

Global Information Society Watch 2009

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Natasha Primo (APC)

Project coordinator

Natasha Primo

Editor

Alan Finlay

Assistant editor

Lori Nordstrom

Publication production

Karen Higgs

Graphic design

MONOCROMO
info@monocromo.com.uy
Phone: +598 (2) 400 1685

Cover illustration

Matias Bervejillo

Translation coordinator

Analía Lavin

Proofreading

Valerie Dee, Lori Nordstrom

Financial partners

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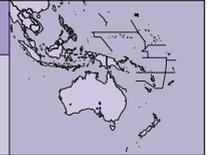
*Dedicated to A.K. Mahan - an activist who valued
intellectual rigour and concrete outcomes.*

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Introduction

Though it has been more than twenty years since the Philippines peacefully overthrew the fourteen-year martial law regime in 1986, the continuing tug-of-war between the forces of authoritarianism and democratisation continues to be played out on many fronts. As the right to information and other communication rights have assumed greater significance with the perceived dividends of the so-called global “information society”, there are continuing efforts to pry open the authoritarian legacy of state (and lately, corporate) information secrecy, by organisations and movements in the Philippines who see “freedom of information” and “the right to know” as crucial to the ongoing democratisation of the country.

This report will outline the terrain of freedom of information in the Philippines, with a special emphasis on online access. It will focus on the battles for access to (official) information, and will touch on the state of media freedom, including freedoms in online environments. The legal and policy context will be outlined, followed by a general discussion of the actual practice on the ground, particularly how recent issues and trends impact on human rights in general, and communication rights in particular. (Due to space limitations, access to knowledge issues, particularly dealing with intellectual property regimes, cannot be discussed extensively but will be referred to briefly.)

Context

Democratic traditions and the martial law legacy

In a region where numerous authoritarian regimes rule, and where information policies are often restrictive and even repressive, the Philippines has been one of the few countries in Asia with a long tradition of a relatively open society and a free and hard-hitting media sector. The succession of Philippine constitutions amended and ratified during specific periods since 1935 have always enshrined a Bill of Rights, which has traditionally been protective of freedom of expression. The right to information is also protected, and even elevated as a distinct constitutional guarantee.

Martial law changed the political landscape irrevocably. The Marcos regime¹ paid lip service to democracy and grossly violated basic rights and freedoms, limiting access to information for its citizens. From 1972 to 1986, presidential decrees and issuances retained the force of law—embodying “one-man rule” during the period—and these were often kept from public scrutiny and debate. In addition, the mass media were severely curtailed, media practitioners critical to

the regime were jailed, and opposition and independent media outlets were shuttered.

Freedoms restored amidst constant threat

After the People Power Revolution of 1986, legal and policy instruments that sought to expunge the worst features of martial law, and to guard against similar authoritarian (and corrupt) restorations in the future, were revived. A constitutional cornerstone is Article III, Section 4 of the current 1987 Constitution: “No law shall be passed abridging the freedom of speech, of expression, and of the press.”

But while all post-martial law presidents and their governments distanced themselves from the authoritarian era by maintaining formal democratic institutions, some have succumbed to authoritarian temptations and have at times resorted to more closed information policies. Official corruption – long a bane of governance – continued to endure and grow as a national problem that fuelled the People Power II Revolt against President Joseph Estrada in 2001, and became a flashpoint for efforts to expand the right to information. In the current Arroyo² administration, government scams and scandals seem to crop up weekly, exposed by a vigilant civil society. The current regime is now seen as more hostile to information rights than its recent predecessors, as it struggles with investigations of large-scale official corruption, and constant criticism of non-transparent government policies, as well as condemnation of its deteriorating human rights record. This history is an important backdrop to the continuing struggle for freedom of information.

Online access

Telecommunications in the Philippines was liberalised in the mid-1990s, at around the same time the internet was introduced. As with mass media, the internet is substantially unregulated and market-driven approaches have become dominant.

