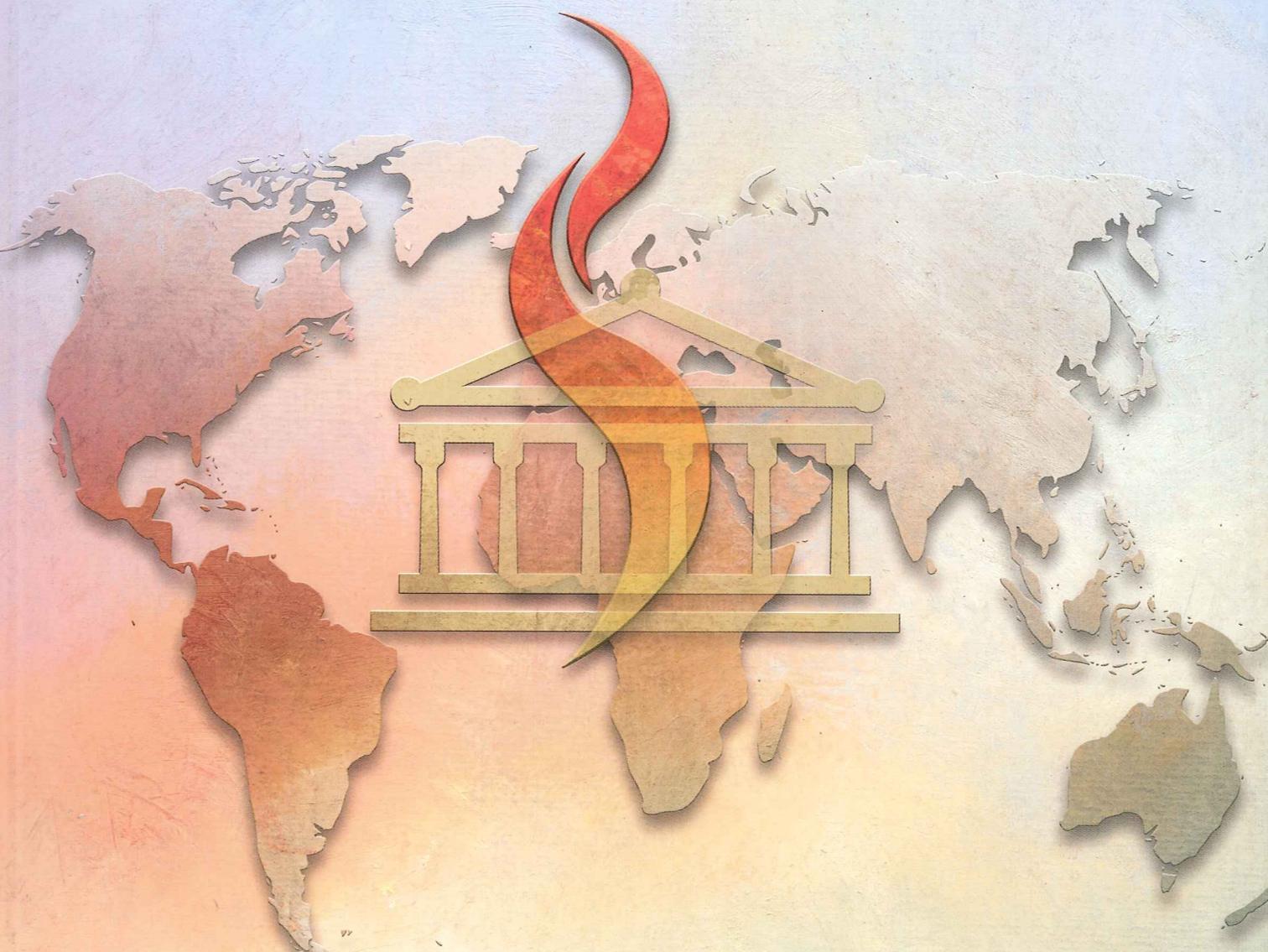


# FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES

Geneva - IPU Headquarters  
25 - 27 May 2005



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INTER-PARLIAMENTARY UNION





# FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES

SEMINAR FOR CHAIRPERSONS AND MEMBERS OF PARLIAMENTARY HUMAN RIGHTS BODIES  
ORGANIZED JOINTLY BY THE INTER-PARLIAMENTARY UNION AND ARTICLE 19 **GENEVA, IPU HEADQUARTERS, 25-27 MAY 2005**

## **"Article 19.**

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."

