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# RIGHT TO INFORMATION, WHISTLEBLOWING AND PREVENTING CORRUPTION

LAW & SOCIETY TRUST

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## *Editor's Note .....*

The November Issue of the LST Review returns to an agonisingly familiar topic, namely the Right to Information. It examines relevant facets of this topic from a domestic as well as from a comparative perspective.

The first paper looks at a variety of concerns that are still extremely relevant to the prevention of corruption and the encouragement of responsible administration in Sri Lanka. While noting the judicial advances made in establishing the right to know within the framework of the constitutionally guaranteed freedom of expression and publication, the analysis reiterates the continued need for a right to information law.

Its subsequent implementation in a manner that negates the culture of secrecy, (which provides a convenient cover for corruption on an unprecedented scale in the country), is stressed.

The need for the demand for an information law to be taken from city based discussions to far more broad based campaigns involving not only the media, activists and academics but also trade unionists, rural and community based activists and indeed, all tax payers who wish to ensure that their tax moneys are properly utilised by the Government, is identified as being key to this process.

It is to be deplored that while Sri Lanka is still struggling to ensure that elements of the basic right to information are incorporated into the legal and regulatory framework of the country, developments in other countries have far surpassed such initial struggles.

This is borne out by the second and third papers published in the Review which provide valuable fact based comparative insights on the extensive working of information laws in relation to the specific areas of encouraging whistleblowing and promoting public accountability in overseas development assistance.

Both topics are of tremendous importance to us. There is no doubt that the lack of whistleblower protection in the public as well as the private sector has led to the decrease of public/private good governance. One example where a Sri Lankan company has adopted whistleblower protection for its employees is pointed to, as an

exemplary precedent in the country-specific paper in the Review. However, commendatory as it is, this is an isolated example.

The comparative paper which follows thereafter looks at whistleblower protection legislation in many parts of the world from a practical approach and makes the point that the demand for such legislation is increasingly, being made not only by trade unionists but also by national and international policy makers engaged in designing anti-corruption policy solutions.

This paper contains an analysis of the United Kingdom's Public Interest Disclosure Act as a pertinent case study.

The concluding paper looks at the importance of ensuring the accountability of international, bilateral and regional donors. This is also a subject of vital importance to Sri Lanka given that the demand for information is applicable not only to entities exercising public functions but also to donor agencies whose decisions affect the rights of thousands of people.

One recent example was the manner in which many landowners whose properties were sought to be acquired by the Road Development Authority (RDA) for the Southern Expressway, complained of difficulties of obtaining information and documentation not only from the RDA but also from key donors of the Expressway project, including the Asian Development Bank (ADB).

The post tsunami aid scenario was also a fertile environment within which complaints of obstruction to requests for information, not only from government bodies but also donor agencies, were evidenced.

Generally, ensuring access to information held by donor agencies that impact on peoples' rights warrants a specific detailed study in Sri Lanka.

*Kishali Pinto-Jayawardena*

# RIGHT TO INFORMATION; ILLUSIONARY COURT VICTORIES AND ITS CONTINUING DENIAL

***Kishali Pinto Jayawardena****

## Introduction

This short paper will look at recent developments in Sri Lanka that are relevant to the right to information including a decision by Sri Lanka's Supreme Court, namely *Environmental Foundation Ltd v Urban Development Authority of Sri Lanka and Others.*[1] This was an instance where the judges critically considered the right of public access to the contents of an agreement entered into between the Urban Development Authority (UDA) and a private company (E.A.P. Networks (Pvt) Ltd relating to the proposed development of Colombo's historic seaside promenade, the Galle Face Green.

This decision, referred to popularly as the *Galle Face Green Case*, will be discussed in the context of previous case law on the right to know.

However, I will make the point that, despite occasional court victories as exemplified by these cases, the impact of these decisions have not been evidenced in public life. The right to information in Sri Lanka remains hedged about by practices of secrecy which are extremely useful for encouraging corruption in the public sector. A far more vigorous campaign focussing on the enactment of a law on right to information (approved by the Cabinet in 2003) is argued to be essential to displace this culture of secrecy.

The relevance of whistleblower protection will be considered both as contained in the draft law and in relation to an innovative policy adopted in one of Sri Lanka's key private insurance companies.

## Pertinent Facts in the *Galle Face Green Case*

The case arose out of newspaper reports in December 2003 consequent to the change of political administration in 2001,[2] highlighting the handing over of control of the Green by the UDA to a private company in order to develop a 'mega leisure complex.'

The Petitioner, (a public interest organisation), upon being apprised of these reports and in particular, a half page newspaper notification by the UDA titled 'More Transparent Than Glass" whereby it was sought to dispell fears that there would not be free and uninterrupted public access to the Green, wrote to the two entities requesting that they be allowed access to the agreement entered into between the parties. However, the UDA replied that it was not in a position to forward a copy of the agreement while there was no reply from E.A.P. Networks (Pvt) Ltd.

The Petitioner came to court on this refusal, alleging that it amounted to a denial of the right to information, (as being implicit in the right to freedom of speech and publication guaranteed in Article 14(1)(a) of the Constitution) and was therefore, unconstitutional.

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[1] SC (FR) Application 47/2004, SCM 28.11.2005. per Chief Justice Sarath Silva with Justices N.K. Udalagama and N.E.Dissanayake agreeing

[2] This refers to the United National Front coming into power in December 2001

Imaginatively, the fact that the UDA itself by its newspaper notification, had brought the matter into the public domain was argued to result in a specific right arising to the Petitioner to have copies of the relevant documents (including the vesting order, the agreement and the approved plans for development) made available to it.

## The Nature of the Information Right under Article 14(1) (a)

In its response, the Court was of the view that the bare denial of access to official information by the UDA was an infringement of the Petitioner's rights under Article 14(1)(a). In other words, it was ruled that, for the rights in Article 14(1)(a) to be meaningful and effective, there is an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It was opined that this should necessarily be so where "the public interest in the matter outweigh the confidentiality that attach to affairs of State and official communications."

Along with the Court finding a violation of Article 14(1)(a), the refusal to release the information requested for in the circumstances of the case was also ruled to be an arbitrary exercise of power in the absence of specific reasons supporting such refusal thereby infringing Article 12(1) of the Constitution.[3]

Though the judgement itself does not discuss previous case law in its reasoning, it is opportune to refer to the background of previous attempts to expand the constitutional right to freedom of speech, expression and publication in a manner as to include the right to information.

The relevant Sri Lankan Constitutional Provision states in Article 14(1) (a), that;

> Every citizen is entitled to the freedom of speech and expression, including publication.

Earlier pronouncements of the Supreme Court had held that a right to information existed within the right of free speech.[4] In *Fernando v Sri Lanka Broadcasting Corporation*[5] the Court observed that freedom of speech could be invoked in combination with other freedoms, and that freedom of speech extends to and includes implied guarantees necessary to make the express guarantees meaningful. Thus it may include the right to obtain and record information, (through interviews and tape recordings), where such information was necessary for the exercise of the freedom of speech. [6] The judicial assertion that this right may even extend to include "a privilege not to be compelled to disclose sources of information if that privilege is necessary to make the right to information fully meaningful" may be noted as being particularly useful to the media

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[3] A further order was made declaring that the purported agreement entered into by the UDA leasing the Galle Face Green to the private company was *ultra vires* and of no force or avail in law given that there was no evidence before court to show that the Green was, in fact, vested in the UDA and that the UDA had the requisite power to enter into such an agreement.

[4] *Visuvalingam and others v Liyanage and others*, [1983] 2 Sri LR 311

[5] [1996] 1 Sri LR 157. Per Justice MDH Fernando.

[6] In this instance, the right of a participatory listener not to have a broadcasting programme abruptly stopped by the authorities was upheld under the right to frredom of expression. It was however judicially opined that the right of a listener *qua* listener alone (in purely receiving information) belonged under the right to freedom of thought guaranteed by Article 10 of the Sri Lankan Constitution rather than within the ambit of the right to freedom of speech in Article 14(1)(a). This judicial reasoning in regard to the right to receive opinions and information (as subsumed in the right to information, *simpliciter*) being a corollary of the freedom of thought, was further developed in the Determination of the Supreme Court in 1997 (*In Re The Broadcasting Authority Bill*, S.D. No 1/97 – 15/97) when a bill seeking to establish a non independent broadcasting regulatory body was determined to be unconstitutional.

In the context of these cases, attempts made by civil society groups to include freedom of information in the constitutional right to expression have been ongoing for the past several years. It is interesting that clause 16(1) of the Draft Constitution of 2000[7] has been formulated in such a manner as to include the right to information within the right to expression and publication as would be clear below.

> Article 16(1) Every person is entitled to the freedom of speech and expression including publication and this right shall include the freedom to express opinions and to seek, receive and impart information and ideas either orally, in writing, in print, in the form of art or through any other medium.

It must be noted that there has been some opposition to these attempts to bring in the right to information within the right to expression. For example, the Law Commission of Sri Lanka, in its previous term of office, had opined that the right to "seek" information should not be included within the right to expression.[8] Such an objection had been advanced seemingly due to fears expressed by the Commission that this innovation may be regarded as an attempt to introduce a new right to information, as if it were, by 'a side wind', given that Sri Lanka presently lacks a Freedom of Information Act. The Law Commission was specially concerned about confidential information.[9]

However, these fears are without adequate justification. As evidenced in the jurisprudence of the European Court relating to Article 10 in the European Convention on Human Rights (ECHR), the right to receive information has been unequivocally interpreted to exclude the right to compel the state to reveal secret information. Thus, it has been remarked 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. Article 10, does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, not does it embody an obligation on the Government to impart such information to an individual."[10]

**Does an Incorporated Body possess Rights in terms of Article 12(1) & 14(1)(a)?**

A furthe issue arose in the Galle Face Green Case which may be ancillary to the general debate on freedom of information but is nevertheless important in terms of the manner in which Article 14(10(a) of the Constitution may be utilised, particularly in freedom of expression litigation.

This question was whether the Petitioner had standing to come before the Court as an incorporated company in terms of the applicable constitutional provisions?

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[7] The enactment of a vastly improved rights chapter in the Draft Constitution has been delayed since 2000 due to political squabbling over other clauses of the draft relating to devolution structures and powers of the President.
[8] Comments of the Law Commission of Sri Lanka on the Draft Constitution of 2000, end note 30, at page 25
[9] *Ibid.*
[10] *Leander v Sweden* , [1987] ( 9) EHHR, 433 at para 74. See also *Gaskin v UK* [1989 (12) EHHR, 36

Where Article 12(1) was concerned, it was observed by Court that the term "persons"[11] in that constitutional article had been judicially interpreted as not being restricted to "natural" persons but also extending to all entities having legal personality. [12]

Insofar as Article 14(1) (a) was concerned, the constitutional article has been differently framed, referring to not "persons" but""citizens" and thus envisaging a different if not more difficult question as to whether a company could claim rights under this constitutional article.

However, here too, the objection that the Petitioner's incorporated status prevented it from claiming the protection afforded to "citizens" was summarily dismissed with the judicial observation that this "distinction does not carry with it a difference which would enable a company incorporated in Sri Lanka to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1)."

This remains however a difficult question given the explicit formulation of Article 14(1) and particularly so, in view of rulings which had earlier been given by the Supreme Court disallowing the rights of a company to come before the Court on free speech issues.

These included *Fernando v Liyanage*[13] where the Supreme Court in ruling that a company is not a "citizen", took away the right of media companies and their shareholders to come before the Court on free speech issues. This decision was affirmed in *Neville Fernando and Others v Liyanage and Others*[14] where the judges unequivocally held that a company, not being a citizen, cannot complain of infringement of fundamental rights and that its shareholders too, cannot complain of a violation since they have not suffered any distinct and separate injury such as to entitle them to allege infringement of their fundamental rights. In *Visuvalingam and Others v. Liyanage and others*,[15] the majority agreed with this view.

In the instant case, the Court did cite precedent which included *Visuvalingams' Case*[16] (in which a minority supported the expansion of Article 14(1) so as to include its application to companies) well as *Leader Publications (Pvt) Ltd v Ariya Rubasinghe, Director of Information and Competent Authority*, [17]

In the latter case, leave to proceed had been granted in terms of Article 14(1) (a) and (g) as well as Article 12(1) but the question of the Petitioner's status as an incorporated company had not been raised by the Respondents as a factor precluding declaration of a violation of a right in terms of Article 14(1). In any event, the Court had limited itself to a declaration that the appointment of the Competent Authority in issue in the case, was a nullity.

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[11] Article 12(1) reads: All ***persons*** are equal before the law and are entitled to the equal protection of the law. (emphasis mine)
[12] *Smithkline Beecham Biologicals S.A. and Another v State Pharmaceutical Corporation of Sri Lanka and Others* [1997] 3 Sri LR, p 20
[13] (SC 1161/82 and 134/82)
[14] [1983] 2 SRI LR 214
[15] [1983] 2 Sri LR 311
[16] *Ibid*
[17] [2000] 1 SriLR, p 265

In this context, a fuller discussion of the legal question as to whether companies can claim rights in terms of Article 14(1) may have been useful in the *Galle Face Green Case.*

## Enactment of a Right to Information Law

Recent efforts to enact a Right to Information Law resulted in a draft, formulated by a committee of senior government officials with the input of civil society and the media[18] during 2003. This draft was thereafter approved by Cabinet. Its enactment has however become delayed due to the lack of political will on the part of the current Government.

