



Assembly
Item 3

A/119/3(c)-R.1
22 September 2008

FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION

***Draft report submitted by the co-Rapporteurs
Mr. K. Malaisamy (India) and Mr. A. Dismore (United Kingdom)***

FREEDOM OF EXPRESSION

Freedom of opinion and expression, enshrined in Article 19 of the Universal Declaration of Human Rights (1948), is widely recognised as a long-standing and historic right throughout the world.

Article 19 expresses the right to freedom of opinion and expression, including the freedom to hold opinions without interference and also, to seek, receive and impart information and ideas through any media, regardless of frontiers.

This right was restated in the International Covenant on Civil and Political Rights (1966) also in Article 19, which reaffirms that everyone has the right to hold opinions without interference, and the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and orally in writing or in print, in the form of art, or through any other media of his choice.

Freedom of expression is seen as underpinning democracy, supporting human rights, helping challenge corruption, attacking religious obscurantism, and as necessary for economic and social development.

Its roots can be found in the civil libertarian ideal of “free speech”, but there is a significant difference.

Where the right of absolute free speech holds sway, as in some western countries, the media can be a virtual monopoly dominated by a handful of powerful corporate entities as a consequence of the commercial market, so that the wide range of views within the society concerned may not be fully expressed. It is also difficult to identify any ethos of public service.

Freedom of expression on the other hand, is the creation of international treaties and governments, a human right that requires the state to take action to guarantee it and of course, to set its bounds: freedom of speech as an expression does not permit someone to shout “fire” in a crowded theatre, as a hoax.

Whilst freedom of expression underpins so many others of our rights and is one of the most valued human rights internationally, it is not and should not be, completely unrestricted. Some limitations are necessary to protect the rights of others, restrictions recognised in principle internationally, as demonstrated in Article 19 ICCPR, which states that this right carries “special duties and responsibilities” and “may therefore be subject to certain restrictions”; but these restrictions are themselves confined to only those “such as are provided by law and are necessary”.

The traditional free market in free speech can, in fact, be counter-productive: it can mean that the widest range of views and opinions in a given society, particularly from the fringes of that society, are not heard, which may exclude fair criticism of government or political leaders. It can also increase the marginalisation of certain views by encouraging governments to be too eager to please the dominant voices in the media. A statutory regime of freedom of expression, however, can attempt to create and guarantee a public service broadcasting ethos, so as to ensure representation of a cross section of views, which is particularly important in emphasising and promoting diversity in a pluralist society.

Equally, the individual rights of others may be significantly infringed, through, for example, defamatory statements or breaches of domestic privacy. Measures that are strictly necessary can protect the rights of individuals who may be at risk of or suffer excessive, unfair defamation; or who have seen their domestic privacy violated.

This begs the question as to how to create an appropriate regulatory regime, which allows the maximum freedom of expression, whilst creating a structure for the widest expression of diverse views, and whilst at the same time protecting the rights and freedoms of others, who may be unfairly affected by an otherwise uncontrolled exercise of the right of freedom of expression by another, possibly hostile, person or media outlet.

If there is to be a regulatory regime, the first and most fundamental caveat is to ensure that regulation does not lead to censorship of inconvenient criticism of the state. Regulation should be established by law and overseen by an institution both independent of government and free of undue pressure from it. Such an independent regulator should see as its role, the taking of appropriate steps to avoid the concentration of the media, through the market, into ever fewer organisations leading to monopolies.

Pluralism in the media is essential to maintain freedom of expression. Regulation or licensing must never be a tool used by an unsympathetic government directly or indirectly to interfere with the independence or indeed to outlaw elements of the media, particularly the broadcast media. Those who exercise their right to freedom of expression for the benefit of society as a whole, such as journalists, but also others such as teachers, writers or trade unionists, must not be at risk of victimisation, but allowed to express their views with independence and security.

Equally, when taking advantage of the right to freedom of expression, the right should be exercised responsibly, and not in a way which deliberately and unfairly infringes the rights of other individuals without reasonable justification. For example, incitement to racial hatred in some European countries (not surprisingly in view of the continent’s history) is criminalised (though such an offence must be sufficiently tightly drawn) whereas in the United States the absolute right to free speech guaranteed by the First Amendment prevents such legal restrictions.