Universal Declaration of Human Rights

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# Foreword

When the first edition of the *World Directory of Parliamentary Human Rights Bodies* was published in 1990, it was suggested that the Inter-Parliamentary Union (IPU) should organize meetings of members of such bodies to exchange ideas among themselves and with human rights experts and non-governmental organizations in the field of human rights. The Second World Conference on Human Rights, held in June 1993 in Vienna, provided an excellent opportunity to organize the first such meeting. It focused on a subject that had never before been studied as such by a global organization, namely parliament in its role as guardian of human rights. The main message that came out of the meeting was that national parliaments can and must play a growing role in promoting and giving substance to human rights and that they must do this in accordance with their own specific means and in a way that is both independent of, and complementary to the action of the executive and judicial branch in each country.

To this end, the meeting recommended inter alia that the IPU should consider setting up a permanent mechanism to inform parliaments about existing international human rights instruments and encourage their ratification and follow-up at the national level and that it should make use of various means, including the periodic publication of its *World Directory of Parliamentary Human Rights Bodies*, to foster contacts and exchanges between those bodies.

Several updates of the World Directory have in the meantime been published and since 2003, the data gathered has also been made available online on the IPU's website. It took longer to put into practice the second recommendation. In 2004, the IPU embarked on a process of organizing yearly seminars intended specifically for members of parliamentary human rights bodies. The first such seminar, held in March 2004 dealt with parliamentary human rights bodies themselves, their mandate, functioning, working methods and their cooperation with other actors in the field of human rights. The seminar confirmed that there was indeed a need for members of such bodies to meet in an informal framework to exchange views on human rights issues of particular importance.

It is therefore not surprising that the second seminar tackled the issue of freedom of expression. Indeed, freedom of expression has been hailed as the cornerstone of human rights and of democracy as it plays a key role in the democratic process: enabling people to choose their representatives through free and fair elections and enabling those same representatives to speak out on their behalf. In organizing the seminar, the IPU associated itself with an expert organization in the field of freedom of expression, Article 19 - Global Campaign for Free Expression. The IPU would like to thank

Article 19's Law Programme Director, Mr. Toby Mendel, and its Executive Director, Dr. Agnès Callamard for their important contributions.

The IPU would also like to thank the resource persons for their invaluable input. They provided valuable insights into the international and regional norms and standards in the field of freedom of expression and the intricacies of this fundamental right, which is so important for the implementation and respect for all other human rights.

The seminar would not have been possible without the generous support of the Swedish International Development Agency (SIDA), which provided funding for the event under the SIDA-IPU Agreement on Core Support during 2004-2008. On behalf of Article 19 and the IPU, I would like to thank SIDA for its support of this event.

The brochure contains a summary record of the contributions of the resource persons and of the debates as well as the summary and recommendations presented by the Rapporteur of the Seminar. While most of the recommendations are addressed to parliaments and their members, there are two which concern the IPU, namely the recommendation to publish a parliamentary guide on freedom of expression and to continue to hold parliamentary seminars on human rights. The IPU will certainly make every effort to put both recommendations into practice.

A handwritten signature in black ink, appearing to read 'Anders', enclosed within a hand-drawn, irregular loop that forms a partial signature or seal.