The principles on which a broad consensus was reached, included the following;

a) Standard as to Maximum Disclosure; The Act establishes a presumption in favour of disclosure on the part of all public bodies and prevails over existing laws restricting information;

b) Standard re Obligation to Publish (proactive measures). An obligation is imposed on Ministries and Public Authorities to make public records and information of a particular kind coming under its purview within certain stipulated time periods. The duty to give reasons for decisions is automatic and not upon request. The obligation to make public includes policy formulation discussions as well, the latter however being subject to certain safeguards so as not to hinder the process;

c) Standard re Promotion of Open Government. ie; public bodies are required to actively promote open government;

d) Standard as to Exceptions; Access to official information is subject only to narrow and clearly drawn exceptions (particularly with regard to national security), some of which are subject to a substantial harm test and a public interest override;

e) Standard re Processes to Facilitate Access; provision for requests for information to be processed fairly and rapidly and for independent review of refusals which allows appeal to a Freedom of Information Commission and finally to the appellate court. Arbitrary refusals are subject to disciplinary action.

f) Standards as to Costs; costs for requests for information is reasonable.

[18] See Law and Society Trust Review, Volume 14 Joint Issue 192 & 193, October and November 2003. The draft was finalised by a committee comprising the Attorney General, the Legal Draftsman, the then Secretary to the Ministry of Justice and representatives of the media, civil society and academia. It applies to information in the hands of public bodies and defined both information and public bodies broadly, focussing on the type of service provided rather than formal designations, in line with international standards. This draft must be distinguished from a draft law prepared by the Law Commission in 1996 which had no media or civil society input and which was strongly critiqued as containing exceptions to the right which would have defeated the very purpose of the law, if enacted.

The draft envisaged the right to obtain information relating to projects by government authorities above a particular monetary value.[19]

## Protection of Whistleblowers

Importantly for the purposes of the current debate, it stipulates a limited extent of whistleblower protection.

Clause 34 states that:

> Notwithstanding any legal or other obligation to which a person may be subject to by virtue of being an employee of any public authority no employee of a public authority shall, be subjected to any punishment disciplinary or otherwise for releasing disclosing any official information which is permitted to be released or disclosed on a request submitted under this Act so long and so long only as such employee acted in good faith and in the reasonable belief that the information was substantially true and such information disclosed evidence of any wrong doing or a serious threat to the health or safety of any citizen or to the environment.

This provision represented a compromise between those members of the drafting committee who were cautious about what they percieved to be the dangers of such a provision being misused by disgruntled public service employees and those who argued that the provision was essential to any modern law incorporating right to information standards.

However a critique could be made that this section is too narrowly worded.[20] Currently, the section protects only disclosure relating to "official information which is permitted to be released or disclosed on a request submitted under this Act". This seriously restricts the protection afforded – it adds little to the protection generally afforded by the introduction of the Act. Best practice whistleblower provisions require that persons should be protected from prosecution for disclosing "*any information* so long as such employee acted:

(a) in good faith; and
(b) in the reasonable belief that:

(i) the information was substantially true; and
(ii) such information disclosed evidence of any wrongdoing or a serious threat to the health or safety of any citizen or to the environment."[21]

Apart from the draft provision in the Act, it is encouraging that some private companies in Sri Lanka are now putting into place internal policies encouraging practices of responsible 'whistleblowing."

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[19]Clause 8 of the Freedom of Information (FOI) Bill specifies an obligation on the relevant Minister/government body to divulge documents in relation to foreign funded projects (where the value exceeds one million united states dollars and locally funded projects (where the value exceeds five million rupees). The information would be released according to guidelines prescribed by the FOI Commission to be established in terms of the law.

[20] The New Delhi based Commonwealth Human Rights Initiative has indeed, made this critique in a general reflective essay on Sri Lanka's draft law.

[21] *Ibid.*

One prominent insurance company for example, has declared a Whistleblowing Policy whereby its intent is to "maintain high standards of corporate governance." The policy is intended to serve as a channel of corporate fraud risk management.and recognize the duty of each and every employee to speak about their genuine concerns in relation to activities which they feel are wrongful or illegal or otherwise harmful to the interests of the company, its employees, customers and all other stake holders. (here in referred to as "legitimate concern/s on wrong doings." The policy allows any employee who has a legitimate concern on an existing or potential wrong doing, done by any person within the company, to come forward voluntarily, and bring such concern to the notice of an independent designated authority.

Relevantly, the company is committed to ensure that such legitimate concerns of employees on wrong doings are taken seriously and investigated. It is pointed out that such legitimate disclosures will enable the company to deal with such matters early, resolve effectively and as much as possible, within the bounds of the company itself. Employees are encouraged to raise any matter which they genuinely believe, constitute a potential or existing wrong doing such as; breach of the standing instructions and/or Code of Ethics of the company. Failure or breach to comply with any legal/regulatory obligation. a miscarriage of justice, Financial malpractice and improper accounting, danger to the health and safety to any body at work, any fraudulent or malicious activity involving company assets or environment, concealing of information in relation to any of the above or any other matter which the employee feels are important for disclosure, provided it has a negative effect or potentiality of a negative effect to the company, and not covered above.

The employee's legitimate concern on the wrong doing must be raised in writing and addressed to the Chairman of the Audit Committee. The employee raising the legitimate concern on the wrong doing, will receive a letter of acknowledgement of his concern and the Audit Committee will decide on the best course of action to follow in dealing with the concern, ensuring at all times the protection of the identity of the employee making the disclosure.

Importantly there is an acknowledgement that anyone raising a concern in the genuine belief that a wrong doing has occurred or about to occur will not be penalized in any way, if after the full investigation, it is found that the concern was a genuine mistake. Any form of reprisal against anyone who in good faith has raised a concern is forbidden and will itself be regarded as a serious offence to be dealt with, under a disciplinary procedure.

In general, while the efficacy of the adoption of such policies will depend on the *bona fides* of the company concerned, there is no doubt that such a practice points to a good example to be followed by both the private and the public sector in Sri Lanka.

## A Change in Advocacy Strategy is Needed for the Enactment of an Information Law

The recent enacting of India's Right to Information law covering the Central Government, the States and the Union Territories is a commendable development. State Information Commissions will be set up in all States as appellate bodies to review the refusal of Public Information Officers (PIOs) in order to facilitate the operation of the Act. India needs to be commended for its passing of a Right to Information Law which will draw upon the considerable jurisprudence in that country in regard to the right of every citizen to ask for information from public bodies in relation to processes of governance.

As any person even remotely acquainted with the Indian right to information movement is aware, the campaigns took place at the extreme grassroots level where women activists demanded from their local government councillors, information as to how the budget allocations were being spent. It was not an elitist formation at central level, limited to the media and academics. Instead, the movement was truly vibrant, resulting in magnificent gains in village communities where, in some instances, politicians and public officials were compelled to resign upon exposure of corrupt practices. Most States enacted their own freedom of information laws that were well utilised thereafter.

In contrast, the campaign to enact a right to information law in Sri Lanka has been largely confined to elite circles. There is no doubt that this has to change. We need to see the need for an information law being advocated by those to whom the lack of information about the way that their public funds are being spent, actually matter rather than purely by those who engage in these exercises as liberal democratic experiments. Both approaches should supplement and complement each other. Without the first requisite of people pressure, the second approach has the lamentable possibility of being caught up in political winds of change which, indeed, is what has happened to the 2003 draft on Sri Lanka's Right to Information law.

Instances where lack of access to information held by authorities exercising public functions has impacted extremely negatively on the rights of ordinary people in the country can be easily identified. For example, difficulties in obtaining the most basic information(from the Government as well as major lenders including the Asian Development Bank (ADB), has had a tremendously negative impact on major development projects in Sri Lanka, including, for example, the Matara-Colombo expressway (Southern Expressway). While landowners with the necessary financial and social support went to court[22] – and indeed, are continuing to invoke legal relief, they are outnumbered by thousands of others (primarily farmers, self employed persons and the like) who were not so fortunate.

Then again, lack of information relating to the utilisation of tsunami aid at all levels of the government process and resultant allegations of corruption as evidenced by the reports of the Auditor General indicates another disturbing scenario as does the alarmingly clear disclosures of corruption within the armed services, particularly in the area of procurement.

The private sector, ( in its eagerness to put into place acountable systems of governance) as well as the media are, of course, good partners in these efforts to enact a right to information law. Concerns of the media industry in relation to the lack of an information law have been expressed in the following manner;

> Good governance requires that rules, regulations, reports, public papers etc should be easily accessible and not denied on some pretext or the other. In this context, the need for a Sri Lankan Freedom of Information Act, both with regard to the public in

[22] The seminal decision in this regard is *Heather Mundy vs Central Environmental Authority and Others* SC Appeal 58/03, SC Minutes of 20.01.2004. SC Appeal 58/2003, judgement of Justice MDH Fernando with Justices Ismail and Wigneswaran agreeing. The Court declared a rights violation of the Petitioner in that she had not been given adequate notice before her land had been acquired for the Southern Expressway. The petition and supplementary documents disclosed the appalling extent to which villagers, in areas earmarked for acquisition for the Expressway, had been unable to obtain documentation and information affecting their rights.

general and the media in particular, is very pressing. Quite often, journalists find it difficult to have access to government information or even to confirm a story or obtain a quote from a responsible officer. Press officers of Ministries/Government Departments are usually entrusted with the job of promoting the personal image of a Minister or a Deputy and rarely have any knowledge themselves of the intricate workings of these Ministries/Departments. The result sometimes is inaccurate reporting which results in clarification being sent subsequently after the damage is done.

This trend has intensified in recent times. Section 3 of Chapter XXXI of Volume 1 and Section 6 of Chapter XLVII of Volume 2 of the Establishment Code prohibits public officials from disclosing any information to the media. Although this has been in statute books for decades, it has never been implemented. However in February 2000, the Cabinet decided to implement this section and gave wide publicity to that effect. This frightened public servants from even confirming or denying information already in the hands of journalists and even from giving initials of public servants or from giving statistical information without the sanction of the Secretary of the Ministry, even in instances where the media plays a public interest role in highlighting a malaria epidemic for example.[23]

## Conclusion

Decisions by Sri Lanka's courts or, for that matter, reports by commissions and committees on specific corrupt deals, (though exceedingly useful in at least bringing the issues to the forefront), will not suffice to address this problem. Instead, a complete overhaul of regulations and practices relating to access to information in the public sector is imperative in order that responsible exposure may act as an effective deterrent. This should be accompanied by a comprehensive right to know law and its effective implementation.

Needless to say, such a right to information law, though not a magic wand to wave away the ills that currently beset public administration, is a required first step in that regard.

[23] See Briefing Paper by the Editors Guild of Sri Lanka on *The Need for Media Law Reform in Selected Areas*, April 2000.

# WHISTLE BLOWING AND CORRUPTION; AN INITIAL AND COMPARATIVE REVIEW

***Kirstine Drew*** [*]

## Preface

Trade unions have long been concerned with the protection of employees who expose malpractice or misconduct in the work-place. So-called 'whistle blowers' – referred to as *bell-ringers* in the Netherlands and *lighthouse keepers* in the USA as[1] – act as guardians of the public interest.

It is increasingly recognised that whistle blowers have an important role to play in combating bribery and corruption. As a result, in recent years, national and international anti-corruption policy agendas have begun to incorporate measures aimed at encouraging and protecting whistle blowers.

The aims of this briefing paper are two-fold. First it seeks to underline the need to have legislation in place that protects, and therefore encourages, whistle blowers. Secondly it aims to provide a critical overview of current *national* and *international* provisions for protecting whistleblowers.

Overall, it is hoped that the information compiled will provide a useful resource for *trade unionists* – as well as representatives of *civil society* and the *private* and *public* sectors - who work in the area of whistleblower protection.

## Whistle blowing, corruption and the public interest

### *Understanding whistle blowing*

The protection of whistle blowers – those who expose misconduct or malpractice in the public interest – is an issue that has traditionally been extremely important to trade unions who are concerned with the protection and well-being of workers. However, in recent years, encouraging, and therefore

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[*]This paper was written for UNICORN, a global trade unions anti-corruption project managed by the Public Services International Research Unit, University of Greenwich, UK. Public Services International is the world wide confederation of public service trade unions. Its mission is to mobilise workers to share information and co-ordinate action to combat international corruption. The author wishes to thank the following for their valuable insights; Guy Denn of *Public Concern at Work*, UK, Tom Devine of the *Government Accountability Project*, UK, Karen Jennings of *UNISON, the Public Services Union*, UK and David Lewis of the University of Middlesex, UK. The report has drawn extensively on empirical evidence collected by the Public Services *International Research Unit* (PSIRU) in the context of its on-going monitoring of privatisation and restructuring of public services around the world. The Review publishes extracts from its findings.
Definitions; Whistle blowing: is understood to mean the act of *disclosing information in the public interest.* Corruption: is understood to mean the *bribes* paid by the private sector to public sector officials, politicians or political parties.

