

# **Freedom of Information in South Asia: Comparative Perspectives on Civil Society Initiative**

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## **1. Introduction**

Information has emerged as a defining characteristic of diverse societies in the contemporary world. Terms such as “information age”, “information technologies”, “information societies”, “information economies”, “information asymmetries” or “information gaps” are being increasingly used in academic and journalistic writings.

An information society seems in competition with an industrial society in terms of better understanding new technologies such as computers and Internet in the backdrop of socio-economic relations. Similarly, “information-endowed” nations and communities are distinguished from the “information-deprived” ones highlighting economic and developmental disparities. It is no co-incidence that information-rich societies are known for wealth generation and quality of life. Although disagreements do exist about the characteristics of “information age” or “information societies”, it is widely recognized that “wealth and power are increasingly being derived from the control – and production – of knowledge”.<sup>1</sup> Information and information-based activities are crucial to such knowledge production and control processes.

Political, economical and technological developments have geared up the process of information generation and now an unprecedented quantity of information is available in public circulation. Since mid-1980s, a wave of democratization swept the globe and opened up societies that were earlier under military dictatorships or under strict communist controls. In the economic domain, the predominance of the neo-liberal ideology and the consequent emphasis on market economy have created pressures in favor of transparency and greater information flows in certain sectors. Global business generally demands economic information to make informed investment decisions and many countries around the world have responded to such demands in selected ways. But most importantly, technological breakthroughs have revolutionized the traditional means of communications and made it difficult for states to control information flows. Thus the

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<sup>1</sup> Sheila S. Coronel (ed.), *Right to Know: Access to Information in Southeast Asia*, published jointly by the Philippine Centre for Investigative Journalism (PCIJ) and the Southeast Asian Press Alliance (SAPA), 2001.

information that is available in the public domain today is simply unprecedented. This general condition, however, hides a number of asymmetries about access to information across various contexts.

A large number of people in developing countries have limited access to means such as print and electronic media whereby they could access authentic information. But the nature and authenticity of information that is made available to them through such channels is determined by the general situation of freedom of information in relation to government and corporate activity. It is also filtered at various levels in view of a variety of political, business or other considerations. Furthermore, the information made available through such channels may or may not be the most relevant to communities, interest groups and individual citizens. This necessitates that, in addition to the information made available through various channels, citizens have the right to access records and information held by the public bodies and corporate entities, which they find relevant to their lives. It is possible to have a situation wherein information about certain domestic activities and foreigners abounds, but citizens lack the most basic information essential for them to make informed choices and improve their quality of life.

In South Asia, generally with a common colonial legacy and different political trajectories, most of the time governmental and corporate functions are performed in a culture of secrecy.<sup>2</sup> Although situation has improved a bit and governments have begun to respond to the demands for openness and transparency in recent years, the region still has a long way to go to achieve the status of “information-rich” or “information-endowed”. However, India has made significant headway in information technology, and the reach-out and variety of print and electronic media in the entire region is growing at an unprecedented pace. Legal and institutional arrangements in different countries in the region remain colonial, which had been essentially designed to control information, and have failed to adjust with the changed circumstances and requirements of being independent and democratic states. Against the background of common historical legacies of certain South Asian countries and the growing importance of information for development and economic growth in the contemporary world, it is important to analyze how civil societies across the region are engaging states on freedom of information and transparency. The nature of such engagements vary, and are explained by a range of factors that relate to different levels of economic

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<sup>2</sup> In Pakistan, for instance, even the reports prepared by various official committees and commissions on corruption are treated as restricted and have been gathering dust in government offices without action. See Roedad Khan, *Pakistan: Dream Gone Sour*, Karachi: Oxford University Press, 1997.p. 153.

development and political trajectories, and the diverse nature of civil society initiatives. The governments seem reluctant to be transparent; and where ever certain steps have been taken, these are essentially in response to either external pressures by the global business or international financial institutions, or to internal pressures by civil society. This paper makes an effort to look into the interplay of these pressures and how the same have impacted the public policies in the region, especially in India and Pakistan.