Anders B. Johnsson  
Secretary General of the  
Inter-Parliamentary Union



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## PROGRAMME OF THE SEMINAR



# FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES

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## PROGRAMME OF THE SEMINAR

### WEDNESDAY, 25 MAY 2005

08.00 - 09.30	Registration of participants and distribution of documents
09.30 - 10.00	Inaugural session: <ul style="list-style-type: none"><li>- Welcome address and opening statement by Mr. Anders B. Johnsson, Secretary General of the Inter-Parliamentary Union</li><li>- Opening statement by Mr. Toby Mendel, Law Programme Director, Article 19</li></ul>
10.00 - 10.15	Election of the President and Rapporteur of the seminar and adoption of the rules of procedure
10.15 - 10.30	Coffee break
	<b>Part I: Defining and protecting freedom of expression</b>
10.30 - 13.00	<ul style="list-style-type: none"><li>▶ Scope and limits of freedom of expression: Legal overview and parliamentary perspective</li><li>- Mr. Toby Mendel, Law Programme Director, Article 19</li><li>- Mr. Miklos Haraszti, Organization for Security and Co-operation in Europe (OSCE), Representative on Freedom of the Media, former member of the Hungarian parliament</li></ul>
14.30 - 16.00	<ul style="list-style-type: none"><li>▶ Defamation: Law and practice</li><li>- Ms. Vesna Alaburić (Croatia), Attorney at Law</li><li>- Mr. Miklos Haraszti, (OSCE), Representative on Freedom of the Media</li><li>- Mr. Serhij Holovaty, Chairperson, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe (PACE)</li></ul>
16.00 - 16.15	Coffee break
16.15 - 18.00	<ul style="list-style-type: none"><li>▶ Access to information</li><li>- Mr. Andrew Ranganayi Chigovera, Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights</li><li>- Mr. Javier Corral Jurado (Mexico), Senator</li></ul>
18.00	Reception (IPU Headquarters)



**THURSDAY, 26 MAY 2005**

- 09.30 - 11.15 ▶ Freedom of expression and the administration of justice: Law and practice
- Dato Param Cumaraswamy, former United Nations Special Rapporteur on the Independence of Judges and Lawyers
  - Mr. Andrew Ranganayi Chigovera, Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights

11.15 - 11.30 Coffee break

- 11.30 - 13.00 ▶ Parliamentary immunities as a means of protecting freedom of expression
- Mr. Noel Kinsella, (Canada), Senate Opposition Leader, ex-officio Member of the Senate Human Rights Committee

14.30 - 16.00 Continuation and conclusions of Part I

16.00 - 16.15 Coffee break

**Part II: Freedom of expression: A human right essential to the promotion of tolerance**

- 16.15 - 18.00 ▶ Defining hate speech: Relevant international norms and state obligations
- Professor Kevin Boyle, University of Essex, United Kingdom
  - Ms. Agnès Callamard, Executive Director, Article 19

**FRIDAY, 27 MAY 2005**

- 09.30 - 11.00 ▶ Parliamentary practices and strategies to curb racist appeals and to promote a tolerant society
- Ms. Boël Sambuc, Vice-President of the Swiss Federal Commission against Racism
  - Ms. Marie-José Laloy, (Belgium), Chairperson of the Human Rights Committee of the Belgian Parliament

11.00 - 11.15 Coffee break

- 11.15 - 13.00 ▶ Parliaments and the media: Working together to combat racism
- Mr. Orlando Fantazzini, (Brazil), member of the Human Rights Committee of the House of Representatives
  - Mr. Gorgui Wade Ndoeye Elhadj, BBC World Service

14.30 - 15.45 Evaluation by participants

15.45 - 16.00 Coffee break

16.00 - 18.00 Conclusions



# Inaugural session

Mr. A. B. JOHANSSON (Secretary General of the Inter-Parliamentary Union), welcoming participants to the IPU Headquarters, stated that freedom of expression was a major issue for the Inter-Parliamentary Union since it constituted the very foundation of parliamentary work. However, its exercise posed a number of questions. He referred in this respect to three major issues. First, freedom of expression was not an absolute right in a democratic society and was subject to restrictions which parliamentarians as any one else should respect. International human rights law authorized limited restrictions in order to safeguard certain imperatives of public interest or other human rights, such as the right to protection of one's reputation and to be free of discrimination. International law, including the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), required States to prohibit hate speech. However, many countries had to face the problem of racist speech which in some instances had also penetrated into parliament. The question arose as to the distinction between racist speech and the legitimate voicing of people's concerns. Mr. Johansson's second point was that governments did not always appreciate criticism and, more often than one might think, tried to silence opponents. The cases referred to the IPU Committee on the Human Rights of Parliamentarians showed that the origin of almost all human rights violations of members of parliament was the exercise of their freedom of speech. In addition, in their fight against terrorism, many countries adopted measures that curtailed freedom of expression beyond the admissible bounds under international human rights norms and standards. Moreover, opposition parliamentarians were sometimes denied access to state-funded media and to information held by public authorities. There was no doubt that such measures had a negative effect on the ability of individual parliamentarians to fulfil their role, in particular to discharge their oversight function, and consequently impacted negatively on the democratic process as a whole.