[1] Tom Devine: Government Accountability Project.

protecting, whistle blowers has become of increasing interest to national and international policy makers engaged in designing anti-corruption policy solutions.

According to the *UK Standing Committee on Standards in Public Life* (formerly known as the Nolan Committee but now know as the Wicks Committee)[2] whistle blowing is defined as "*raising a concern about malpractice within an organisation or though an independent structure associated with it.*" However, others hold the view that there is no universally accepted definition of whistle blowing, agreeing with the Australian Senate Select Committee's that "*what is important is not the definition of the term but the definition of the circumstances and conditions under which the employees who disclose wrong-doing should be entitled to protection from retaliation.*"[3]

The potential value of employees coming forward and raising concern over workplace malpractice, with a view to defending the wider public interest, is largely self-evident. Investigations into a host of disasters that have taken place around the world, in both the public and private sectors, have revealed that employees were either aware of the problem and too worried about damaging their jobs and careers to raise their concerns – or that employees had raised concerns but that these had been ignored (see *TABLE below).* The cost of this silence – to human life, the environment, public health, livelihoods, employment, financial security and the public purse – is devastatingly high.

Despite Hollywood's efforts to glamorise whistle blowing (e.g. the trade unionist, Karen Silkwood's heroic battle against Kerr McGhee Plutonium Processing Plant in the USA) today's whistleblowers face a harsh reality. Those courageous enough to blow the whistle often do so at considerable personal cost. The findings of a study of whistle blowers in the USA (see BOX 1) illustrate the extent of the emotional stress suffered by whistleblowers – and underline society's dominant perception of whistleblowers as trouble-makers. The individual cases presented in BOXES 2-5 show that, without exception, the whistleblowers all suffered damage to their careers.

The case of the Enron whistle blower (Case 5, Box 6), Sherron Watkins, is really about *not* blowing the whistle. Whilst the letter Ms Watkins wrote to Kenneth Lay outlining her concerns has proved extremely useful to the on-going investigation into Enron, Ms Watkins did not take action until the investigation was already underway. The aim of whistle-blower legislation is to ensure that those workers who speak out in the public interest are protected, and thereby encouraged, by de-stigmatising whistleblowing, contributing to a change in the prevailing culture and providing a real alternative to silence.

[2] This is a standing committee set up by the UK Parliament to safeguard standards in public life and first chaired by Lord Nolan. The Nolan Committee produced three reports. In its first (1995) it recommended that all civil servant departments in the UK should nominate a member of staff to hear the concerns of employees in confidence; its second and third reports recommended that local authorities should introduce codes of practice and procedures for whistleblowing

[3] David Lewis: Whistleblowing at Work: On What Principles Should Legislation be Based; Industrial Law Journal, Vo. 30 No.2 June 2001

## TABLE: THE COSTS OF SILENCE

| SCANDAL | COUNTRY | DATE | ISSUE | IMPACT | FINDINGS |
|---|---|---|---|---|---|
| UNION CARBIDE INDIA LIMITED | India | 1984 | Gas Leak Safety | >3800 killed 40 total disability 2,680 partial disability [4] | Workers, together with a local journalist, had raised concerns, but these had been ignored by the local authority. |
| CLAPHAM RAIL CRASH | UK | 1988 | Safety | 35 killed 500 injured | The Inquiry into the crash found that workers knew that there was risky loose wiring but had turned a blind eye. |
| PIPER ALPHA | UK | 1988 | Oil Platform Safety | 167 killed | The Cullen Report found that workers were worried about their future employment and had not wishes to raise safety concerns |
| MOMBASSA FERRY | Kenya | 1994 | Safety/corruption | 300 people killed | Allegations of corruption were ignored. |
| COLLAPSE OF THE BANK OF CREDIT AND COMMERCE INTERNATIONAL | UK | 1991 | Fraud/corruption | £2 billion over 19 years | The Bingham Enquiry found that there was a climate of intimidation and that staff did not feel that they could voice their concerns. An internal auditor who raised concerns was dismissed. |
| THE COLLAPSE OF ENRON | USA | 2001 | Fraud | Loss of jobs/costs to share-holders; loss of pensions and lifelong savings of employees | The 'non' whistleblower Sherron Watkins set out her concerns in a 7-page letter to the Chief Executive, Kenny Lay. However she did not blow the whistle externally. There is no comprehensive whistleblower protection for private sector employees in the USA. |

## BOX 1: SHOOT THE MESSENGER

**A study of whistleblowers in the USA found that:**

- 100% were fired - most were unable to find new jobs
- 17% lost their homes
- 54% harassed by peers at work

[4] http://www.bhopal.com/review.htm

- 15% were subsequently divorced
- 80% suffered physical deterioration, 90% reported emotional stress, depression and anxiety
- 10% attempted suicide

*Source: Irish Times, 29 May 2000*

**BOX 2: BLOWING THE WHISTLE TO INTERNAL MANAGEMENT**

CASE 1

**Who:** Internal auditor, Colin Cornelius
**Which organisation:** Hackney Council, London
**When:** 1992
**Where:** UK
**What:** Fraud
**Blew the whistle to:** Internal management
**Consequences:** Sacked for gross misconduct; employment tribunal ruled against employer

**BOX 3:BLOWING THE WHISTLE TO THE POLICE**

CASE 2

**Who:** Eddie Cairns, Management Accountant
**Which organisation:** Enterprise Ayrshire
**When:** 1994
**Where:** UK
**What:** Financial irregularity
**Blew the whistle to:** the police after following advice of professional accountancy body CIMA
**Consequences:** sacked for breaching confidentiality; professional body powerless to help

**BOX 4: BLOWING THE WHISTLE TO PARLIAMENTARIANS/PRESS**

CASE 3

**Who:** Assist. Auditor: Paul Van Buitenen
**Which organisation:** European Commission
**When:** 1998-1999
**Where:** Luxembourg/Brussels
**What:** Fraud and mismanagement
**Blew the whistle to:** Member of European Parliament, then the Press
**Consequences:** suspended half-pay; reinstated/banned from auditing; hanging on ...

**BOX 5: BLOWING THE WHISTLE TO PARENT COMPANY**

CASE 4

**Who:** Assist. Auditor: Antonio Fernandes
**Which organisation: Netcom Consultants**

**When:** December 1999
**Where:** UK
**What:** Chief Executive false expense claims (£370,000)
**Blew the whistle to:** USA parent company
**Consequences:** dismissed; tribunal ruled unfair dismissal under PIDA (first case), awarded £300,000

## BOX 6: NOT BLOWING THE WHISTLE

CASE 5

**Who:** Sherron Watkins, Internal Accountant
**Which organisation: Enron**
**When:** 2001
**Where: USA**
**What:** Accounting malpractice and fraud
**Blew the whistle to:** Chief Executive
**Consequences: None.** In fact Sherron Watkins didn't really blow the whistle. She wrote a letter to the Chief Executive outlining her concerns. Whilst this letter has been useful in the subsequent investigation, it did not initiate the investigation.

## BOX 7: NO UNIVERSAL UNDERSTANDING OF CORRUPTION

**WORLD BANK**
(i) corruption = "offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution"
**OECD**
corruption = "bribery of foreign public officials in international business transactions illicit payments"
**EUROPEAN UNION CONVENTION ON THE FIGHT AGAINST CORRUPTION INVOLVING OFFICIALS OF THE EUROPEAN COMMUNITIES OR OFFICIALS OF THE MEMBER STATES OF THE EU**
corruption = "deliberate action of whosoever promises or gives, directly or through an intermediary involving officials of the European Union or officials of Member States of the European Union."
**DRAFT UNITED NATIONS CONVENTION AGAINST CORRUPTION**
corruption = "promising, requesting, offering, giving or accepting, directly or indirectly, of an undue advantage or prospect thereof that distorts the proper performance of any duty or behaviour required of the recipient of the bribe , the undue advantage or prospect thereof."
**COUNCIL OF EUROPE – CRIMINAL LAW CONVENTION**
corruption = "bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others"

***Understanding corruption[5] and whistle blowing***

As is the case with whistle blowing, there is no universally accepted definition of corruption. The traditional definition – *corruption is the abuse of public office for private gain* – is now understood to be unbalanced, unhelpful and is largely discredited.

Different organisations engaged in combating corruption have therefore tended to focus on different forms of corruption (see BOX 7). In the context of this report, corruption is understood to be an activity that involves two parties: *the bribe-maker* (the private sector individual or organisation) and the *bribe-taker* (the public sector official, politician or political party) who, driven by the prospect of making significant economic gains, engage in a 'win-win' transaction.

In recent years, the economic incentives to engage in bribery and corruption have increased dramatically as a result of prevailing liberalisation policies. These policies seek to limit the role of the state, in favour of the private sector, mainly through privatisation and contracting out. This has had two effects. First the boundary between the public and private sectors has blurred as the two sectors have become increasingly inter-connected. Secondly, private sector enterprises, in pursuit of profit, are provided with increased incentives, and opportunities, to engage in bribery.

In principle, whistleblowers provide potentially powerful mechanisms to deter bribery and corruption. Bribery and corruption are most likely to flourish where the likelihood of getting caught is low and the sanctions applied to those who are caught are insufficient. Protecting whistleblowers, and thus encouraging people to speak out, clearly increases the chance of detection. So long as sanctions are sufficiently severe, providing protection for whistleblowers should provide an effective deterrent.

There is now a vast amount of *policy* and *empirical* research that supports the case for including protection for whistle blowers in national and international anti-corruption policy initiatives. Two examples illustrate the point.

The first concerns *public procurement policy*. A recent EU-wide study[6], which aimed to analyse different national approaches to dealing with corrupt companies in the public tendering procedures, specifically identified the need to take action in relation to whistleblowers. It recommended that member states adopt "*a common approach to whistle blowers*" on the basis that "*the only way to find out about men of straw is to have a fresh pool of information*. More specifically, it recommended that member states:

- assign responsibility to central authorities for receiving information from whistleblowers;
- set up and monitor whistle blowing hot-lines; and
- adopt common standards of protection for whistle blowers.

The second concerns the findings of an experiment, undertaken by the Dutch public service Trade Union, the Federatie Nederlandse Vakbeweging (FNV), which set up a hotline for public service

[5] This briefing paper is focusing on grand or large-scale corruption, often committed in the context of privatisation and public procurement contracts. Grand corruption is different in nature and its policy solutions from petty corruption which is often driven by need rather than greed.

[6] *'Procurement and Organised Crime': - An EU-wide study: Edited by Simone White*

employees. Over 3 days, the hotline received 8000 calls and FNV representatives held in-depth discussions with 150 whistleblowers. Concerns fell into the following categories:

- abuse of power (33%);
- non-observance of regulations (20%);
- concealment of information (14%);
- multiple abuses including corruption, fraud, mismanagement of public funds (33%)

Earlier the same year, the FNV conducted a survey of public services employees that found that *25% of civil servants* had considered making disclosures about abuses, but had kept quiet due to fear of reprisal. Both findings underlined the value of whistleblowers as potential source of information - as well as the need for their protection and encouragement.

***Understanding the public interest***

It is important to note that public sector employees are not the sole defenders of the public interest. *Private sector* employees, as well as citizens, can find themselves in the position of uncovering malpractice and wishing to disclose information in order to protect the public interest.
In relation to combating bribery and corruption, there is considerable potential for private sector employees to disclose information in the public interest:

- *first (*as previously discussed), the interface between the public and private sectors provides the primary source of bribery and corruption. Potential whistleblowers may work on either side of this interface;
- *secondly*, elements of the private sector play a fundamental role in serving the public interest. The accountancy profession is a prime and topical example. The recent collapse of Enron underlined the extent to which society relies on auditors to provide ensure that companies' financial information is accurate. Indeed a key lesson of the Enron affair is the need to have in place greater checks and balances to ensure that accountants and auditors discharge their public interest duty. *Cases 1-6* demonstrate the valuable role that accountants and auditors have in disclosing information in the public interest on corrupt practices – and the need for their protection.

It is essential, therefore, that those seeking to encourage whistleblowers recognise the importance of protecting private as well as public sector employees.

National Legislation: A Comparative Overview

*Overview*

The first example of national whistle blowing legislation was introduced in the USA[7], as part of the Civil Service Reform Act of 1978, and then later amended by the Whistleblower Protection Act 1989.

[7] There are a number of *federal statutes* that protect private sector employees in relation to violations of specific federal laws: e.g. relating to health and safety or the environment. Generally these tend to be much narrower in scope than the Whistleblower Protection Act. There are also a number of state laws that protect private and public or private or public employees.

Since then a number of countries have recognised the need to protect whistle blowers - often in the wake of scandals - and introduced whistleblower protection legislation.