## 2. Status of Freedom of Information in South Asia

India, Pakistan and Bangladesh inherited certain laws that restrict and control information held by public bodies. The Official Secrets Act 1923 among them is so broad in its application that hardly any information or record escapes its cover.<sup>3</sup> This Act still remains in force in various South Asian countries and, despite repeated demands in recent years, it has not been repealed or amended in a substantial manner to allow greater transparency and access to information.

Other than the official Secrets Act 1923, laws that work against information disclosure and freedom of media in Pakistan include the Security of Pakistan Act 1952, the Maintenance of Public Order Ordinance 1960 and various sections of the Penal Code and the Code of Criminal Procedure. In addition to these, the Rule 18 of Government Servants (Conduct) Rules, 1964 states: “No Government Servant shall, except in accordance with any special or general order of the Government, communicate directly or indirectly any official document or information to a Government Servant unauthorized to receive it, or to a non-official person, or to the press.”<sup>4</sup> Similarly, Article 6 and 7 of the *Qanoon-i-Shahadat* Order (Law of Evidence), 1984<sup>5</sup> impose restrictions of disclosure of information. However, in the case of Ms. Benazir Bhutto vs. Federation of Pakistan,<sup>6</sup> the Supreme Court of Pakistan held that privileges claim under Article 6 and 7 of the *Qanoon-i-Shahadat* Order do not give absolute power to public officials to retain the documents or evidence at their will. Hence, the public interest is to be determined by the courts, and not by the public officials themselves.

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<sup>3</sup> See the Introduction of the “Model Freedom of Information Act, 2001”, published by CRCP in 2001, p. 3.

<sup>4</sup> Government Servants (Conduct) Rules, 1964, Islamabad, Pakistan.

<sup>5</sup> Article 6 reads: “No one is permitted to disclose official record relating to the affairs of the state unless authorized by the head of the department concerned, who shall give or withhold such information as he thinks fit”. On the other hand Article 7 provides that no public official can be compelled to disclose a communication “when he considers that the public interest would suffer by disclosure”.

<sup>6</sup> See NLR 1992 SCJ, p. 606.

In India, the Central Civil Service Rules, 1964 strengthen the Official Secrets Act 1923 by prohibiting government servants from giving out any document to anyone without authorization. In addition, Section 123 of the India Evidence Act 1872 does not allow evidence from unpublished official records without authorization by head of the relevant department. On the other hand, Section 124 of the Act reads: “No public official shall be compelled to disclose communications made to him in official confidence, when he considers that public interest would suffer by disclosure”.<sup>7</sup>

In Sri Lanka, it is the Official Secrets Act No. 32 of 1955 that restricts disclosure of information and records held by public bodies.<sup>8</sup> Other laws that restrict information disclosure include Press Council Law No. 5 of 1973, Official Publications Ordinance No. 47 of 1946, Public Security Ordinance No. 25 of 1947 and Prevention of Terrorism Act No. 48 of 1979.<sup>9</sup>

These three countries had also inherited bureaucracies, management styles and organizational cultures, which exclude public participation, incidence of transparency and accountability to the people. These too have not been changed much over the last decades since independence and often work to actively or passively resist changes that are attempted or made for transparency and information disclosure. This explains that various interpretations through judicial decisions and sometimes even policy decisions have not been effectively implemented by the bureaucracies in different countries.

In Pakistan, for instance, government departments and ministries are required under government rules to publish annual reports. However, in many cases, such reports are either not published or they are published in such a small number that most people hardly get to know about them. Their content is often deceptive and lacking substance – aimed at hiding information instead of disclosing it. Their circulation is also generally restricted; and in many cases, most of the reports remain staked in the store-rooms for years. As a matter of fact, these reports are prepared with the aim of just meeting the formal requirement under the rules and not really to promote transparency about the respective ministry or department.

