INTER-PARLIAMENTARY UNION
120th Assembly and related meetings
Addis Ababa (Ethiopia), 5 - 10 April 2009

Third Standing Committee
Democracy and Human Rights

C-III/120/R-rev
23 December 2008

FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION

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FREEDOM OF EXPRESSION

1. Freedom of expression and the right to information are important not only to ensure individual dignity but also to guarantee a thriving democracy based on popular participation and government accountability.

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

3. 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.

4. 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 or her choice.

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

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

7. 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.

8. Freedom of expression on the other hand, derives from 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.

9. While 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 recognized in principle internationally, as demonstrated in Article 19 of the International Covenant on Civil and Political Rights, which states that this right carries "special duties and responsibilities" and "may therefore be subject to certain restrictions"; however, these restrictions are themselves confined to those "such as are provided by law and are necessary".

10. 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 marginalization of certain views by encouraging governments to be too eager to please the dominant voices in the media. The concentration of media ownership in a very few hands exacerbates this tendency.

11. State broadcasting organizations cannot be seen to be objective, public interest broadcasters. A statutory regime of freedom of expression, however, can attempt to create and guarantee a public interest broadcasting ethos, so as to ensure representation of a cross section of views, which is particularly important in emphasizing and promoting diversity in a pluralist society.

12. 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.

13. This begs the question as to how to create an appropriate regulatory regime that allows the maximum freedom of expression while creating a structure for the widest expression of diverse views and 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.

14. 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. The role of such an independent regulator should be to take appropriate steps to avoid the concentration of the media, through the market, into ever fewer organizations leading to monopolies.

15. States and public bodies, including government at the local level, should not use their financial power, to place or withhold advertising and its revenues, for example, to influence or dominate editorial policy.

16. 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 victimization, but allowed to express their views with independence and security.

17. Equally, when taking advantage of the right to freedom of expression, the right should be exercised responsibly, with self-discipline, 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 criminalized (though such an offence must be clearly defined) whereas in the United States of America the broad right to free speech guaranteed by the First Amendment prevents such legal restrictions.

18. The need to protect individual reputations is widely recognized 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 that 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.

19. While 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 that 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.

20. As defamation is aimed at protecting the rights of individuals as compared with 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 criminal law. The main purpose should be to encourage apologies and corrections, and any financial remedy should take into account the potential effect on the right to freedom of expression, in general.

21. 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 that 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.

22. 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. State authorities should, however, refrain from curtailing legitimate media freedom in the name of fighting terrorism. At the same time, the media should exercise their freedom of expression judiciously during counter-terrorism operations and similar crises.

23. 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 banning demonstrations on a large scale.

24. In the context of counter-terrorism policy, criminalization of the promotion or glorification of terrorism must be clearly defined 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.

25. Legitimate comment and criticism should not be equated with, or seen as, causing offence. However, stereotyping and insulting language can seriously affect dialogue and coexistence among 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.

26. 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.

27. 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".

28. 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.

29. While 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 organization with a specific mandate to administer fair governance of the Internet is the answer.

RIGHT TO INFORMATION

30. We should not underestimate the barriers to the exercise of freedom of expression for the ordinary person. While this paper so far has particularly focused on the rights of the media and journalists, political leaders, especially in opposition, and other opinion formers such as teachers and trade unionists, the right to freedom of expression – like all human rights – is universal.

31. In this context, the lack of information – and thus the right to access information – is obvious. People cannot express a view if they do not have the building block of the essential facts on which to do so. We return to this issue below.

32. For the ordinary person, this is but one of the many barriers to the necessary empowerment which ultimately leads to the universal exercise of the right of freedom of expression, and in turn wider participation in policymaking and democratic life. Exclusion from media outlets; lack of education and illiteracy; access for those with minority languages; time poverty, especially for women; and general economic poverty and deprivation all conspire to prevent the wider population from exercising freedom of expression.

33. The exchange of experience and good practice models around the world, aimed at developing and building the rights of freedom of expression and access to information, is essential. But this can only have meaning in the wider fight against poverty, deprivation, democratic exclusion and for the empowerment of all.

34. Meaningful participation in governance is a vital component of democracy, as are openness and accessibility of information about government performance and service delivery. This also helps contain corruption and hold 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.

35. The fundamental principle underpinning the right to access information should be maximum disclosure. The presumption should be that all information is accessible, subject only to such exemptions as are necessary and proportionate, which protect overriding public and private interests.

36. While it is in the nature of any bureaucracy to wish to maintain its secrets, public bodies need constant reminding that the information they hold is not theirs but belongs to the public.

37. Information includes material in many forms, including records, documents, press releases, circulars, orders, contracts, samples and models. It also encompasses e-mails, data in electronic form, manuscripts, files, faxes, and material produced by computers or other electronic devices.

38. Authorities should publish data and other information pro-actively, as a matter of course, in the broader public interest of informing the public and holding government to account.

39. Behind these broad principles, detailed issues emerge. It is self-evident that the right should apply to public bodies in the widest sense – central and local government, schools and universities, hospitals, and police and prison services, for example.

40. But what of non-State actors such as companies ranging from global multinationals to small enterprises; and private individuals? Few freedom of information regimes around the world extend the right beyond public authorities; but a case can clearly be made for the applicability of the right to major public registered companies, whose power can often eclipse government; small organizations and individuals, however, may be seen in a different light.