National whistle blowing legislation varies from country to country in terms of:

- *Who* is protected;
- The *disclosure routes* that are protected;
- The scope of *information* disclosures that is protected;
- The *motivation* that is protected.

*TABLE 4* provides an overall summary of the whistleblower legislation that has been adopted by a selected number of countries[8]. It also identifies specific strengths and weaknesses, together with any additional relevant information: e.g. *amendments, origins, reviews.*

***Who is protected: Public versus Private***

The vast majority of national whistle blowing legislation is aimed at *protecting those in employment* from reprisal for disclosing information discovered in the work place in the public interest. This is the case for all the national legislation (*sic, studied in this Report*) with the exception of Australia's *South Australia's Whistle blowing Protection Act (WPA), Capital Territory's Public Interest Disclosure Act*[9]*, Queensland Whistleblower Protection Act* and Western Australia, which cover *citizens* rather than simply employees.

In many cases, however, *employment-based legislation* only protects *public sector* employees. This exclusion of private sector employees from the protection offered by whistle blower legislation is a fundamental weakness especially in view of the importance of the *private-public sector interface* as a key source of corruption, together with the fundamental role that some parts of the private sector play in protecting the public interest.

This distinction between the public and private sector in the area of the protection of whistleblowers, which focuses on the detection and deterrent of public sector malpractice, was until recently mirrored in the anti-corruption policy agenda. The traditional, but now largely abandoned definition of corruption – *corruption is the abuse of public office for private gain* – firmly places corruption in the public sector and ignores any private sector (supply-side) involvement.

However, in recent years the debate in relation to corruption has moved on, with policy-makers clearly recognising the importance of tackling the private sector element of corruption. As a result, there has been a host of national and international initiatives aimed at deterring private sector bribery and corruption.

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[8] Information has been compiled for countries for which either information is available in English and which in many cases has been assessed by other researchers (e.g. USA, Australia, UK, Korea) or on the basis of interviews with trade unionists (Netherlands, Sweden).

[9] However, whilst both protect any *person* who discloses information, protection is restricted to information disclosures concerning a *public official*.

Evidence of similar requirement for balance in approach to protecting public and private sector whistleblowers can be demonstrated by considering the:

- effectiveness of codes of conduct – the private sector's response to protecting whistleblowers;
- need to support national anti-corruption legislation – the case of the USA.

## Codes of Conduct

One approach to the protection of *private sector* whistleblowers has been the adoption of *codes of conduct* that include provisions for protecting whistleblowers.

Recent years have witnessed the 'rise and rise' of the *corporate social responsibility* (CSR) agenda, with the result that companies today can choose from a vast array of private sector codes of conduct, many of which include anti-corruption policies and practices. However, the findings of a recent survey, which aimed to identify the extent to which Multinational Companies (MNCs) have in fact adopted anti-corruption and whistle blowing policies[10], provide considerable cause for pessimism.

First it found that out of a sample of 82 MNCs, whilst 87% of respondents (50% of the total sample) reported having introduced anti-corruption policy statements, only 49% - just 33% of the total sample – had put in place measures to protect whistleblowers. This is likely to be the maximum number of companies that provide protection for whistle blowers as non-respondents to the survey are likely to be poor performers in relation to both anti-corruption and whistleblower policies.

However, the report also found the translation of policy into practice to be weak: "*the majority of companies may be relying on the presence of a code alone to ensure sufficient protection against corruption. In practice, awareness and understanding of codes may not reach beyond head office level.*" Hence in fact fewer than 25% of companies had clearly defined management systems and lines of accountability to deliver their policy commitments – the type of procedures that would be need for whistleblower protection to work.

The case of Enron provides further cause for scepticism. *In principle*, Enron was wholly committed to *Corporate Social Responsibility* (see BOX 9). However, Sherron Watkins, the Enron non-whistleblower (see Case 5), in her evidence submitted to the investigation, stated that she did not approach her two managers with her concerns on the grounds that this would be "fruitless" and might cost her job. Hence, *in practice*, despite elaborate policies, Enron's internal mechanisms for encouraging and protecting whistleblowers were inadequate.

In this context, the *OECD Guidelines for Multinational Enterprises* provide a welcome step forward. The Guidelines provide the only example of a comprehensive code of conduct that has been endorsed, and is enforced, by government. Overall, however, whilst codes of conduct are extremely useful, if subject to monitoring by governments, trade unions or civil society, they have limitations and should be seen as an addition to, *not a substitute for*, government regulation.

[10] A Governance of Bribery and Corruption: A Survey of Current Practice: Friends, Ivory& Sime

## Supporting National Anti-corruption Legislation: The USA

The USA's Foreign Corrupt Practices Act (FCPA) was adopted in 1977, making it a criminal offence for USA companies – as well as those foreign companies whose securities are listed in the United States – to pay bribes to foreign government officials. The FCPA however does not provide whistle blower protection. Given USA labour laws, this is a significant weakness. Whilst federal employees receive protection under a federal, civil whistleblower law (see TABLE 4) - and some states have enacted similar laws to protect state employees – there is only patchwork protection for private sector employees. U.S. common law rule construes employment as a relationship which may be terminated at will by either party for a good reason, a bad reason, or no reason at all.

Although there has been some erosion to the common-law rule from state statutes and case law, the prevailing rule remains *employment-at-will.* There are strong policy arguments in favour of legislative enactment of *just-cause protections*, which would allow employers to impose adverse employment actions against employees only for just cause. Such legislation is common in Western Europe and Canada, but has only been enacted in one state – Montana – in the United States. Thus, under the current legal regime, employers, particularly in the private sector, can demote or terminate whistleblower employees without fear of legal consequences. The employment-at-will doctrine provides a major disincentive to would-be whistleblowers and undermines a potentially valuable deterrent to corruption. Whereas collective bargaining provides a means of securing employment contracts with a just-cause provision – i.e. an agreement that employers may impose an adverse employment action on an employee only for a just cause – only 8% of workers in the private sector are organised and able to benefit from the negotiation of such agreements.

Indeed, the fact that the USA Government had to draft a post-Enron Whistleblowers Reform Bill is testimony to the inadequacy of existing whistleblower protection provisions for private sector employees.

### *Type of Disclosure Route Protected: Internal versus External*

A second characteristic by which national whistle blowing legislation varies is the protection afforded to different types of *disclosure routes* (see TABLE 4).

The *USA* represents one end of the scale. Its legislation protects disclosures made by federal employees *irrespective of the disclosure route used.* This means that public sector whistleblowers are protected from reprisal, even in cases where they blow the whistle to the media.

The UK legislation (*PIDA*) represents a mid-way position and takes a 3-pronged approach:

- first, it encourages whistleblowers to use *internal mechanisms*, so as to give the company a chance to address the problem;
- secondly, in cases where these internal mechanisms either do not exist or fail to work, the legislation encourages whistle blowers to use *prescribed external agencies*;

- finally, and under a strict set of conditions, the legislation protects whistleblowers that make wider disclosures to, for example, the media. This applies in the event of a particularly serious issue, where there is fear of reprisal or cover up, or where the matter has been reported internally or to the prescribed person but has not been dealt with properly.

*Canada's* proposed *Public Service Whistle blowing Act* provides an example of legislation that does not provide for any external disclosures.

The issue of what represents good practice does not command consensus.

For many the UK's *Public Interest Disclosure Act* provides a model, as its emphasis on first using internal disclosure routes gives the organisation the opportunity to respond to the problem and provides the basis for good industrial relations. Yet, at the same time, whistle blowers who in certain circumstance, use the media still fall under the protection of the Act.

Others, however, argue that disclosures should be protected irrespective of the routes they use - as is the case in the USA - and that encouraging whistleblowers to use internal routes may be counter-productive.

According to the Government Accountability Project (GAP) in the USA[11], there is plenty of evidence from the USA to suggest that authorities will not start an investigation once they know that employers were given "early warning" and thereby the chance to destroy the evidence as a result of first making an internal disclosure. GAP questions the assumption implicit in the UK model that organisations will act in 'good faith': an assumption that indeed looks naïve in the light of recent actions by Enron and Arthur Andersen. Overall, however, there *is* consensus that whistle blowing legislation that protects only internal reporting internally is insufficient and that there is a need for whistleblowers to be protected for disclosing to external organisations - and if need be to the Press.

The recent case of Enron once again perhaps underlines the point. According to one Senator, the Enron management had created 'almost a culture of corporate corruption"12 . In such a case it is hard to imagine how internal systems of whistle blowing, based on reporting internally to management, could have ever succeeded.

### Types of information disclosures protected: Public and Private

Another issue for consideration in the design of whistle blowing legislation is the scope of protection as regards the *type of information* that is disclosed.

The descriptions provided in TABLE 4 once again demonstrate a large range and once again highlights the unequal treatment of public and private sectors in the protection afforded by whistle blowing legislation. In the UK and South Africa the legislation provides for a broad disclosure base. However this is not the case for the Australian statutes or New Zealand's Protected Disclosure where

[11] Telephone Interview held with Tom Devine: May 2002

[12] Senator Byron Dorgan, Financial Times, 03/02/02:
http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT31LW2E9XC&live=true&tagid=ZZZZV1CYA0C&Collid=ZZZ563ECC0C

it is not at all clear whether disclosures relating to the private sector would be protected. In the context of combating bribery and corruption, it is essential that whistle blowing legislation provides equal protection to the disclosure of information in the public interest irrespective of whether it concerns the public or private sector.

### Motivation for disclosure

All the legislation provides protection on the basis that there is good faith and reasonable belief. Whilst on the face of it this seems uncontroversial, David Lewis, a UK-based academic, argues that that this focus on motivation is misplaced: "*if workers have reasonable grounds to believe that their information is true or likely to be true why should their motive for disclosing be relevant.*" [13] Lewis argues his position on the basis that the public interest may not be served if a whistle blower is deterred from raising truthful concerns due to the possibility of their motives being examined.

## 4 A Case Study of National Legislation: UK PIDA

This section presents the UK's Public Interest Disclosure Act as a case study of national legislation. It sets out the motivation behind the act and the key characteristics of the Act before going on to look at the implementation in practice. Whilst it is still early days in terms of assessing the Act's implementation and impacts it is nonetheless useful to document any lessons that are emerging even in these early stages.

#### *Motivation*

The UK's Public Interest Disclosure Act (PIDA), was introduced in the wake of a number of disasters in the UK including the collapse of the *Bank of Credit and Commerce International (BCCI)* in which investigations found that a corporate climate of fear and intimidation prevented employees from voicing their concerns and the Clapham rail disaster which killed 35 people and after which an investigation found that workers had been aware of but not voiced their concerns over safety of wiring systems. In addition, there was considerable controversy over so-called gagging clauses[14], which placed unreasonable restrictions on employees, contained in the contracts of public service as well as a growing consensus over the need to tackle the culture of secrecy that permeated public service in the UK.

#### *Description*

The Public Interest Disclosure Act 1998 aims to protect whistleblowers from victimisation and dismissal, where they raise genuine concerns about a range of misconduct and malpractice. It covers virtually all employees in the public, private and voluntary sectors, and certain other workers, including agency staff, home-workers, trainees, contractors, and all professionals in the NHS. The usual employment law restrictions on minimum qualifying period and age do not apply.

A worker who blows the whistle will be protected if the disclosure is made in *good faith* and is about:

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[13] *supra n* 3

[14] clauses in contracts which set unreasonable restrictions on what employees were able to speak out about

- a criminal act
- a failure to comply with a legal obligation
- a miscarriage of justice
- a danger to health and safety
- any damage to the environment
- an attempt to cover up any of these.

PIDA extends protection given to health and safety representatives to individuals who raise genuine concerns about health, safety or environmental risks. (The Employment Rights Act 1996 already gives some legal protection to employees who take action over, or raise concerns about, health and safety at work.)
Whistleblowers will be protected when in *good faith* they:

- raise concerns internally;
- raise concerns with the relevant Government minister if they work in quangos or in the National Health Service;
- make disclosures to prescribed persons, such as the Health and Safety Executive, the Inland Revenue, the Audit Commission and the utility regulators (see Appendix 2)
- make wider disclosures (which could include to the media, MPs or the police), where the matter:
    - is exceptionally serious;
    - is not raised internally or with a prescribed regulator, because the worker reasonably feared that he/she would be victimised;
    - is not raised internally because the worker reasonably believed that there would be a cover-up and there is no prescribed person;
    - was raised internally or with a prescribed person, but was not dealt with properly.

- Such wider disclosures must be *reasonable* in all the circumstances.

Where a whistleblower is victimised following a protected disclosure, he/she can take a claim to an employment tribunal for compensation (appeals can be made to the Court of Appeal). Employment tribunals normally consist of a labour representative, a management representative and a judge. If a whistleblower is dismissed, he/she can apply for an interim order to keep his/her job, pending a full hearing. There is no qualifying period for bringing an unfair dismissal claim under PIDA and the awards of compensation that may be made are not limited.

Furthermore, confidentiality clauses, such as gagging clauses in employment contracts and severance agreements, which conflict with the protection provided by the Act, will not be legally binding.