Mr. Johansson went on to say that, third, in all parliamentary systems, members of parliament enjoyed immunity so as to enable them to speak their mind without fear. While the scope of parliamentary immunity was different from one country to another, it shielded members of parliament from any prosecution or other proceedings for votes they cast or statements they made in the exercise of their parliamentary mandate. In recent years, the necessity and pertinence of parliamentary immunity had been increasingly questioned and sometimes even been considered to be an unjustified privilege afforded to members of parliament. He stated that all these important questions would no doubt be raised in the debates, and concluded by wishing participants a fruitful discussion.

Mr. T. MENDEL (Law Programme Director, Article 19), speaking on behalf of Article 19, said that he was very pleased to have the opportunity to share with parliamentarians the expertise his organization had gathered over the years in the field of freedom of expression. Indeed, Article 19 had developed a number of guidelines and principles the implementation of which was greatly dependent on legislative action such as, for example the principles on freedom of information legislation. He stated that he would speak on the substantive issues during the seminar and was looking forward to a fruitful debate.





## FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES

### SUMMARY AND RECOMMENDATIONS PRESENTED BY THE RAPPOREUR OF THE SEMINAR

**Mr. Emile Guirleoulou, President of the Committee on General and Institutional Affairs,  
Member of the National Assembly of Côte d'Ivoire**

We have met here at the invitation of the Inter-Parliamentary Union (IPU) and Article 19 to speak about a right which lies at the very basis of our work as parliamentarians and that of our parliaments, freedom of expression. It is a right which is not easy to put into practice, and one which is not respected in many countries. In the past three days, with the help of experts, we explored the scope and limits of this fundamental right, the principles and standards that have been drawn up on this subject over the years by international and regional courts and human rights bodies and by national courts, and lastly the protective measures that are required if we are to exercise our freedom of expression without fear.

Freedom of expression is the cornerstone of democracy, for democracy is vitally dependent upon the expression of ideas and opinions. The very word "parliament" derives from the French *parler*, "to speak".

This right is enshrined in the Universal Declaration of Human Rights and the international instruments that most States have ratified, in particular the International Covenant on Civil and Political Rights, and also in our countries' Constitutions. However, it is a constant challenge for our countries to ensure respect for it. It is through the laws that we adopt that we can meet this challenge and provide the greatest possible protection of this right. As legislators, we have a special responsibility in this field.

The freedom of expression enjoyed by parliamentarians depends to a great extent on the freedom of expression enjoyed in society in general

and the possibility for all persons to express themselves freely. In many countries it is the legal framework that has been established to defend this fundamental right that also protects our freedom of expression when we speak outside of the parliament. We do not work in a vacuum; others play a decisive role, and so a significant part of our discussions were devoted to the role of the media and press freedoms. It is those freedoms that allow citizens to express themselves, to be informed and to prompt and take part in the public discussion without which there can be no democracy. It is also for us the most important means of communicating with our constituents.

Our relations with the media are not always without problems, but it is clear that we depend on one another. Mutual respect is therefore of the essence.