The need to protect individual reputations is widely recognised by international human rights instruments around the world, based on the premise that in a democratic society, freedom of expression must be guaranteed, but may be subject to those narrowly drawn restrictions which are necessary to protect legitimate interests including reputation and privacy. An appropriate balance is needed between freedom of expression and injury to reputation and privacy.

Whilst self regulatory mechanisms established by the media are undoubtedly important and may well be effective and accessible for providing remedies, they do not always do so. Inevitably, some protection against defamation is likely to be necessary in law. However, this cannot be justified, if its purpose is to protect individuals against harm to reputation which they do not have or do not merit, or is used to prevent legitimate criticism, or the exposure of official wrongdoing or corruption. Governments and other public authorities cannot rely on a right to a reputation for good governance. Nor can it be justified as serving to protect any interest other than reputation, particularly if aimed at the maintenance of public order, national security or friendly relations with foreign states or governments.

As defamation is aimed at protecting the rights of individuals as against other individuals (or media outlets), any legal right should be an individual civil legal right for the one against the other and not a matter for the criminal law. The purpose should be to encourage apologies and corrections first and foremost, and any financial remedy should take into account the potential effect on the right to freedom of expression, in general.

We should also be aware of the danger of powerful corporate entities relying on the right of freedom of expression to resist legitimate regulation: for example tobacco companies challenging an advertising ban on the basis that it infringes their freedom of expression. One option would be to affirm that only humans, not corporations have human rights, but this is not permitted by some human rights instruments which grant companies the same rights as people, including the right to freedom of expression. An alternative would be to accept that "commercial speech" is of inherently less worth than "political speech", and therefore limitations on it are easier to justify (though they still should be justified).

Inevitably, there will be occasions from time to time, when the exercise of freedom of expression is in direct conflict with the state in exceptional circumstances, such as a state of emergency or when countering an active terrorist threat.

A state of emergency should not be used as an excuse to clamp down on freedom of expression. Emergency powers are legitimate only in cases of extreme national crisis which threaten the life of the nation, as defined by the International Covenant on Civil and Political Rights. Any steps taken must be strictly limited to what is necessary, by way of a temporary legal response, to that exceptional and grave threat. This proportional response is unlikely to justify aggressive action such as suspending broadcast media, detaining journalists, censoring newspapers or the widespread banning of demonstrations.

In the context of counter-terrorism policy, criminalisation of the promotion or glorification of terrorism must be sufficiently tightly drawn offences, so as not to deny the legitimate expression of criticism by media professionals, political groups, civil society or those otherwise involved in defending human rights. Counter-terrorism policy should be aimed at combating terrorism, not at the inconvenient exercise of freedom of expression, by political or media critics or opponents.

The incitement of hatred against minority groups, whether ethnic, national, social, religious or on grounds of sexuality is also an abuse of the right of freedom of expression. The right against discrimination is indivisible from the obligation to exercise freedom of expression responsibly.

Stereotyping and insulting language can seriously affect dialogue and coexistence amongst and within different communities. The necessary fight against intolerance and discrimination, creating a solid basis for the strengthening of democracy, requires respect for diversity and multiculturalism.

The International Covenant on Civil and Political Rights requires the prohibition by law, of “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

Any such law should be careful not to amount to censorship and should be clearly and narrowly defined, but must ensure the protection of the rights of other individuals who may be affected by statements that are made.

Whilst states may regulate freedom of expression, within their own frontiers, the World Wide Web has created major challenges for the fair regulation of the internet, to ensure that it constitutes a democratic medium of expression in compliance with human rights principles, without interfering with the legitimate rights of others. Ultimately, an international organisation with a specific mandate to administer fair governance of the internet is the answer.