The existence of external disclosure routes provides an incentive for employers to put in place internal whistle blowing procedures: NHS taken the lead.

*Implementation*

## Assessing the Evidence

PIDA does not require employers to put in place organisational whistle blowing policies. However, as discussed above, the fact that the Act provides for external disclosure gives them a strong incentive to do so. The National Health Service has taken the lead in the UK and the UNISON Guide to Whistle blowing "Speaking Without Fear" provides model procedures. However, over and above putting in place policies, to be effective organisations need to support implementation through adequate allocation of resources for monitoring, training and awareness.

The University of Middlesex undertook a survey of Higher and Further Education organisations in England and Wales in order to assess the level of support for the implementation of PIDA. The survey results, based on responses provided by 349 Higher and Further Education institutions, showed that whereas the majority (90%) had put policies in place, most of these had never been used and only c14% were supported by training. Hence, overall it seems that whilst PIDA has been highly effective in terms of stimulating organisation to put in place organisationally-based compliance policies, there is a lack of meaningful support for these policies.

## Role of the Trade Unions

Trade unions have played an active role in England and Wales both in campaigning for and supporting PIDA. This action has included:

*Pre-legislation*

- Campaigning for legislation to be put into place and working with other civil society organisations in this respect;

*Post-legislation*

- Production of a guide to the Act which is primarily targeted at trade union branch officers and stewards. However this guidance has also been used by the Department of Trade and Industry in its promotion of the Act: *Speaking Out Without Fear: UNISON Guide to Whistle blowing*
- Producing a model whistle blowing Policy and Procedure;
- Negotiating with employers on disclosures routes – enabling a trade unionist to disclose to his/her trade union representative and advising and providing training on whistleblower procedures.

# PROMOTING PUBLIC ACCOUNTABILITY IN OVERSEAS DEVELOPMENT ASSISTANCE: HARNESSING THE RIGHT TO INFORMATION

*Charmaine Rodrigues*[*]

*"A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives."*

James Madison, Former US President, 1822

*"International financial institutions have played an important role in highlighting the importance of transparency and in the development and dissemination of internationally recognised disclosure standards. And to strengthen their credibility as proponents of transparency, as well as to enhance their accountability to the general public, IFIs have made significant efforts to improve the transparency of their own views and operations. Nevertheless, there remains room for improvement."*

G-22 Working Group on Transparency and Accountability, 1998

## Introduction

Today, overseas development assistance totals more than US$50 billion. The World Bank and the International Monetary Fund – created after the Second World War with a mandate "to help prevent future conflicts by lending for reconstruction and development and by smoothing out temporary balance of payments problems"[1] – now have an incredible influence over the domestic policy agendas of developing countries throughout the world.[2]

To a lesser extent, so too do the newer regional development banks.[3] Bilateral and regional donors – many of whom engage with countries over which they previously reigned as colonial powers – also have considerable sway over the direction of recipient countries' domestic policies. Unfortunately, while the domestic influence of national and international donors has grown over the last 50 years, many donors remained unaccountable to domestic constituencies who they claim are the beneficiaries of their work.

They have historically negotiated projects and loans with the Executive Branch of Government such that, in practice, both elected parliaments and the constituencies they represent have regularly been

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[*] The author is the Co-Coordinator of the Right to Information Programme at the Commonwealth Human Rights Initiative, New Delhi, India

[1] George, S. (1999) "A Short History Of Neo-Liberalism: Twenty Years Of Elite Economics And Emerging Opportunities For Structural Change", presented at the Conference On Economic Sovereignty In A Globalising World, 24-26 March, Bangkok, p.1.

[2] Stiglitz, J. (2003) Globalization and Its Discontents, New Delhi, Penguin Publishing.

[3] Most notably, the Inter-American Development Bank (established in 1959), the African Development Bank (established in 1964) and the Asian Development Bank (established in 1966).

excluded from the development process. However, as the UNDP observed in its seminar 2002 Human Development Report on democracy: "the deeper is their intervention in sensitive governance reforms in developing countries, the greater is the need for international organisations to be open and accountable."[4]

At the same time, recipient countries also often exhibit a lack of accountability in their management of overseas development assistance (ODA). There are too many stories in too many countries in too many regions of the world of infrastructure projects being undertaken with development money which served no public purpose, yet filled corrupt officials pockets with donor money. Projects and programmes funded through loans have failed to meet their objectives, while nonetheless leaving the public with massive debts.

Most troublingly, stories abound of ODA which has simply been siphoned off directly into the pockets of elites. For example, it has been estimated that "About one out of every three dollars that the Bank gave Suharto's government over a 30 year period from the mid-sixties to the mid-nineties went to the pockets of Suharto's people. This came to about $10 billion of the $30 billion World Bank lendingprogram."[5] Transparency International estimates that over $30 billion in aid for Africa – an amount twice the annual gross domestic product of Ghana, Kenya and Uganda combined – has ended up in foreign bank accounts.[6]

With the close of the Cold War, donors who had previously used development aid to bolster strategic geopolitical alliances are less tolerant of blatant corruption in development spending. As countries push forward to meet the Millennium Development Goals, donors and recipient government are being increasingly called upon to be more accountable for their allocations and expenditure of development funds. However, many governments continue to shroud their development activities in secrecy. Projects are implemented with little involvement of beneficiaries and there is a black hole of information available during the design, tendering and implementation process. At the same time, many argue that donors continue not to practice the good governance lessons that they preach – namely, to implement effective public participation strategies and to ensure that they themselves are fully transparent and accountability to the communities with which they work. As one activist observed: "[International Financial Institutions] IFIs often deny communities their right to timely information and, by doing so, prevent meaningful participation in the design and implementation of projects and policies. IFI secrecy undermines domestic democratic processes, reduces the development effectiveness of the institutions, increases the likelihood that their work will cause social and environmental damage and alienates interested parties."[7]

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[4] UNDP (2002) Human Development Report 2002: Deepening democracy in a fragmented world, http://hdr.undp.org/reports/global/2002/en/pdf/chapterfive.pdf, p.8.

[5] Walden Bello (2006) "WB/IMF in Crisis", Spring Meeting Wrap-up, sent in an email from the 50 Years Email List, stop-wb-imf@50years.org.

[6] United Nations, (2000) Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Press Kit Backgrounder No3: http://www.un.org/events/10thcongress/2088b.htm

[7] Saul, G. (2002) "Transparency and accountability in international financial institutions", BIC, excerpt from original featured in Richard Calland and Alison Tilley (eds) The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice, Open Democracy and Advice Center, South Africa, www.bicusa.org/bicusa/issues/IFI_Transparency_Chptr.pdf,p.3.

One key mechanism for promoting greater accountability in overseas development assistance is to entrench transparency by enacting national right to information laws while implementing information disclosure policies within international financial institutions and donors. While not an obvious policy prescription, arguably the prioritisation of information disclosure as an accountability mechanism has the potential to be revolutionary. As one commentator observed, "Access to information, consultation and public participation in policy-making contributes to good governance by fostering: greater transparency in policy-making; more accountability through direct public scrutiny and oversight; enhanced legitimacy of... decision-making processes; better quality policy decisions based on a wider range of information sources; and, finally, higher levels of implementation and compliance given greater public awareness of policies and participation in their design."[8]

## The Right to Information: What, Where and Why

in 1946, the United Nations General Assembly recognised that "Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated."[9] Soon after, the right to information was given international legal status when it was enshrined in Article 19 of the International Covenant on Civil and Political Rights which states:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive and impart information and ideas through any media and regardless of frontiers*" (*emphasis added*).

Over time, the right to information has been reflected in a number of regional human rights instruments, including the African Charter on Human and Peoples' Rights,[10] the American Convention on Human Rights[11] and the European Charter of Human Rights.[12] This has placed the right to access information firmly within the body of universal human rights law. Up until the late 1980s, only ten countries in the world had right to information laws; today more than sixty countries have enacted access legislation.[13] Nonetheless, the right to information has still yet to be fully harnessed as a tool for promoting transparency, accountability and public participation at the national and international levels.

### *What is the right to information?*

Different terminology has been used - freedom of information, access to information, the right to know - but fundamentally, the concept remains the same. The right to information includes:

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[8] Caddy, J. (2003) "Building open government: lessons from experience in OECD countries", unpublished, Commonwealth Human Rights Initiative, New Delhi, p.1.

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

[10] See Article 9(1), African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

[11] See Art. 13(1), American Convention on Human Rights, 1969, Costa Rica, OAS Treaty Series No. 36, 1144 U.N.T.S. 123.

[12] See Article 11(1), Charter of Fundamental Rights of the European Union, 2000, Nice, Official Journal of the European Communities, C 364/1.

[13] Banisar, D. (2004) The Freedominfo.Org Global Survey: Freedom Of Information And Access To Government Record Laws Around The World, updated to May 2004, http://www.freedominfo.org/survey.htm.

- the right of citizens to request access to information from public bodies (and in some national contexts, to access to information from private bodies, at least where the information affects people's rights[14] or where the private body is performing a public function and/or is responsible for expending public funds);[15]
- the duty of the government to supply the requested information to that citizen, unless defined exemptions apply, and
- the duty on the government to disclose proactively information that is of general public interest without the need for requests from its citizens.

**What about accessing information from private bodies?**

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

South Africa has pioneered the application of disclosure duties on the private sector under the *Promotion of Access to Information Act 2000*. Section 50 of the Act allows a person access to any record of a private body if that record is *"required for the exercise or protection of any rights"*. This is a very broad provision. The new Indian *Right to Information Act 2005* also covers private bodies to some extent, as it applies to any *"body owned, controlled or substantially financed directly or indirectly by funds provided by the... Government"*. This means that if private bodies receive subsidies or concessions from the Government, they may be covered by the law. Innovatively, the Indian Act also permits the public access to "information relating to any private body which can be accessed by a public authority under any other law for the time being in force."[16] This means that where a public authority *should* have obtained information from a private body – for example, an environmental impact report, hazardous waste disposal plan or financial audit – even if it has not received a copy yet, a person can demand access to that report.

In practice, this requires governments develop legislation, setting out the specific content of the right - who people can access information from, how, when and at what cost - and the duties on relevant bodies to provide information, including when they can legitimately refuse to provide information. Internationally, a number of best practice principles have been recognised which should underpin any right to information law. Specifically, at a minimum the law should:

- Promote the principle of maximum disclosure of information, subject only to limited, tightly drafted exemptions;
- Ensure that access procedures are user-friendly, cheap, quick and simple;

[14] See Part IV of the Promotion of Access to Information Act 2000, South Africa.
[15] See for example: s.2(f) of the Indian Freedom of Information Act 2002; s.5(3) of the Jamaica Access to Information Act 2002; s.4 of the Trinidad & Tobago Freedom of Information Act 1999; and s.5(1) of the UK Freedom of Information Act 2000.
[16] The Right to Information Act 2005 (India), s. 2(f).

- Require decisions regarding disclosure to be reviewable by an independent, impartial body, such as an Information Commissioner or Ombudsman;
- Permit penalties to be imposed on officials for non-compliance with the law; and
- Impose ongoing monitoring, training and public education duties on the Government.

***Why is right to information a useful development tool?***

Much of the failure of poverty reduction and development strategies to date can be attributed to the fact that, for years, they have been designed behind closed doors by governments who consulted with 'experts' but shut out the very people who were supposed to benefit. Poor people and women in particular are often completely excluded from decision-making processes in Bangladesh. Many people in Bangladesh will likely identify with the experience of a parliamentarian in Ghana who complained that the interim Poverty Reduction Strategy Paper required by the World Bank, as well as crucial decisions to take advantage of the Highly Indebted Poor Country Initiative which will affect government policy directions for years to come, were not even referred to Parliament at large.[17] Too often, donors have been complicit in keeping development planning processes closed. Multilateral institutions, such as the World Bank and the International Monetary Fund, are now beginning to open up following pressure from civil society groups, but much more work still needs to be done.

In this context, it is noteworthy that the Secretary-General of the United Nations, Kofi Annan observed in 2003 that: "The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed."[18] With assured information, marginalised groups will be given their rightful voice and a powerful tool to scrutinise and engage with the development activities being directed at them. They can access information about their development rights, as well as the projects and programmes from which they are supposed to be benefiting. In fact, experience shows that personalinformation is the most common type accessed under right to information laws. People use the law to ensure they receive proper entitlements and find out what the government is doing for them or for their locality.

## Plugging leaks by opening up the system[19]

Corruption and waste of government funds can be particularly detrimental to the effective provision of public services. In particular, public health and education systems have often suffered from underinvestment and/or chronic leakages of the little funding they receive, because their beneficiaries are so often the voiceless poor. This is especially troubling for Bangladesh. Net primary enrolment ratio is relatively high at 84%,[20] but the Government spends only 2.4% of GDP on education.[21] It is

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[17] Globalization Challenge Initiative, (2000) 'Who Governs Low Income Countries: An Interview with Charles Abugre on the Ghana Poverty Reduction Strategy Initiative', IMF and World Bank News and Notices, Fall: www.challengeglobalization.org/html/news_notices/fall2000/fall2000-01.shtml

[18] Annan, K. (1997) Address to the World Bank conference "Global Knowledge '97", Toronto, Canada, on June 22: http://www.ctcnet.org/kannan.html as on 1 October 2003.