Diversity of the media is indispensable for democracy, and is an essential aspect of freedom of expression. One of our conclusions is that it is not only a question of the number of types of media or the number of television stations and newspapers that counts, but also the diversity of opinions that can thus be expressed. In many of our countries, this has been ensured by opening up the media to the private sector. The existence of private and public media is a condition *sine qua non* for diversity of opinion and of information. On this point, many participants pointed to the danger that certain types of media may be concentrated in the hands of the few. Such a concentration often goes hand in hand with a lack of diversity and quality in the presentation of information. The establishment by the



## FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES

State of an independent body to oversee the issuance of broadcasting licences was cited as a means of addressing this problem. For example, in the United Kingdom, the Office of Communications (Ofcom), when issuing new broadcasting licences, must determine whether the media in question will add to the existing level of diversity. In this field, parliaments have a role to play; through the law, they can establish such institutions and ensure their independence. In several countries, the law provides for a direct role of parliaments in the nomination procedure for the members of audiovisual supervisory bodies.

Our African colleagues referred to the predominant role of radio in the broadcasting of information in many countries, especially in rural areas. Here too, it is essential that diversity should be ensured.

Over and above their legal obligations, the media, but also parliamentarians, have a moral and ethical duty to protect freedom of expression and maintain a climate of mutual respect.

Freedom of expression is not an absolute right; people cannot say just anything they want. However, the restrictions on that right that are allowed under international standards are limited, and must be interpreted *sensu stricto*. International law provides clear standards on this. It is in this context that we discussed the topic of defamation. Many of us are tempted to respond to critics by suing for defamation. The experts who took part in the seminar reminded us that as public figures, we must show greater tolerance to criticism and show restraint. A public response to criticism is most appropriate, rather than resorting to the justice system. Furthermore, the experts and many of our colleagues emphasized the adverse effects that defamation suits can have on freedom of expression in general, especially if, as is the case in a large number of countries, there are provisions for prison terms. That notwithstanding, there has been a trend towards the decriminalization of defamation. However, it was noted that decriminalization did not resolve the problems posed by private law, in particular the

imposition of prohibitive damages. Parliaments should adopt laws to ensure that the penalties provided in respect of defamation are reasonable and that the principle of proportionality is respected.

As parliamentarians, we, as anyone, have a right to privacy. At the same time, given our important role in political life, we must accept that the public has the right to examine our actions and that, consequently, the scope of privacy protection is more restricted for us. It is the public interest that defines the limits of our privacy.

In order to form an opinion and make decisions in full knowledge of the facts, one must have access to information. Our parliamentary work is dependent on the access that we have to information from various sources, be they governmental or non-governmental. The right to have access to public information must be the rule, and any refusal by the State to provide information must be duly justified. We must legislate in this sense. But this rule must also apply to parliament itself; we have the duty to be transparent. Our parliaments have done a great deal to open up to constituents. In an increasing number of parliaments, debates are carried live on radio or television.

The independence of the judiciary is one of the pillars of democracy. The judiciary, as the ultimate arbiter of conflicts, must have uncontested authority and the public's trust. Many countries have imposed restrictions on freedom of expression to ensure and protect the authority and impartiality of the judiciary. In recent years, there has been a general tendency to interpret such restrictions more stringently. Indeed, the judiciary is a public institution, and as such is open to public criticism. Some of us have noted that such criticism, when it is fair and justified, in fact defends the independence of the judiciary and respect for the law. Ensuring this independence and respect is precisely the duty of a parliament, and it may sometimes be imperative for a parliamentarian to criticize a judicial procedure if it is clearly inequitable.

In order to carry out our functions, we must be able to freely express ourselves without fear of reprisal from any quarter. That is a condition sine qua non for ensuring the independence of the parliament itself and the separation of powers. Parliamentary immunity serves this objective. It protects the parliament, rather than the parliamentarians. In no way is it the purpose of parliamentary immunity to grant parliamentarians impunity for criminal acts. We discussed the various systems of parliamentary immunity that have been established in our parliaments. Beyond their differences, they all provide for the absolute protection of statements delivered at the plenary or in committee, and also of the votes cast. This absolute protection also covers individuals who testify before parliamentary committees and commissions. It is necessary to afford the same protection to fair and accurate records of the parliamentary debates; without such protection, the live broadcast of parliamentary debates would be impossible. However, we also noted that freedom of expression, which every parliamentarian must enjoy, can be seriously limited by party discipline, which may involve sanctions, even including the loss of the parliamentary mandate. Party discipline may have the effect of preventing parliamentarians from speaking on behalf of their constituents. Similarly, the existence in some countries of "taboo subjects" which the parliament is not permitted to take up is detrimental to democracy.