Current internet penetration estimates range between 6.3% and 21.1% of the population. Broadband penetration remains low at less than 1%. On the other hand, as traditional fixed telephony plateaued, the Philippines emerged as a top regional market for mobile telephony, with the number of subscribers climbing to 57 million—about 65% of the population.³ With the number of short message service (SMS) messages sent reaching almost a billion a day, the country is considered one of the “texting capitals of the world”, both in per capita terms and in innovative use.

1 President Ferdinand Marcos, 1965 to 1986.

2 President Gloria Macapagal-Arroyo.

3 Statistics cited are from the websites of the International Telecommunication Union (www.itu.int/ITU-D/ict), the National Telecommunications Commission (www.ntc.gov.ph), and Internet World Stats (www.internetworldstats.com).

These figures also indicate that only the middle and upper economic classes, mostly in the urbanised areas, have the internet access to take advantage of their right to information in online environments. But with school and community access rates increasing, and the constant advocacy by civil society for universal access and digital/social inclusion, this may change. Furthermore, high mobile penetration across social classes and evolving mobile applications continue to make this space an area to watch. From a human rights perspective, the ubiquity of mobile communications and growing popularity of the internet make this a new battleground for content filtering issues.

Policy and legislative environment

After martial law, a more independent Supreme Court in a freer environment emphasised the citizen's access to laws and state policies as a public interest: "The days of the secret laws and the unpublished decrees are over... Mysterious pronouncements and rumored rules cannot be recognized as binding unless their existence and contents are confirmed... [in order] to make full disclosure and give proper notice to the people."⁴

Guarantees strengthened

The current constitution ratified in 1987 – which sought among other things to restore and reaffirm people's rights immediately – reiterated and strengthened the constitutional guarantee:

Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving the public interest (Article II, Sec. 28).

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as a basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law (Article III, Sec. 7).

It also required specific classes of information to be made public, including information on foreign loans obtained or guaranteed by the government (Art. XII, Sec. 21); the declaration of public officers or employees of their assets and liabilities (Art. XI, Sec. 17); and the journal of the proceedings of the legislature (Art. VI, Sec. 16 [4]) as well as its records and books of accounts (Art. VI, Sec. 20).⁵

The Supreme Court in 1987 laid down key principles in applying the right to information in a landmark case, *Legaspi vs. Civil Service Commission* (G.R. No. 72119, 29 May 1987):⁶

- The right to information is a public right.
- The constitutional guarantee is self-executing, though not absolute. As such, it does not require any enabling legislation for it to become enforceable.
- Government agencies are without discretion in refusing access to information of public concern; therefore they may be compelled by a writ of *mandamus*.⁷

Other policy instruments

Republic Act 6713 of 1987 further strengthens this constitutional provision via the Code of Conduct and Ethical Standards for Public Officials and Employees and its accompanying implementing rules and regulations. The Act supported the "full public disclosure" policy, and required officials to act on requests within fifteen working days from receipt of the requests.⁸ The Supreme Court also issued rules for issuing a "writ of habeas data".⁹

Online media

No comprehensive policy framework exists which defines particular access imperatives regarding online content environments. The mass media are, however, generally free, subject to existing laws and the monitoring of state regulatory agencies.¹⁰ The internet is traditionally an unregulated space, but remains an underdeveloped policy/governance area in the Philippines; existing policy institutions are relatively weak and strategic gaps remain in policy frameworks.¹¹ Telecommunications regulations exist, but for now focus on rules for trade practices.

Between policy and practice: Issues and gaps

Because of such a progressive policy framework regarding the right to information, the Philippines is considered one of the more open countries in terms of accessibility of public documents.¹² However, effective implementation for the past twenty years has been uneven, hampered by legal and procedural gaps, state capacity and information and communications technology (ICT) policy issues, as well as low commitment within government to comply, particularly when political (i.e., partisan) considerations are involved.