Nevertheless, it is through judicial decisions and interpretations of various constitutional provisions that the right to information received constitutional

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<sup>7</sup> *Global Trends on the Right to Information: A Survey of South Asia*, by Article 19, CHRI, CPA and HRCF, July 2001, p. 65.

<sup>8</sup> *Ibid*, p. 132.

<sup>9</sup> *Ibid*, pp. 132-134.

justification in certain countries of South Asia. In India, for instance, the Supreme Court located the peoples' right to information within the ambit of their fundamental rights to life and liberty and freedom of speech and expression.<sup>10</sup> Similarly, the Supreme Court of Pakistan has ruled that the freedom of information is a pre-requisite for the fundamental right to freedom of speech and expression, which is enshrined in Article 19 of the Constitution.<sup>11</sup> Such judicial decisions and interpretations of constitutional provisions, however, have not led to legislative measures by relevant legislative bodies in India and Pakistan. Instead, such developments took place only when domestic political pressures built-up or when it became clear that lack of action would harm economic interests of the country.

It was in India that, in view of advocacy efforts by certain civil society groups, first right to information laws were enacted by the states of Tamilnadu and Goa in 1997. Other states that followed suit include Karnataka, Maharashtra, Delhi, Assam and Rajasthan. The Union of India passed the Freedom of Information Act in December 2002.<sup>12</sup> Pakistan is the only other country in South Asia that promulgated the Freedom of Information Ordinance in October 2002. This is, however, applicable only to the federal subjects and does not cover the provincial subjects. No province in Pakistan has so far enacted any law to guarantee freedom of information.

Most of these laws suffer from serious flaws and inadequacies. In general, these exempt a large number of government records, exclude private sector from their preview and are weak in providing efficient implementation mechanisms. Most importantly, these laws do not override the existing laws, which restricts their mandate. Nor has the Official Secrets Act 1923 been amended or repealed to allow greater freedom of information. However, these are widely seen as positive developments and a significant break from the past culture of secrecy in which even the minimum access of citizens to official records was subject to official discretion. In fact, these laws introduce a cultural shift, whereby citizens can demand information, while relevant departments have to justify the denials if they opt for rejecting information requests.

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<sup>10</sup> S.P. Gupta vs. Union of India --- 149) case.

<sup>11</sup> Nawaz Sharif vs. President of Pakistan, PLD 1993 SC 473.

<sup>12</sup> *Times of India*, December 17, 2002.

### **3. Nature of Civil Society Initiatives and their Impact**

As indicated above, different factors have contributed to the enactment of freedom of information laws in different countries. In the UK, for instance, it was the change of government and the coming into power of the Labour Party that paved the way for the Freedom of Information Act 2001. In certain East Asian and East European countries, it has been closely linked with restoration of democratic systems. In the case of East Asian countries, additional pressures came from the global business for transparency and more economic information.<sup>13</sup>

In Pakistan, the demand for freedom of information and transparency in government departments basically emerged as a result of growing concern about corruption in late 1980s and 1990s. First such initiative was taken in 1990 when Professor Khurshid Ahmad, a Jamaat-i-Islami Senator, moved a private bill on freedom of information in the Senate. This, however, never received any serious attention of the house and was killed by the standing committee. Later in 1994, Malik Kasim, a leading politician and the then Chairman Public Accounts Committee, also realized the importance of freedom of information and took steps to draft a freedom of information bill. This effort too failed because of bureaucratic resistance and the early dismissal of the government.