RIGHT TO INFORMATION

Among the various forms of government that currently exist in the world, democracy is considered by and large to be the preferred form. Parliamentary democracy presents clear advantages in terms of sovereignty of the people, the supremacy of the legislature, accountability of the executive and the independence of the judiciary. Meaningful participation in governance is a vital component of democracy. In this regard, openness and accessibility of information about government's performance and service delivery to citizens is another vital component of democracy. In other words, democracy requires an informed citizenry and transparency of information, which are important to its functioning. This also contributes to containing corruption and holding governments and their agencies to account. In the words of the late Mahatma Gandhi, the real *swaraj* (self-governance) will come not by the acquisition of authority by the few but by the acquisition of the capacity by all to resist authority when abused. To that end, the right to information plays a vital role. It ensures transparency, accountability, openness, good governance, empowerment of citizens and prevents corruption. Indeed, it is the oxygen of democracy.

The word “information” is derived from the Latin *informare*, which means to fashion, shape or create, to give form to. In other words, information is an idea that has taken on a form, such as the spoken or written word. In an information-based society, access to information has become inevitable. Information means material in any form, including records, documents, press releases, circulars, orders, contracts, samples and models. It also encompasses e-mails, data in electronic form, manuscripts, files, faxes, and materials produced by computers or other electronic devices.

The right to information means the right to inspect works, documents, records; take notes, extracts, certified copies of documents or records; obtain information in the form of print outs, diskettes, floppies, tapes, video cassettes or any other electronic mode.

The key aspects of the right to information include:

- i. Transparency and accountability in the working of every public authority;
- ii. The right of any citizen to request access to information and the corresponding duty of government to meet the request except for classified information;
- iii. The duty of government to proactively make available key information to all;
- iv. Responsibility of all sectors: citizenry, NGOs, the media, etc;
- v. Responsibility of all sectors: citizenry, NGOs, the media, etc.

From a historical perspective, Sweden was the first country in the world to grant the right to information in 1766. The people of that country have tasted the fruits of openness in administration for an uninterrupted period of more than 230 years. In Sweden, access to government documents is a right and non-access is an exception. This process has led to a decrease in public suspicion and distrust of officials and, in turn, has given citizens a sense of confidence. Moreover, it provides a solid foundation for public debate and gives citizens control over their government.

Finland passed a law in 1951 on the right to information. France has accepted the notion of citizens having access to government information. In Australia, the Freedom of Information Act has been in force since 1982.

In the USA, the Freedom of Information Act was passed in 1966 followed by its statutory companions, the Privacy Act 1974 and the Sun Shine Act 1976. The judiciary also contributed to the development of the right to information. Indeed, the Freedom of Information Act was not designed to increase administrative efficiency but to guarantee the public's right to know how the government discharges its duty to protect the public interest.

In the UK, the Freedom of Information Act 2000 came into force on 1st January 2005. Individuals may make requests for information held by roughly 100,000 public authorities covered by the Act. This wide definition includes schools, health bodies, and Parliament itself. Anyone has the right to ask public authorities for any information, including people living abroad, non-UK citizens, journalists, political parties, lobby groups and commercial organisations. The Act applies to all recorded information held by public bodies, not just information produced after commencement in 2005.

In Canada, the Freedom of Information Act has conferred the right of information on all citizens, providing a complete system of disclosure of information contained in government files to applicants. Certain exceptions exist for matters such as Cabinet decisions or other confidential papers. Furthermore, a provision exists for the possibility of appeal in cases where access to information is denied.

In New Zealand, the law not only provides for freedom of information, but also provides information free of charge and thus encourages its citizens to make full use of the relevant law. In summary, the role of secrecy seems to have lost its ground in the recent past throughout the world.

In India, the right to information is enshrined in the preamble of the Constitution of India. It endows the citizen with the fundamental right to know what the government is doing in its name. The right to information has received judicial recognition through landmark judgements of Indian courts to the effect that the right to know is derived from the concept of freedom of speech and expression and, as such, is an integral part on the one hand of the right to life and liberty, and on the other, guaranteed under Articles 19 and 21 of the Constitution of India. The Right of Information Act came into effect across India only in 2005. It is the outcome of the efforts of civil society organizations, people's movements and deliberations of the National Advisory Council. Its enactment marks a significant shift for Indian democracy, ensuring greater access of citizens to information and greater responsiveness of government to the needs of the community.