4 Justice Isagani Cruz, in "Tanada vs. Tuvera, G.R. No. 63915, 29 December 1986". Cited in Malaluan, N. (2006) Right Versus Access to Information: The Gap Widens Under Macapagal-Arroyo, in *Access to Information Network (ATIN) Clamdown on the People's Right to Know*, ATIN, Quezon City, p. 2.

5 *Ibid.*, p. 3.

6 This summary is in Malaluan, N. (2006) *op. cit.*, p. 4-5.

7 A writ of *mandamus* is a legal petition that enjoins a person or entity to perform an act that the law requires.

8 Republic Act 6713 and its Implementing Rules and Regulations are accessible at the Civil Service Commission website: www.csc.gov.ph

9 A petition for the *writ of habeas data* is a legal remedy for those whose right to privacy in life, liberty or security is violated or threatened by anyone (public or private individual/entity) engaged in gathering, collecting or storing of data or information regarding the aggrieved party (especially victims of human rights violations). See: www.chanrobles.com/writofhabeasdata.html

10 Aside from the National Telecommunications Commission, there is a Motion Picture and Television Regulatory and Classification Board to deal with regulating "questionable content", and an Optical Media Board that tackles "intellectual property" issues concerning "piracy".

11 See Alegre, A. and Tuano, P. A. (2007) Philippines, in Finlay, A. (ed.), *Global Information Society Watch 2007*, APC and ITeM, p. 187-190. www.giswatch.org/gisw2007

12 See for example Coronel, S. (ed.) (2001) *The Right to Know: Access to Information in Southeast Asia*, Philippine Center for Investigative Journalism, Quezon City.

The Philippine Center for Investigative Journalism (PCIJ) had recorded at least fourteen cases of major requests effectively denied by eleven government agencies over the past decade, for flimsy excuses.¹³ Some recent high-profile examples where information disclosure has been denied include the report of Supreme Court Justice Hilario Davide Jr. on electoral reform; the report of the Independent Commission to Address Media and Activist Killings; the anomalous National Broadband Network (NBN) deal; and various government contracts and loan agreements.¹⁴

General access to information: Legal and procedural gaps

The Access to Information Network (ATIN) is composed of civil society organisations doing public interest work in the fields of media freedom and communication rights, development, governance and law, who have come together to advocate the people's right to information. They, as well as other advocates, have noted numerous problems in practice:¹⁵

- *Absence of a uniform and speedy access procedure:* Access to information is differently and inconsistently applied across government agencies. Government granting therefore remains *discretionary in practice*, and agencies are able to frustrate the exercise of this right.
- *Absence of a definite scope, particularly on what information may be exempted:* Limitations "as may be provided by law" are hampered by the lack of such a defining law. For example, this gap prevented access to the proposed text of controversial free trade agreements, like the Japan-Philippines Economic Partnership Agreement.¹⁶
- *Legal difficulties in enforcement:* In the absence of a definite procedure and scope, it remains difficult to enforce administrative and penal sanctions for unlawful withholding of information. Related to that, the judicial remedy to compel disclosure (i.e., writ of *mandamus*) remains inaccessible to the general public.

These gaps moved groups like ATIN to push for an enabling law that provides the mechanics for implementation. The Freedom of Information Act of 2008 (House Bill 3732), shepherded by ATIN, passed the Lower House of Congress and a counterpart Senate Bill 3308 has been calendared for second reading in September 2009, hopefully to be passed before Congress adjourns.

Online access: State capacity and ICT policy gaps

- *Poor state of government information systems:* Even in analogue form, the level of many government agencies' recordkeeping is inadequate, and is worse when one deals with digital databases. Several government agencies often post laws and other information on their own websites, but this is highly uneven across agencies. There also is no central website that contains all current laws, and the individual websites are not always easily searchable. So online access may be possible, but is more the exception than the rule, though some public and private institutions are seeking to address this. (An ongoing study by the Centre for Internet and Society in Bangalore has pinpointed interesting efforts to promote better online access to law in the country: the Supreme Court's e-Library Project, Arellano University's Philippine Laws and Jurisprudence Databank, and the Chan Robles law library.)¹⁷