41. Like all rights, the right to information only has meaning if it is accessible, and if necessary, enforceable. A simple low- or no-cost procedure to request information is the start, with sensible time limits for compliance. A refusal should be accompanied by an explanation of its justification. A refusal of, or non-reply to, a request must be capable of review by an independent adjudicator on appeal. Such adjudicators must be adequately resourced to provide decisions in a timely manner; and empowered to enforce their decisions, both on a specific request, and on more general guidance. Adjudicators need also to function as independent, proactive reviewers, monitoring performance in the round.

42. Protection against victimization must be in place for the "whistleblower", who releases "inside information" in the public interest, for example to expose corruption or other wrongdoing.

43. In what format should information be made available? With electronic record keeping, should public authorities be required to reduce to written paper documents their data on request? Or examine records to publish an otherwise unnecessary analysis, produced only as a response to the request? Should historic records and data be available, even if predating the introduction of the right to information by the State concerned? Inevitably, the wider the right, the greater the resource implications for the State.

44. The key tension within discussion of the right of freedom of information, though, is the extent to which data is exempted from that right.

45. In what circumstances can the public interest justify non-disclosure? The public interest test should favour disclosure. Information should only be withheld if the public interest in so doing outweighs the public interest in disclosure. National security and defence are obvious examples – so long as these exclusions are not interpreted beyond what is strictly necessary.

46. Other records – for example on the economy, or commercial interests, or formulation of policy – may be necessarily confidential at the time of their creation, but should not be permanently so regarded, once the need for confidentiality has expired.

47. The most important interface, though, is the right to personal privacy, as against public access to information. Personal information, legal professional privilege, information originally provided by an individual in confidence – all require protection from the prurient requesting access.

48. The corollary of this is the right of the data subject to access, and if necessary to correct, the personal information held upon the individual concerned, both by public and private bodies.

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

50. In Canada, the Access to Information Act conferred the right to information on all citizens, providing a complete system of disclosure of information contained in government files. Certain exceptions exist for matters such as Cabinet decisions or other confidential papers. Provision exists for appeals in cases where access to information is denied.

51. In New Zealand, the law provides for freedom of information free of charge and thus encourages its citizens to make full use of the relevant law.

52. In India, the right to information has received judicial recognition through landmark judgements of the Indian courts. 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. In order to ensure greater and more effective access to information, the Parliament of India enacted the Right to Information Act in 2005. The Right to Information Act provides for the right of individual citizens to access information from all public offices.

53. Although the constitutions of most African countries guarantee the right of access to information, very few of them have enacted laws that give effect to this right.

54. Only five African countries have adopted access to information laws: South Africa (Promotion of Access to Information Act, 2000), Uganda (Access to Information Act, 2005), Angola, Zimbabwe (Access to Information and Protection of Privacy Act, 2002), and Ethiopia (Law on Mass Media and Freedom of Information, 2008).

55. In South Africa, under the Promotion of Access to Information Act both a natural and a juristic person, be it a private or public body, can request information from both public and private bodies. Information held by private bodies can only be requested if the requester can prove that such information is required for the exercise or protection of any right. Similarly to the Ugandan law, the Promotion of Access to Information Act provides a procedure for requesting information, appointment of information officers in every public and private body, and the functions of information officers, which among others include the duty to assist applicants in making their requests comply with the requirements of the law. The right of appeal in cases where the request for information has been denied is to the courts, which in their nature are inaccessible in terms of cost and inordinate delays. The responsibility to monitor the implementation of the Act lies with the South African Human Rights Commission, which is an independent constitutional body.

56. The Access to Information Act of Uganda grants every citizen the right to access information and records in possession of the State or any public body. It also provides grounds for restricting access to information, proactive disclosure of certain categories of information, appointment of information officers, functions and duties of the information officer, procedure for requesting information and for judicial review of any refusal of information on grounds of limitations or restrictions. Cabinet records and records of cabinet committees, and records of court proceedings before the conclusion of the case, are exempted from the application of the Act.

57. The Zimbabwean Access to Information and Protection of Privacy Act of 2002 applies to information that is being held by public bodies only. The right of appeal where access to information has been denied lies to the Zimbabwe Media and Information Commission. As well as the records that are normally subject to exemption in other jurisdictions, the Act exempts what is called "protected information" from disclosure. This includes advice relating to policy, information relating to inter-governmental relations or negotiations and information relating to the financial or economic interests of public bodies or the State. The wide scope of protected information under the Act has led to criticism among human rights activists in that country that it does not comply with the basic tenets of freedom of information.

58. Malawi, Mozambique, the United Republic of Tanzania, Kenya, Nigeria, Zambia, Liberia, Sierra Leone, Ghana, Madagascar, Algeria and Morocco are at various stages of enacting access to information legislation. In some of these countries, access to information bills have been pending in the parliament concerned for over three years.

59. Parliaments and their members have an important role to play in promoting and protecting the right of access to information. They should work towards ensuring implementation of an appropriate legislative framework in their respective countries.

60. Lack of access to information and lack of knowledge about the decision-making process account for many people's sense of powerlessness. Traditional secrecy should be part of history. While the right of information is a means to monitor the State's actions, this right inevitably has its own limitations and is not a substitute for good governance, but rather is intended to support and advance the process.