The aims of the right to information in the Indian context are: i) to ensure that citizens secure access to information under the control of the public authority, ii) to promote transparency and accountability in the working of every public authority, iii) to ensure the constitution of the Central Information Commission and the State Information Commission; and iv) to deal with related matters.

The right to information has been recognized at the global level and many countries have signed a number of conventions guaranteeing this right. In fact, this global recognition has led to the recognition of the right to information and the right to know as constitutional rights in several countries. The relevant international instruments are listed below:

- The Universal Declaration of Human Rights 1948 (Art. 19)
- The American Declaration of The Rights and Duties of Man 1948 (Arts. 1 & 4)
- The European Council Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Art. 10)
- The International Covenant on Civil and Political Rights 1966 (Art. 19) The International Convention on the Elimination of All Forms of Racial Discrimination 1965 (Art. 7)
- The American Convention on Human Rights 1969 (Art. 13)
- The African Charter on Human and Peoples' Rights 1981 (Art. 9)
- The Convention on the Elimination of All forms of Discrimination against Women 1979
- The Declaration on the Right to Development 1986
- The Convention on the Rights of the Child 1989
- The European Convention on Human Rights 1950 (Art. 10)

The right to information ensures openness in administrations by enabling the public to demand information about various issues such as deteriorating civic amenities, facilities, welfare measures, assets and antecedents of elected representatives, utilization of public funds, quality and standard of goods and services and basic human rights, etc. It promotes transparency, empowers the citizen, reduces corruption, increases efficiency, makes officials accountable and puts an end to their indifference.. Unless the citizens are informed of their rights in the form of information, they cannot assert their rights and make the government accountable for its actions.

The right to information may sometimes suffer from inadequacies or loopholes either in the way relevant legislation is framed or enforced. They broadly fall under the following headings:

Legal inadequacies

- The system suffers from inadequate manpower, resources and infrastructure.
- There is no code of conduct for the information seeker and as such, the right is likely to be misused.
- Certain provisions are not clear and some of the important areas have not been well defined and demarcated
- There is a culture of secrecy.

Institutional inadequacies

- Priority, time frame and follow-up mechanisms are either not fixed or are not clear in the system.
- Chronic and almost incurable delays at all levels.
- Habit of evading decision-making.
- Non-availability or inaccessibility of officials at all levels to individual citizens.
- Singular lack of courtesy, consideration and concern to the grievances of individual citizen or groups.
- Lack of human approach to visitors in any government office.
- Time-consuming meetings and discussions which are mostly unproductive and eat away the real business hours.
- Failure and indifference on the part of officials to channel their energies to issues affecting the ordinary man.
- Failure to set up inspection and controls which are time-honoured tools of gauging efficiency at all levels. This consequently leads to corruption by way of seed money or “speed money” for getting things done.

In short, there is either system failure or human failure.

Civil society inadequacies

- Inability to play a positive and constructive role in the dissemination of information.
- Failure to supplement government efforts.
- Lack of cooperation and coordination with other government departments/agencies.

Recommendations

The following areas may be worth analyzing:

- The status of government machinery.
- The problems and difficulties faced by citizens due to government policies.
- The workings of government-citizen schemes.
- The factors that impede development.
- The bottlenecks in the way of development.
- The level of corruption.

In addition, the following steps may also be considered:

- Ensure voluntary disclosure of information
- Employ adequate manpower to handle the process.
- Set up an information bank.

- Organize awareness campaigns.
- Limit exemption areas.
- Issue detailed guidelines for proper implementation of the right to information (in local languages where necessary).
- Appropriate use of the media.
- Secure sufficient budget allocations.
- Institute an award or recognition for best performance in the proper handling of information requests.

Lack of access to information and lack of knowledge about the decision-making process account for much of people's sense of helplessness. Government must assume its responsibility and mobilize skills to ensure a flow of information to citizens. The tradition of secrecy should be discarded. In fact, the oath of secrecy should be replaced with an oath of transparency. While the right to information is a means of determining the justness (or lack thereof) of the State's actions, it should accord high importance to the public interest. Lastly, the right to information has its own limitations and is not a substitute for good governance, but rather is intended to support and advance the process.