Two other issues relating to ICT and internet policy and governance – one supply-side and the other demand-side – also affect citizens' right to information:

- *Lack of a strategic e-governance¹⁸ framework and strategy:* Underpinning the issue of the lack of state capacity in managing their information and allowing access are basic gaps in the government's ICT governance framework and strategy. In an upcoming assessment of the government's ICT targets in its six-year development plan, researchers have noted the glaring lack of an effective e-governance strategy that takes advantage of ICTs as an enabler of democracy and social inclusion. This lack has hampered the development of a sound government content strategy, and fails to see the advantages of open government.¹⁹
- *Lack of a coherent digital inclusion and universal access strategy:* Addressing the universal access gap is a significantly relevant factor for online access. Government has taken a generally *laissez faire* and overly market-driven approach in addressing the lack of digital inclusion among its citizens, which would enable citizens' participation in the so-called information society. It has failed to correct "market failures" in the provision of access to the internet to large parts of rural areas not reached by commercial providers and carriers, as well as to particularly vulnerable sectors. This ultimately prevents wide sections of the population from taking advantage of the internet to access much-needed information and knowledge.²⁰

13 For an overview of these difficulties, see a two-part article by the PCIJ, "Access to Information Denied", at pcij.org/stories/2009/access-to-info-denied.html and pcij.org/stories/2009/access-to-info-reporters.html

14 Access to Information Network (ATIN) (2009) A Primer on Freedom of Information in the Philippines, 27 May, p. 5. For coverage on the NBN scandal, see: www.inquirer.net/specialfeatures/nbndeal/index.php

15 ATIN (2009) op. cit. See also Malaluan, N. (2006) op. cit., p. 5-7.

16 Lat, M. T. (2006) The Right to Information in International Treaties: The Case of the Japan-Philippines Economic Partnership Agreement, in Access to Information Network (ATIN) *Clampdown on the People's Right to Know*, ATIN, Quezon City, p. 2.

17 See elibrary.judiciary.gov.ph, www.lawphil.net and chanrobles.com: from numerous interviews with researcher Grace Armstrong, June 2009.

18 Here used to include e-government (i.e. government-citizen interaction) as well as a broader, more interactive and participatory multi-stakeholder strategy.

19 Foundation for Media Alternatives and ideacorp (forthcoming 2009) *A Civil Society Assessment of the Medium-Term Philippine Development Plan 2004-2010 in the Area of ICT Governance* (tentative title).

20 Ibid.

Political issues

- *Growing government secrecy:* ATIN notes that there is a very low level of bureaucratic commitment to openness, with a high level of distrust for information seekers.²¹ A growing concern is how the state – especially under the current administration – has been compromising the people’s right to know. A recent indication of this is the government’s Executive Order (EO) 464, which invokes the concept of *executive privilege* – the power of the president to withhold information from the courts, Congress, and ultimately the public, for reasons of “national interest”.²² What has been objectionable is the wide latitude given to prevent officials from “spilling the beans” or “whistle blowing” on potentially illegal transactions, to protect the powers-that-be. Now known as the “gag rule” for government officials, EO 464 has limited Congress’ power of legislative inquiry and its ability to investigate government anomalies, and media and human rights advocates are worried.²³
- *Attacks on media freedom:* The media are a primary channel for citizens to information on matters of public interest, and investigative journalism has flourished in the country. The Philippine media have been among the freest (and most free-wheeling) in the world. Ironically, the country has been tagged as one of the most dangerous countries for journalists globally, with 134 killed since 1986, 69 under the current Arroyo regime alone, the most since the martial law era.²⁴ Many of these murders (as in the case of hundreds of others including activists, peasants and pastors) have been unsolved. This has nurtured a culture of impunity, which poses a direct threat to information freedom as it has a chilling effect on the media.²⁵
- *Online censorship and surveillance:* Though Philippine online environments are generally free and unregulated, recent research shows that targeted hacking of anti-government websites does occur. The mobile telephony space has also been subjected to surveillance and content blocking both by state and non-state actors, for political and economic reasons.²⁶ Such unauthorised online (internet and mobile) monitoring and filtering is

harmful to access to information rights as it prevents the free expression and communication of citizens and groups. International discourses on “cyber crime” and “cyber terrorism” are increasingly used to justify domestic policy and practice that are problematic for human rights.