[19] World Bank (2003), World Development Report 2004: Making Services Work for Poor People, Washington, pp. 62-63 & 185.

[20] *Ibid.* p. 260. N.B. The net enrolment ratio is the ratio of enrolled children of official age for the education level indicated to the total population of that age.

[21] Above, n. 23, p. 256.

essential that at least this funding is properly spent. Access to information about budgets and expenditure can be a key mechanism for ensuring accountability of funds. A case in Uganda provides a good example of how the right to information was used to crack down on corruption in a developing country's education system.

Despite increased expenditure on education in Uganda in the 1990s, an expenditure tracking survey revealed that during a five-year period 87% of all funds meant for primary schools in Uganda went into the pockets of bureaucrats while enrolment remained less than 50%. Astonished by these findings, the national government began giving details about monthly transfers of grants to districts through newspapers and the radio in a bid to curb the siphoning of funds.

At the other end, primary schools were required to post public notices on receipt of all funds. Parents therefore had access to this information and were in a position to monitor the educational grant programme and demand accountability at the local government level. In five years, the diversion of funds dropped phenomenally from 80% to 20% and enrolment more than doubled from 3.6 million to 6.9 million children. Schools with access to newspapers were able to increase their flow of funds by 12 percentage points over other schools. Information dissemination, though a simple and inexpensive policy action, enforced greater accountability in local government and ensured proper use of the taxpayer's money.

In addition to the overarching significance of the right to information as a fundamental human right which must be protected and promoted by the state, the following arguments in support of the right should also be recalled when advocating the right to parliamentarians and other key stakeholders:

- *It strengthens democracy*: The right to access information gives practical meaning to the principles of participatory democracy. The underlying foundation of the democratic tradition rests on the premise of an informed constituency that is able thoughtfully to choose its representatives on the basis of the strength of their record and that is able to hold their government accountable for the policies and decisions it promulgates. The right to information has a crucial role in ensuring that citizens are better informed about the people they are electing and their activities while in government. Democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgments on the basis of facts and evidence, rather than just empty promises and meaningless political slogans.

- *It is a proven anti-corruption tool*: The right to information increases transparency by opening up public and private decision-making processes to scrutiny. Information openness is a source of light to be shone on the murky deals and shady transactions that litter corrupt governments. It enables civil society and especially the media to peel back the layers of bureaucratic red tape and political sleight of hand and get to the 'hard facts'. It is not coincidental that countries perceived to have the most corrupt governments also have the lowest levels of development or that countries with access to information laws are also perceived to be the least corrupt.

- ***It supports economic development***: The right to information provides crucial support to the market-friendly, good governance principles of transparency and accountability. Markets, like governments, do not function well in secret. Openness encourages a political and economic environment more conducive to the free market tenets of 'perfect information' and 'perfect competition'. In turn, this results in stronger growth, not least because it encourages greater investor confidence. Economic equity is also conditional upon freely accessible information because a *right* to information ensures that information itself does not become just another commodity that is corralled and cornered by the few for their sole benefit.

- ***It bolsters media capacity***: In robust democracies, the media acts as a watchdog, scrutinising the powerful and exposing mismanagement and corruption. It is also the foremost means of distributing information; where illiteracy is widespread, radio and television have become vital communication links. However, where the media is unable to get reliable information held by governments and other powerful interests, it cannot fulfil its role to the best of its abilities. Journalists are left to depend on leaks and luck or to rely on press releases and voluntary disclosures provided by the very people they are seeking to investigate. Lack of access to information also leaves reporters open to government allegations that their stories are inaccurate and reliant on rumour and half-truths instead of facts. A sound access regime provides a framework within which the media can seek, receive and impart essential information accurately and is as much in the interests of government as it is of the people.

- ***It helps to reduce conflict***: Democracy and national stability are enhanced by policies of openness which engender greater public trust in their representatives. Importantly, enhancing people's trust in their government goes some way to minimising the likelihood of conflict. Openness and informationsharing contribute to national stability by establishing a two-way dialogue between citizens and the state, reducing distance between government and people and thereby combating feelings of alienation. Systems that enable people to be part of, and personally scrutinise, decision-making processes reduce citizens' feelings of powerlessness and weakens perceptions of exclusion from opportunity or unfair advantage of one group over another.

***Where has the right to information been entrenched?***

Sweden passed its openness legislation in 1766, in the intervening 200 years only a handful of countries enacted right to information laws. Following the end of the Cold War however, particularly with the push for democratisation in Eastern Europe, right to information legislation was increasingly high on the democratic agenda. Today, more than 65 countries have right to information laws and another 30 have bills in various stages of development.

Unfortunately however, very few countries in Asia have enacted openness legislation. Only Japan, Thailand, South Korea, India and Pakistan have passed access laws. The Philippines has a constitutional provision which entrenches the right to information, but a comprehensive law has not yet been developed. In Indonesia, a bill has been drafted but no action has been taken on it for years.

## Harnessing the right to information to promote accountability in Overseas Development Assistance

By entrenching a legal right to access information, development stakeholders are equipped with a tool which will enable them to gain the information they need if they are to effectively engage in the development processes which are occurring around them. As the G-22 Working Group on Transparency and Accountability recognised: "Transparency...facilitates increased public participation in the design and implementation of development projects and thereby contributes to the local acceptance and ultimate success of projects."[22] An entrenched right to access information upon request – ideally coupled with a concurrent duty on relevant institutions to proactively provide key information project-affected people – goes a long way to transforming the rhetoric of participatory development into a reality. In fact, the UNDP itself noted in its 1997 Human Development Report: "A strategy for poverty eradication must focus...on such fundamental reforms as promoting political participation by all, ensuring accountability and transparency in government,...[and] promoting free flow of information and freedom of the press..."[23] This applies not only in the national, but also the international, context.

### *Promoting accountability through RTI at the national level*

It is now firmly recognised that entrenching a culture of open government through access to information laws supports the twin governance tenets of transparency and accountability.[24] Corruption is able to breed in places which are kept hidden from view. Conversely, openness through information disclosure has been recognised as a key tool in tackling mismanagement and malfeasance both in the public and private spheres. By enabling access to information related to government decision-making as well as the implementation of projects and programmes, the possibility that such activities will be tainted with corruption is reduced.[25]

Put most simply, public officials, aware that their actions may well be scrutinized by the public at some future date, are less likely to misbehave for fear of getting caught. This is particularly significant in a development context in light of the suggestion from the World Bank that "...countries that tackle corruption and improve their rule of law can increase their national incomes by as much as four times in the long term"[26] The efficiency gains to be had from open governance as a result of information disclosure should not be undervalued.

## Implementing proactive information disclosure

Even in the absence of a comprehensive law on the right to information, one effective way of promoting development accountability and more meaningful public participation in development

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[22] G-22 Finance Ministers & Central Bank Governors (1998) Report Of The Working Group On Transparency And Accountability, http://www.imf.org/external/np/g22/taarep.pdf, p.x.

[23] Feldman, E. & Martin, R. (1998) "Access to Information in Developing Countries", Transparency International, http://www.transparency.org/working_papers/martin-feldman/index.html, p.110.

[24] Commonwealth Human Rights Initiative (2003) Open Sesame: Looking for the Right to Information in the Commonwealth, Chapter 1, CHRI, New Delhi.

[25] Roberts, A. (2000) "Access to Government Information: An Overview of Issues", in Neumann, L. (ed) (2000) Promotion of Democracy through Access to Information, The Carter Center, http://www.cartercenter.org/documents/1272.pdf, p.9.

[26] World Bank (2004) "Feature Stories: The Costs of Corruption", 8 April, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

activities is for recipient governments to explicitly priorities greater dissemination of information to the public. At best, information dissemination is currently only an *ad hoc* activity pursued by some individual development projects. However, even this information disclosure is usually more in the form of positive press releases rather than substantive information on development strategies and implementation approaches. Many recipient governments are still to recognise that information dissemination could usefully be made a development priority in its own right, across all Government departments and development projects.

Promoting greater dissemination of Government information to the public is a cheap, simple but very effective mechanism for demonstrating a government's development bona fides to the public (and to donors) in the short-term. With more information, the public can better understand and engage with the government's development priorities. If they are given more specific information about projects in their area or programmes being implemented for their benefit, they will better know what services they should expect and be part of a broader accountability framework by themselves demanding that implementers meet their commitments. From the government's perspective, information dissemination should also be prioritised because it will make the public more aware of just how much the government is attempting to do.

Ideally, a recipient government could develop and implement a whole-of-government information policy which requires more information to be proactively disseminated by all Ministries and government agencies. From a development perspective, it is particularly important that the Treasury/Ministry of Finance is signed up to any such policy, as the disclosure of budget information is one key area where transparency should be a priority. Any Ministry for Development should also, of course, be targeted, while Ministries which are implementing specific development programmes or projects should also be under an obligation to proactively publish information about project initiation, design, tender, implementation and evaluation. Such information is not sensitive and there is no justification for secrecy. Yet, often as a hangover from colonial days when governments reigned supreme and were not answerable to their populace, governments forget that the public have the "right to know" what is being done in their name and for their benefit! Proactively providing information to target communities will enable them to more effectively work with implementers and thereby ensure better and more sustainable outcomes.

### India: Exposing corruption in the food ration distribution system[27]

The Government of India spends Rs 26,000 crore annually on food subsidies to 6.5 crore people living below the poverty line. The system works by providing highly subsidised food rations to poor people who must present their ration card at privately run ration shops under the Public Distribution System (PDS). Unfortunately, considerable corruption surrounds the PDS welfare programme. Rations are often siphoned off because ration shop dealers make false entries into their records books to show rations are distributed, and then take the rations and sell them on the open market. A closed system of record-keeping allowed the problem to exist.

In March 2003, using the Delhi *Right to Information Act 2001*, a local NGO (called Parivartan) applied for four months worth of records of all shops in a particular district. After months of campaigning, the information was made available to the applicants. Following an audit of the records,

[27] Source: Arvind Kejriwal, Parivartan (2005).

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

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

Even in the absence of a government information policy, any Ministry can still promote disclosure of their own information proactively. Even a single Ministry which is committed to openness and accountability could effectively take the lead in demonstrating to the whole of Government how simple but effective information dissemination can be as a means for promoting greater public engagement in – and public commitment to - government reform and development activities. For example, more information in the public domain about the size of the Budget and its priorities, as well as regular expenditure updates, can serve to reduce suspicion about mismanagement or misdirection of funds to non-priority sectors. Similarly, dissemination of information about grants to local provinces or agencies could contribute to a better understanding of the roles and responsibilities of the different levels of government. This could have benefits for the government, by ensuring that people do not unfairly blame departments for nonperformance in areas which are not their domain.

Some suggestions are listed below of specific types of information that governments should proactively disclose as a priority:

- Publish quarterly Budget expenditure reports on Government or Ministry of Finance website;
    - Break down the budget so that the public can understand what development projects are being funded, by whom, in what amount and which department(s) is managing the project;
    - Include information about "Donor Contributions", including which donors are giving what money to what projects over what amount of time
    - Publish summary Budget expenditure reports in the newspapers, in a form which is easily comprehensible to lay people;
    - Notify NGOs and other outreach organisations of this initiative and encourage them to proactively disseminate the information via their own networks.

- Publish – possibly on a dedicated national development website – a list of all development projects/programme being initiated, designed or implemented, including information about which national Ministry is responsible for the activity, what donor(s) is supporting the activity, how much money has been allocated (broken down into a budget if possible), what has been spent to date

- Publish all relevant design documents, contracts and implementation reports and/or order that members of the public can access such documents upon request;

- Where appropriate, publish details of monthly grants given to provinces/districts/local councils – both general grants, and sectoral grants, such as health and education

  - Information can be published on the web, in the newspapers, on the radio and by posting such information on public notice boards in schools and health clinics
  - Notify NGOs and the churches of this initiative and encourage them to proactively disseminate the information via their own networks.

- Publish quarterly reports of the expenditure of each parliamentarians Local Constituency Development Funds (if one exists)

  - To support the submission of such Reports by MPs, consider amending the relevant regulations to permit a specified percentage of the funds to be used to publish expenditure reports

**Enacting a right to information law**

While individual departments can move forward immediately with proactively disclosing relevant information, nonetheless, a comprehensive national law is the most efficient means of ensuring the effective operationalisation of the right to information. Drawing on international and regional standards, evolving State practice, and the general principles of law recognised by the community of nations, in 1999, Article 19, an NGO which specifically works on these issues, developed "Principles on Freedom of Information Legislation" which set out the key features that should ideally be present in any information disclosure policy or law.