Another significant initiative was taken by Mr. Fakhruddin G. Ibrahim, the law minister in the caretaker government in 1996-97, who drafted a Freedom of Information Ordinance. However, he resigned before the promulgation of the Ordinance by President Laghari in early 1997. It is widely believed that the original draft of Mr. Ibrahim had been toned down after his resignation to restrict the scope of citizens' access to information. Despite that it was a very weak law in a number of respects, it was allowed by the following elected government of Nawaz Sharif to lapse, as it was never produced before the Parliament for enactment. It was despite the fact that government had declared accountability and anti-corruption as its high priority agenda. Apparently the Ordinance did not suit bureaucratic interests, while it was easier to just let it lapse in the absence of any significant awareness in the civil society or general public about its significance. Not surprisingly, the lapse of Freedom of Information Ordinance 1997 went almost totally unnoticed. Hardly was any protest or criticism reported on its lapse from any corner in the media.

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<sup>13</sup> Sheila, op. cit.

Consumer Rights Commission of Pakistan (CRCP) was the first civil society group that started demanding freedom of information from the year 2000 onward. In the course of its work for consumer protection, it had confronted serious information-related problems and had become convinced that freedom of information was a pre-requisite to protect consumer rights. For instance, it had failed to access information held by certain public bodies [e.g. Capital Development Authority (CDA) and Pakistan Council for Research in Water Resources (PCRWR)] about the quality of drinking water in Islamabad, which is still treated as confidential. CRCP later drafted a Model Freedom of Information Act in 2001 and got involved in sustained advocacy effort for its enactment.

In the meanwhile, sensitivity about the problem of corruption had substantially increased against the background of worsening economic difficulties. The poor economic performance had also made the country substantially dependent on IFIs for development loans and balance of payment support. In 2001, the Asian Development Bank (ADB) included enactment of freedom of information law as one of its conditions for the release of loans. It is against this background the current Freedom of Information Ordinance was promulgated by the military government in October 2002. Later, the National Accountability Bureau (NAB), while working on the anti-corruption strategy, realized the importance of freedom of information and became an advocate of strong freedom of information regime in the government.

In short, the enactment of freedom of information in Pakistan can be attributed to a number of domestic and international pressures involving greater concern about corruption, advocacy by CRCP and certain other civil society groups, and pressures by the IFIs. While the ADB conditionality might have played an important role in terms of getting the Ordinance promulgated, it is the CRCP that has worked in a sustained manner since 2000 to create awareness and advocacy. Over the last year, it has also been engaged in efforts to get the Ordinance fully implemented through notification of Rules of Business and other steps by the government, especially in terms of improving record-keeping systems and staff training. Other civil society groups that have worked for freedom of information include Liberal Forum Pakistan, Centre for Civic Education (CCE) and Human Rights Commission of Pakistan (HRCP).

Unlike Pakistan, the first initiatives for freedom of information in India came from the grass-root movements. The Mazdoor Kisaan Shakti Sangathan (MKSS) emerged as a grass-roots movement in 1990 in Rajasthan to struggle for minimum wages and transparency in employment records and wage rolls.<sup>14</sup> Hence, the right to information and right to survival became united in its struggle. This movement had significant impact and forced the state government to take measures for increased transparency and access to information. A watershed development occurred in June-July 1997 when MKSS staged a 53-days long dharna in Jaipur, which forced the state government to issue a gazette notification whereby members of the public were entitled to a certified copy of official documents at the panchayat level at a nominal price. The MKSS was also a major driving force behind the formation of the National Campaign for People's Right to Information (NCPRI) in late 1990s.

It is as a result of grass-roots movements like MKSS that freedom of information has been a significant issue in the political domain in India. In late 1990, the then Prime Minister, Mr. V. P. Singh, had appointed a Cabinet Committee to study means by which freedom of information could have been promoted. The Committee, however, was dissolved on August 27, 1990 before it could issue a report. On April 9, 1990, the National Front government had also promised to amend the Official Secrets Act for greater transparency and access to information.<sup>15</sup> Although no concrete steps could be taken throughout 1990s, it is important to note that the issue was on the political agenda and, as the time passed, it assumed higher priority in view of civil society pressures.

