Key; Report on freedom of information and the media in Armenia, Azerbaijan and Georgia. 15 Apr 2005
- Transparency Charter for International Financial Institutions: Claiming our Right to Know <http://www.article19.org/pdfs/standards/transparency-charter-english.pdf>
- Russia: The forbidden Zones, Environmental Information Denied, 2006 <http://www.article19.org/pdfs/publications/russia-the-forbidden-zone.pdf>
- Malaysia: A haze of secrecy, 2007 <http://www.article19.org/pdfs/publications/malaysia-a-haze-of-secrecy.pdf>
- Abkhazia: A Survey of Access to Information, and its impact on people's life, 2007, <http://www.article19.org/pdfs/publications/abkhazia-foi-report.pdf>
- Access to Information as an Empowerment Right (jointly with ACD), 2007 <http://www.article19.org/pdfs/publications/ati-empowerment-right.pdf>
- Ukraine: For internal use only, 2008; <http://www.article19.org/pdfs/publications/ukraine-foi-report.pdf>

ANNEX TWO

PRINCIPLE 2. OBLIGATION TO PUBLISH Public bodies should be under an obligation to publish key information

Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.

Public bodies should, as a minimum, be under an obligation to publish the following categories of information:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