In 2000, the United Nations Special Rapporteur endorsed these principles.[28] Notably, the African Union, the Organisation of American States[29] and the Commonwealth[30] have also endorsed minimum standards on the right to information, while the European Union has developed a specific Regulation on Freedom of Information.[31] These various generic standards have been summarised into the five principles below:

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[28] Hussain, A. (2000) Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted in accordance with Commission resolution 1999/36, Doc.E/CN.4/2000/63, 5 April. See also Ligabo, A., Haraszti, M. & Bertoni, E. (2004) Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.

[29] See Organisation of American States - General Assembly (2003) Access to Public Information: Strengthening Democracy, resolution adopted at the fourth plenary session, June 10 2003, AG/RES.1932 (XXXIII-O/03).

[30] See (1999) Commonwealth Freedom of Information Principles, in Promoting Open Government Commonwealth Principles And Guidelines On The Right To Know, Report of the Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development, Marlborough House, London, 30-31 March 1999.

[31] See European Union (2001) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal of the European Communities L145/43.

- Promote the principle of maximum disclosure of information, subject only to limited and very tightly drafted exemptions;
- Ensure that access procedures are user-friendly, cheap, quick and simple;
- Require decisions regarding disclosure to be reviewable by an independent, impartial body, such as an Information Commissioner or Ombudsman;
- Permit penalties to be imposed on officials for non-compliance with the law; and
- Impose ongoing monitoring, training and public education duties on the Government.

The push for a right to information law can be a long and arduous process. In the United Kingdom, civil society groups started lobbying for an access law in 1984 but a national law was passed only in 2000 and came into force five years later in 2005. In India, the movement for a right to information law started in 1994, but national legislation was only operationalised in 2005. A review of campaigns from around the world throw up a number of useful ideas that advocates can utilise to lobby for an Act. Some of the most innovative and useful are discussed below.

### Networking for change

Building coalitions of like-minded groups encourages broad-based consultation and representation of a wider variety of interests. This contributes to a better legislative outcome, and also has long-term benefits in terms of building support for the law and developing a ready-made constituency of users of the law who understand how it functions and how it can benefit them. Coalition-building also strengthens the bargaining position of a group of advocates – sheer strength of numbers often carries weight with policy-makers keen to maintain broad appeal to voters. A common voice also strengthens the messages being sent to legislators; multiple or mixed signals can be confusing and can dilute the impact of recommendations for change. At the more practical level, a bigger group of organisations working on the same issue usually results in the availability of more resources, both human and financial, and the development of specialised expertise within the network.

### NGOs are increasingly targeting donors to be more transparent

International advocates are increasingly alert to ensure that these powerful entities do not slip under the radar simply because they perceive themselves as answerable only to their own mandates and member country governments, rather than citizens. Groups such as the Bank Information Centre[32] and Bretton Woods Project[33] closely monitor developments at international financial and trade institutions and push for greater transparency, accountability and citizen participation, in particular, through providing greater public access to information. In February 2003, a group of activists from five continents met to further their ability to work together and set up the Global Transparency Initiative, an informal network aimed at tackling the secrecy surrounding the operations of these international bodies.[34] National parliamentarians and CSOs should consider partnering with such international groups because their contacts and knowledge of the intricacies of international organisations is invaluable.

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[32] See www.bicus.org.
[33] See www.brettonwoodsproject.org.
[34] See the website of the Global Transparency Initiative at http://www.ifitransparency.org/.

## Incorporating openness into election manifestoes

Access to information laws are often presented by advocates as a tool in the struggle against corruption and more effective development. The issue of access to information can therefore be an excellent selling point for politicians entering an election cycle; voters are likely to consider favourably a commitment by a politician to work towards open government, anti-corruption and the enhancement of citizens' rights. Activists and supportive legislators can promote this view amongst political parties and politicians to good effect, particularly where there are upcoming elections. Ideally, campaigners can lobby political parties to include a commitment to implementing an access to information regime as part of their manifesto. Such a commitment to open government will likely be well-received by voters and provides a good starting point for implementing transparency and accountability at a practical level when in power.

The experience of many access to information campaigns around the world shows that that it is much easier to get an access to information law adopted when a new government has just been elected, especially where it was elected on a platform of democratic reform.[35] Notably however, in many countries further campaigning will be necessary to ensure that new governments stick to their election pledges. In federal systems, parliamentarians in state governments could also consider taking the lead, passing a good law which can then be used as a model for national legislation. This was famously done in Japan, where the push for right to information started at the local council level and eventually snowballed into the enactment of a comprehensive national law.

### Developing a model law or private members bill

Where there is no clear government plan to introduce an access to information law, civil society or parliamentarians can take the initiative to promote their own draft to the government. In fact, the great majority of the over 50 access to information laws adopted since 1990 have had significant civil society input into the drafting process.[36] Partnering with members of parliament who are open to the promoting a draft law has proved a successful strategy in many countries. In Zambia, the Zambian Independent Media Association (ZIMA) reviewed the governments draft FOI Bill, and as part of a coalition, proposed an alternate FOI bill drafted to support principles freedom of the press and to reflect international standards. Advocacy was initiated around the bill via a stakeholders' workshop. From the workshop, a task force emerged to progress advocacy on the issue. In India too, the first draft of the new national *Right to Information Act 2005* was developed by the National Campaign for the People's Right to Information, which submitted it to the National Advisory Council (a group of NGOs advising Government on its key priorities) who then passed a final draft to the Government for consideration.

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[35] Darbishire, H. (2003) "The role of civil society in the adoption and implementation of Freedom of Information laws", CHRI unpublished.

[36] Darbishire, H. (2003) "The role of civil society in the adoption and implementation of Freedom of Information laws", CHRI unpublished.

**India: Using a local law to uncover procurement irregularities**[37]

Documents recently released under the local Delhi *Right to Information Act 2001* raised a major public controversy over World Bank involvement in bidding for water privatisation contracts in Delhi. In 1998, the Delhi Government put out a tender regarding developing a plan to privatise its water supply. The multi-million dollar contract was awarded to a Calcutta subsidiary of PricewaterhouseCoopers (PwC) in 2001. Allegedly, the contract was awarded despite strong opposition from the Delhi Water Board, which consistently ranked PwC lower than other corporations during three subsequent rounds of bidding.

On 28 July 2005, Parivartan (a Delhi based anti-corruption NGO), citing internal documents obtained through a freedom of information request, charged that World Bank officials had repeatedly overruled Indian civil servants to push their preference in the selection of a contractor. Arvind Kejriwal of Parivartan stated: "Despite reservations, the Water Board cancelled the earlier evaluation and invited fresh bids. A new evaluation committee was formed to go through the financial and technical evaluation. The PwC again failed to clear the evaluation test. The World Bank asked for detailed scores given by each member of the evaluation committee and subsequently demanded that the scores given by one member, RK Jain, be omitted as he had given low marks to PwC."

Parivartan also called attention more generally to the importance of transparency and open decisionmaking in international organizations like the World Bank: "If the World Bank claims that such disclosure is not allowed under its current policies, we also demand that in the interests of being a 'transparent public institution,' it should change its global disclosure policies to enable public access to such information by the citizens of any of the countries concerned. The records of the Delhi Jal Board and their correspondence with the Bank indicate that the only way people can understand the reasons for certain crucial decisions taken is through access to the relevant correspondence," said Kejriwal. The World Bank's India Country Director responded to Parivartan's accusations in a press statement on 29 July and defended the Bank's intervention in the contract bidding.

Parivartan has stated that the documents they obtained show that the deal promises to accrue super profits for a few water companies and in so doing significantly push up the water bills of ordinary people as well as deny water to those unable to afford the heavy bills. Under the project, the management of each of Delhi's 21 zones would be handed over to water companies which will collect management fees, engineering consultancy fees and a bonus. Parivartan has estimated that at 24,400 US dollars per month, management fees to each expert alone, would work out to more than 25 million dollars a year. Further, each water company has a say in deciding its own annual operating budget and there are provisions for upward revision which can be misused to make extravagant demands on the government. Parivartan's calculation is that, if the project is accepted, a typical family may find its water bills increasing five times over. Under intense public criticism, the Delhi Jal Board has decided

[37] Case study summarised by Ms Mandakini Devasher, based on: 'Documents Spur Public Debate about World Bank Involvement in Awarding Contract for Delhi Water Deal', Kristin Adair, as posted on freedominfo.org – IFTI Watch (14 September 2005), http://www.freedominfo.org/ifti.htm; 'Depute Officials for Public Hearing on Water, Shiela told', The Hindu (9 October 2005), http://www.hindu.com/2005/10/09/stories/2005100903430400.htm; 'Right to Information Exposes World Bank Water Deal', Bharat Dogra, IPS News, (6 November 2005).

not to go ahead with the recommendations of the World Bank report prepared by PricewaterhouseCoopers after the Chief Minister met with a group of NGO representatives.

### Using the media to raise awareness

Encouraging mainstream media organisations, which are often geared to current news stories around events, to cover the intricacies of law making in the abstract is always an uphill task. Regardless, press contacts can be cultivated – this will take, time, energy and nous, but it can be done. Education campaigns can be specifically targeted at raising awareness in the media themselves. More generally, the key is to demonstrate to the media why the public will be interested in the issue – it is this interest that will sell newspapers and get people to tune into news bulletins. In fact, assuring the media of public interest is not actually such a major task; in many countries, citizens will be keen to receive information from the media on how they can keep their government's accountable and take control of their own development through the right to information.

### Utilising the right to information

Even where a law is in place, it will only improve public accountability for development expenditures if it is USED by the public, parliamentarians and the media to expose mismanagement and malfeasance and demand change. Information laws are only effective where they are used – often and innovatively. Over time, just the knowledge that the law *could* be used is often enough to encourage officials to strive to meet higher standards of efficiency, effectiveness and accountability.

To promote better development accountability, people may wish to ask for information about development expenditures relating to their particular locality or in relation to particular sectors. For example, in the state of Rajasthan in India, the famous movement Mazdoor Kisan Shakti Sanghatan (MKSS), asked for information regarding development expenditures in the two districts in which they worked and uncovered massive misallocation of funds when they audited the documents they were finally provided with.[38] In another case, an NGO in the state of Madhya Pradesh accessed documents about purchases made under an ILO project which was supposed to assist with improving health care outcomes for child labourers. Part of the project involved purchasing medical kits, but the NGO accessed information which showed that the project spent more than US$3000 on the purchases despite the lowest tender price being less than US$1000. In a country where more than 400 million people live on less than US$1 a day, this is a culpable misuse of development funds.[39] Today in India, many NGOs now request information about local level development activities, such as the drilling of bore wells, installation of water pumps, building of local schools/health clinics/community centres and payment of wages by government bodies responsible for development projects. They have used the information to uncover large-scale corruption in the development sector.

[38] Based on: Mishra, N. (2003) People's Right to Information Movement: Lessons from Rajasthan, New Delhi, UNDP, p.10.

[39] Story collected by Dr Rakesh Ranjan, consultant to the Commonwealth Human Rights Initiative.

## Promoting development accountability through parliamentary committees

The use of parliamentary committees and taskforces to examine important political issues is becoming increasingly prevalent. Unfortunately, in many countries, the work of parliamentary committees is closed to the public, which reduces their capacity to promote accountability through transparency. Where committees are open however, they can be a very effective oversight mechanism to check that development funds are properly spent.

### *Promoting accountability through RTI at the international level*

Over the past decade or so, the right to information movement has made significant progress. First recognised in the domestic context for its important contribution to good governance, in more recent years, the right to access information has become a key plank in the strategy of civil society activists determined to make donors more transparent, accountable and open to the participation of beneficiaries.

The World Bank, which produced the very first MDB information disclosure policy, has itself recognized that: "The sharing of information is essential for sustainable development. It stimulates public debate on and broadens understanding of development issues, and enhances transparency and accountability in the development process. It also strengthens public support for efforts to improve the lives of people in developing countries, facilitates collaboration among the many parties involved in development, and improves the quality of assistance projects and programs."[40] Nonetheless, official development assistance continues to be misdirected, in large part because the public, parliamentarians and sometimes even local officials cannot access information from donors about how it is being spent. In this context, it is important that proactive information disclosure and the legal right to information are recognised by donors as a core mechanism for promoting accountability.

## Implementing information disclosure policies

Despite the clear benefits of regular information disclosure, as a practical means of promoting transparency, public participation and accountability, donors have been slow to take up the right to information as a key issue for action. In particular, regional and international donors – who are not covered by domestic right to information legislation – have not necessarily embraced information disclosure as a strategy in its own right. Information disclosure policies have been viewed more as administrative policies rather than core strategic documents which support their overall mandate to work accountably to dispense development assistance.

## Existing disclosure policies

It took some time for the multilateral development banks (MDBs) to come around to the fact that they needed not only to advocate, but also to implement, the right to information themselves. As has been common amongst the MDBs, it was the World Bank that took the lead, implementing the first MDB Information Disclosure Policy in 1993.

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[40] World Bank, op cit, Foreword by Mr James D Wolfensohn, President of the World Bank.