In 1997, the government setup a working group under the chairmanship of a consumer activist Mr. H. D. Shourie to draft a bill for right to information. The draft bill prepared by the Working Group under Mr. Shourie became a basis for another bill that was drafted in 2000 and presented in the Parliament. Later, this bill was debated in the cabinet and the two houses of the Parliament, and was finally enacted in December 2002. It has been a subject of intense debate at various forums in India including in the government. This is in sharp contrast to the situation in Pakistan where the drafting and promulgation of Freedom of Information Ordinance 2002 did not involve more than a few people in the government. As a result, there is a

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<sup>14</sup> Bela Bhatia and Jean Dreze, *Campaign in Rural India* (Working Paper), Berlin: Transparency International, September 1998.

<sup>15</sup> "Freedom of Information and Expression in India", PUCL Bulletin, April 1991.

greater awareness about the need of freedom of information in India than in Pakistan.

#### **4. Conclusions**

Citizens' access to information and records held by government bodies and corporate entities, subject to certain minimal exemptions, is crucial to achieve freedom of information and develop 'information-endowed' societies and economies. In the contemporary world, it is no coincident that 'information-endowed' countries perform better in economic terms. It is essentially because information and knowledge have become substantial factors to explain growth, wealth and power.

The countries of South Asia, however, perform poorly in terms of freedom of information. Culture of secrecy is still predominant and legislative developments have failed to keep pace with requirements of building participatory, transparent and accountable systems of governance. Various kinds of pressures, however, have lately begun to make their impact in terms of pushing the governments to realize that greater transparency is required to meet the emerging challenges of governance and globalization.

The problem of corruption has witnessed unprecedented increase in the last two decades and it coincides with opening up of markets for foreign investors and products across the region. The inequalities, uncertainties and upheavals that the liberalization process causes are also seen as contributory factors to increased corruption in various societies. Civil societies and governments across the region are trying to confront this challenge of massive corruption. Their responses have varied between simple administrative and traditional type of legislative measures aimed at increasing punishments and strengthening anti-corruption departments to institutional reforms that are appropriate for the globalization context. It is widely realized that while it is important to strengthen traditional accountability and anti-corruption systems, greater transparency in public departments is essential for citizens to play an effective role and protect their rights against corrupt practices that hurt their lives and livelihood options.

More information and transparency is also needed in the private sector, which is fast growing in the face of states that are withdrawing from economic activities and provision of most public services. In such a context, it is important that governments not only play their regulatory roles effectively but also provide a transparent environment in which citizens

could make informed choices. Conversely, private sector, especially the global business, also requires greater transparency and access to economic information to compete and make informed investment decisions.

Realizing the importance of freedom of information for good governance and global businesses, IFIs have also been pushing for it in the member of states. IFIs have not only themselves adopted information disclosure policies but have also included enactment of freedom of information laws in their conditionalities for loans. They, however, have been more influential in cases where member states were more dependent on borrowing from them.

Like others, South Asian countries have been influenced by all above factors, albeit to varying degrees, depending on specific domestic contexts. However, only India and Pakistan have so far enacted freedom of information laws. In India, significant grass-roots movements have emerged to demand access to information, and have fed into the political process to achieve enactment of suitable laws. This has been possible against the background of established democratic system in India, which allows greater spaces for engagement by civil society groups. Pakistan, on the other hand, did not witness any significant demand from the civil society in 1990s. Certain initiatives emerged from within the government with the aim of combating corruption but failed to gain ground in view of bureaucratic resistance and lack of active support from the civil society. Over the last few years, however, the situation has changed, as certain civil society groups like CRCP have begun to actively advocate for it.

Freedoms of information laws in both India and Pakistan have a number of common features. They include a lots of exemptions, exclude private sector from their preview and are week in providing implementation mechanisms. In addition, neither India nor Pakistan has repealed the Official Secrets Act 1923 to allow greater freedom of information. Old attitudes persist and bureaucracies are hugely resistant to change. The constituency for reform is still small and must grow and become more proactive to achieve more substantial and effective outcomes.