- *Restrictive intellectual property (IP) regime:* There is also an ongoing policy debate in the Philippines about how restrictive IP frameworks are – in this case, the country’s Intellectual Property Code, and the still officially unreleased National IP Policy and Strategy (NIPPS). Certain civil society groups assert that the country is uncritically following dominant international private interests in overriding development objectives via a strict copyright and patent legal regime.²⁷ The negative effect on access to information and knowledge is beginning to cascade to many sectors and areas (e.g., copyright, access to medicines, biodiversity, arts/culture). And big business has always been willing to enforce conservative copyright regimes. A recent illustration was when one large internet service provider (ISP) was taken to task for capping bandwidth and slowing down subscribers’ paid-for and guaranteed internet speeds if they were suspected of engaging in peer-to-peer downloading of copyrighted material.²⁸

Action steps

The Philippines’ democratic traditions of information freedom and more open government are now under threat on several fronts. State actors are slowly implementing a more restrictive information regime as a strategy for political survival, and have shown the capacity to do so without proper regard for human rights. The state has also partly abdicated its role as a defender of the public interest by being remiss in instituting progressive policies encouraging online access, by failing to defend media from attack by anti-democratic forces, and by allowing private interests to further enclose knowledge and information to the detriment of development imperatives and people’s rights.

Communication rights advocates must unite with human rights groups to defend against such trends, continue to work for greater information access, and craft policies which institutionalise this via strategic legislation and policy development. They must prepare to mount legal challenges to ever-increasing violations, and be eternally vigilant to the various threats, especially in online environments.

The right to information is a necessary condition for the effective exercise of other rights, and must be protected and expanded by all. ■

21 ATIN (2006) op. cit. p. 7.

22 The text of EO 464 may be accessed here: www.doe.gov.ph/popup/EO%20464.pdf

23 See Ilagan, K. (2008) Right to information and government’s hangover of secrecy, 16 April. www.pcij.org/blog/?p=2294 and Bernas, J. (2008) The limits of ‘executive privilege’, *Inquirer.net*, 17 February. opinion.inquirer.net/inquireropinion/columns/view/20080217-119534/The-limits-of-executive-privilege

24 Center for Media Freedom and Responsibility: www.cmfr-phil.org/map/index_inline.html.

25 The Philippines ranks sixth worldwide among countries that fail to prosecute cases of journalists killed for their work, according to the Committee to Protect Journalists’ Impunity Index. See: cpj.org/reports/2009/03/getting-away-with-murder-2009.php

26 The Foundation for Media Alternatives (FMA) is part of the Open Net Initiative in Asia (opennet.net) and is drafting a country report on “Internet and Mobile Telephony Content Monitoring and Filtering” (forthcoming 2009).

27 The Third World Network and FMA convened a series of civil society meetings and roundtables in mid-2009 to consolidate responses to the NIPPS.

28 Villafania, A. (2009) Subscribers hit Globe P2P bandwidth cap, *Inquirer.net*, 18 May. technology.inquirer.net/infotech/infotech/view/20090518-205734/Subscribers-hit-Globe-P2P-bandwidth-cap

GLOBAL INFORMATION SOCIETY WATCH (GISWatch) 2009 is the third in a series of yearly reports critically covering the state of the information society *from the perspectives of civil society organisations across the world.*

GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels
- **Encouraging** critical debate
- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy*. It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

In addition, 48 country reports analyse the status of access to online information and knowledge in countries as diverse as the Democratic Republic of Congo, Mexico, Switzerland and Kazakhstan, while six regional overviews offer a bird's eye perspective on regional trends.

GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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