Since that time, all of the MDBs have developed information disclosure policies.[41] Unfortunately, a close review of the policies shows that while the narrative of openness and disclosure is firmly in place, too often the substantive clauses fall far short of the ideal. It was likely this fact that prompted the G-7 Finance Ministers and Central Bank Governors, as recently as 2001, to note that "[e]nhancing internal governance, accountability and transparency are crucial to enable the MDBs to strengthen their role in the fight against poverty and retain institutional credibility. Over the last few years, significant progress towards greater transparency and openness has been made. However, there is still scope for further improvement."[42]

**Uganda: Information empowers citizens to expose poor project design**

Access to information laws offer a very practical means for individuals and civil society to take on the state and protect their rights. This has been particularly well-illustrated by environmental action groups which have been very adept at using access to information legislation to expose and discourage antigreen government programs.

For example, in 2002 in Uganda, Greenwatch Limited, an environmental NGO, successfully used the open government clause in Article 41 of the Ugandan constitution to obtain the release of a key document about a controversial dam project that the Ugandan government and the World Bank had previously declined to release. The Ugandan High Court ordered the release of the document, whose very existence the Ugandan government had denied during the court proceedings. A subsequent analysis of the document, commissioned by the International Rivers Network assessed that "Ugandans will pay hundreds of millions of dollars in excessive power payments if the World-Bank-financed Bujagali Dam proceeds according to plan." The project is now on hold.[43]

The International Monetary Fund (IMF) has been severely criticised for operating in secret. Its 1998 disclosure policy lists documents that can be made available; but disclosure is only possible if concerned governments consent. Agendas and minutes of meetings of the governing board are excluded from what is already a very bare list of documents for disclosure. Successive managing directors have stated that the IMF is only accountable to its member countries, and increased openness will require consensus among governments.[44]

The World Trade Organization also has only relatively limited information disclosure. Information about the governing structure and descriptions of key bodies and functions are available, as are all final agreements and summaries of governing body decisions and statements. However, all trade

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[41] African Development Bank Group (2003) Disclosure of Information Policy Paper, http://www.afdb.org/about_adb/disclosure.htm; Asian Development Bank (2005) Public Communications Policy, http://www.adb.org/Documents/Policies/Confidentiality_Disclosure/ confidentiality.pdf; Inter-American Development Bank (2003) Disclosure of Information Policy, http://www.iadb.org/exr/pic/info/infofinaleng.pdf; World Bank (2002) The World Bank Policy on Disclosure of Information, http://www1.worldbank.org/operations/disclosure/policy.html.

[42] G-7 Finance Ministers and Central Bank Governors (2001) "Strengthening the International Financial System and the Multilateral Development Banks", Meeting in Rome, Italy, 7 July 2001, http://www.idlo.int/texts/IDLI/mis5716.pdf.

[43] "Ugandan Judge Orders Release of Key Document on Bujagali Dam", 22 November 2002, http://www.freedominfo.org/ifti1102.htm#1 as at 22 July 2003.

[44] Roberts, A. (2000) "Informational commons at risk", p.15, http://faculty.maxwell.syr.edu/asroberts/documents/chapters/commons.pdf as on 1 October 2003.

negotiations and dispute settlements are closed to the public. Critics argue that providing access to agreements only after they are signed is unsatisfactory because without knowing what really goes on during negotiations, it is difficult to hold the WTO or country representatives to account. The new 2002 Derestriction Policy[45] though, is very comprehensive, shortening the time frame in which documents can be released from an average of eight to nine months to six to eight weeks.[46] Some documents can still be withheld (most commonly, documents the member itself has provided to the WTO) if a WTO member-government demands non-disclosure, but the list of undisclosed documents has been cut down.

By contrast, the United Nations Development Programme's (UNDP) Public Information Disclosure Policy is relatively wide and inclusive. The Policy's objective is stated clearly to be to "ensure that information concerning UNDP operational activities will be made available to the public in the absence of a compelling reason for confidentiality".[47] There is "a presumption in favour of public disclosure of information and documentation generated or held by UNDP".[48]

Anyone can ask for copies of any document in the UNDP's possession, except those expressly exempted on such grounds as commercial confidentiality, confidentiality of internal deliberative processes, legal privilege and privacy of employees.[49] The European Union (EU) also has a relatively strong information disclosure regime. The 2000 Charter of Fundamental Rights of the European Union explicitly guarantees access to documents of the European Parliament, Council and Commission.[50] In 2001, the EU passed a specific regulation on freedom of information to "ensure the widest access possible to documents".[51] It covers "all documents held by an institution, that is to say, drawn up or received by it and in its possession, in all areas of activity of the European Union".[52] The Regulation obligates both the European Union Commission and the European Parliament to maintain updated public registers of documents on the internet.

### Limitations of existing disclosure policies

While some progress has been made in terms of strengthening donor disclosure, the disclosure policies of most international financial and trade institutions still contain major deficiencies. Advocates – both within civil society and within the legislature – need to be alert to these shortcomings, so that they can lobby institutions to fix them as well as ensure they properly understand the parameters of what they can access under relevant disclosure policies. Specifically, key issues with disclosure policies include:

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[45] WTO (2002) Procedure for the Circulation and Derestriction of WTO Documents, Doc. WT/L/452, decision of 14 May 2002, http://docsonline.wto.org/DDFDocuments/t/WT/L/452.doc as on 1 October 2003.
[46] WTO (2002) Explanatory note on old and new procedures, http://www.wto.org/englisl/forums_e/ngo_e/derestr_explane_e.htm as on 1 October 2003.
[47] UNDP (1997) Public Information Disclosure Policy, paras 1 and 6, http://www.undp.org/csopp/CSO/NewFiles/policiesinfo.html, as on 1 October 2003.
[48] *Ibid.*
[49] *Ibid.* Part II.
[50] Doc. 2000/C 364/01, Article 42 http://www.europarl.eu.int/charter/pdf/text_en.pdf as on 1 October 2003.
[51] Regulation (EC) 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 30 May 2001, .http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/docs/1049EN.pdf as on 1 October 2003.
[52] *Ibid.* Art.2.3.

• Member state vetoes: Many policies allow member states to veto disclosure of documents which relate to their country. This harks back to the past when international organisations adopted a policy of strict non-interference in national politics and policy development. It is inappropriate today and moreover, does not accord with best practice disclosure approaches adopted in domestic laws where it is the body which holds the information which has the final say over whether information should be released – even if it involves a third party's interests. Ironically, the very international bodies which argue that they cannot force governments to disclose their documents are the same ones who use the threat of withdrawing financial support to load up loan agreements with any number of other conditionalities. If they are willing to use their power to force national governments to implement controversial domestic policy reforms, it is problematic that they are reluctant to adopt a similarly firm stance when their transparency and accountability are at issue.

• Private company exemptions and vetoes: Many policies include very broad exemptions to protect against the disclosure of information provided by or related to private companies. Exemptions are often supported by an actual veto which allows private companies to decide whether or not their information should be disclosed. Such an approach is no longer appropriate. Any private company which receives public monies – which is what the international financial institutions are largely funded with – should be required to be open and accountable to the public. This is certainly the approach which is increasingly being adopted in national access laws.

• Failure to disclose drafts: Although policies are increasingly broadening out the types of documents they will allow to be released, nonetheless, there continues to be a reluctance to require the disclosure of draft documents. This is disappointing because for information disclosure to meaningfully promote public participation in practice, it is important that documents are disclosed prior to being finalised so that the public can usefully input their ideas and make suggestions for amendments. As one activist from India observed: "Unless a public is fully empowered with all the relevant and required knowledge *within a relevant time frame*, its participation in a given situation is cosmetic at best."[53] (*emphasis added*). Unfortunately though, policies "are generally geared towards informing people of decisions that have already been made, rather than giving people the information that they need to participate in decision-making. There are notable exceptions to this rule, but in general the IFIs [the International Monetary Fund and the multilateral development banks] fail to share detailed information early in the deliberative process and are more comfortable distributing outcomes of decisions rather than working drafts."[54]

• Failure to disclosure ongoing implementation reports: Policies increasingly require more public input and information dissemination while projects are being designed, in recognition of the fact that beneficiaries have too often been excluded from deciding what they want and what is in their best interests. However, once a project is agreed upon, it is essential that the public, and in particular, project beneficiaries, can access ongoing information about how implementation is progressing. Some polices require the disclosure of summary implementation information, but even this is not enough. People should be able to access all implementation reports so they can assess for themselves whether the project is on-track.

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[53] Guttal, S. op cit.
[54] Saul, G. op cit, p.5.

• Failure to translate information and dissemination in accessible forms: All of the international donor organisations work in multiple countries, the majority of which have official languages other than English. Despite this fact, they all operate in English this makes the inclusion of a translation policy vital to any information disclosure policy – information is next to useless if it cannot be understood by recipients. Unfortunately, only the World Bank has a comprehensive translation framework, and even this has its deficiencies – most notably, the fact that the responsibility for decisions on translation (including what, when, and how) is discretionarily vested in the institution responsible for the document. The internet is a key mode of information dissemination identified in most disclosure policies, but it goes without saying that tens of millions of project affected people do not have access to the internet. The World Bank has instituted the most progressive supplement to the internet, establishing Public Information Centers (PIC) in most of their country offices. The Bank's specific policy on PIC's notes that many have taken on an active dissemination role, using a variety of methods and customized packages - such as road shows, brochures in English and local languages, monthly or quarterly newsletters or booklets, and "mini" PICs established throughout the country.[55] This work needs to be extended by the World Bank and replicated by the other organisations.

### Utilising disclosure policies effectively

For information disclosure policies to be useful in promoting more accountability in overseas development assistance, they need to be used by stakeholders actively and effectively. Unlike many other policies which place specific duties on officials, an information disclosure relies for its utility on affected or interested people using it to promote more transparency. Importantly, information disclosure policies provide a direct link between beneficiaries and donors. Rather than beneficiaries having to rely on their governments to represent them or donor country citizens to take up issues on their behalf, disclosure policies can be used BY beneficiaries to directly hold donors accountable.

### Encouraging recipient governments to open up

More controversially, donors can also be active in promoting information disclosure around development projects by encouraging national governments to enact right to information laws and/or implement information disclosure as a matter of policy. For example, Ghana's Poverty Reduction Strategy, developed in consultation with the World Bank with CSO involvement, requires that an FOI law will be adopted by 2004.[56] Donors such as the international financial institutions increasingly make transparency a condition of loans and assistance and issues of transparency have increasingly been included in dialogue between governments and the international community via the good governance agenda. Although precise requirements are not always formulated, it is often a criterion that the government takes steps to promote transparency, and this is something which CSOs have exploited to good effect.

Notably however, many development activists are highly critical of "donor conditionality" as a means of achieving sustainable policy reforms. In many other sectors, conditionality has led to national

[55] World Bank (2003) Strengthening the World Banks Public Information Centres, http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/08/12/000012009_20030812092512/Rendered/PDF/260211Str110PICs.pdf, paragraph 2, p.vii.

[56] This is a requirement listed in the 'policy matrix' of the PRSP. See www.worldbank.org/poverty/strategies/index.htm, as at 9 June 2003.

reforms being handled as a "tick-the-box" exercise, where governments simply do the minimum needed to satisfy the donor, without seriously internalising the reform agenda. In the long-term, this has often led to a lack of sustainability of any short-term gains. In the area of freedom of information, activists sit on both sides of the fence regarding conditionality as an advocacy approach.

Apart from conditionality, donors will have to think more innovatively about how to support domestic activities to entrench the right to information. One obvious way, is to require information disclosure to be an integral part of all projects supported by the donor. This would not require legislative action on the part of the recipient government, but would be one step forwards in familiarising local officials with the mechanics of information disclosure. Over time, once the benefits of disclosure manifest – for example, more accountability for expenditure and more effective public participation in development activities – it is to be hoped that governments would be keener to take the lead on entrenching the right to information more comprehensively through legislation.

## Conclusion

It is important to note the limitations of the right to information, most significantly, the fact that information is not a cure all in terms of increasing transparency and participation, but is only a tool – albeit a central tool – that can be used in support of a more comprehensive strategy. Simply developing an information disclosure policy will change little in practical terms if officials are not committed to their new disclosure duties and the public are not aware of their rights and assisted in exercising them. Furthermore, it is necessary that other mechanisms are in place to maximise the benefits of increased information disclosure. For example, anti-corruption divisions need to be established to prosecute malfeasance where information is brought to light. Participation mechanisms need to be developed to ensure that once project-affected people obtain access to information about the development and/or implementation of activities they have accessible avenues for channeling their feedback back to decision-makers. Additionally, it must be institutionalized that decision-makers are required to be consider the inputs of the public, and not only governments, the private sector and/or consultants.

Nevertheless, the right to information offers a cheap but effective tool for contributing to oversight of the allocation and expenditure of overseas development assistance. Although governments and donors often talk about transparency, rarely do they implement concrete mechanisms for promoting greater openness. The right to information – which can be relatively easily operationalised through legislation and/or information disclosure policies – addresses this problem in a practical way. It provides a direct link between donors, governments and the public and empowers ordinary people to engage with the development processes that affect them, but too often sideline them. More information will bring more accountability and should be prioritised by all development players accordingly.

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