In the same context, parliaments rarely have a role to play in the drawing up of international instruments, and their ability to effectively assume their role as guardians of human rights is therefore compromised. The ratification for which they are competent in many countries rarely permits them to hold a genuine debate on the contents of the instruments in question. Parliaments must have the opportunity one way or another to see through the drafting of treaties so as to ensure better follow-up of their provisions thereafter.

The second part of our discussion addressed issues related to hate speech. Measures to fight racist speech,

which too often are limited to the adoption of laws repressing freedom of expression, must be part of a broader strategy to attack the hatred which underpins this speech and which is a denial of equality among human beings. By fighting racist speech, we pursue the basic aim of ensuring respect for equality. It is difficult and complex to define incitement to hatred, and such factors as the historical and sociological context of the countries concerned must be taken into consideration. As parliamentarians, we must play a much more active role, and show the way. Some of our parliaments are confronted with racist speech in the institution itself. We must take steps against such trends, for example through parliamentary codes of conduct, or by eliminating financing for political parties that cater to such speech.

All countries are confronted with the problems of hatred and discrimination and have the duty to implement a comprehensive strategy to promote equality and respect for others and for their differences. We heard several examples of measures taken against intolerance. For example, it is possible to establish independent institutions to promote equality and draw up national plans for that purpose. Clearly, the media must be included in any such strategy if there is to be any hope of achieving a result. We heard examples of ways in which parliament, in particular human rights committees, can take the initiative to move toward constructive dialogue with the media and society at large.

We recommend to all parliaments to set up human rights committees with a mandate to make parliamentarians aware of human rights issues. Lastly, we must make sure that our States ratify international and regional human rights instruments and bring their legislation into line with such instruments.

We invite the IPU to publish a parliamentary guide on freedom of expression and to continue to hold parliamentary seminars on human rights ■





# **FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES**

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## **EXPERTS' CONTRIBUTIONS AND EXTRACTS OF THE DEBATE**



# Part 1

## **DEFINING AND PROTECTING FREEDOM OF EXPRESSION**

- Scope and limits of freedom of expression: Legal overview and parliamentary perspective
- Defamation: Law and practice
- Access to information
- Freedom of expression and the administration of justice: Law and practice
- Parliamentary immunities as a means of protecting freedom of expression

## SCOPE AND LIMITS OF FREEDOM OF EXPRESSION: LEGAL OVERVIEW AND PARLIAMENTARY PERSPECTIVE

### Mr. Toby Mendel, Law Programme Director, Article 19

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that the organization he represented took its name from Article 19 of the Universal Declaration on Human Rights, which stipulated that everyone had the right to freedom of opinion and expression, including the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Although the Declaration was not a binding instrument, his organization took the view that Article 19 had become legally binding under customary international law. Moreover, the International Covenant on Civil and Political Rights, ratified to date by 154 States, was a binding instrument, and its Article 19 guaranteed freedom of expression in similar terms, as did all regional human rights instruments and the vast majority of national constitutions.

The scope of the right to freedom of expression had been interpreted by the United Nations Human Rights Committee, which had developed a large body of jurisprudence. Authoritative interpretations had also been elaborated by regional human rights organizations and a number of international bodies such as the Organization for Security and Co-operation in Europe (OSCE).

The right to freedom of expression was not absolute, but could be restricted by certain overriding public and private interests. A three-part test for the legitimacy of restrictions had been developed.

The first requirement was that any restriction on freedom of expression must be provided for by law. No official, police officer or any other authority could decide autonomously to restrict its scope – hence the crucially important role of parliamentarians as custodians of the law.

Second, restrictions must pursue a legitimate aim. Only a small number of social interests listed in the International Covenant on Civil and Political Rights, such as protection of the rights and reputation of others, public order, public morals and national security, were sufficiently important to warrant overriding freedom of expression.

The third and most important requirement was that any restriction must be justifiable as necessary, which meant, according to existing jurisprudence, that the restriction must be applied in pursuit of a pressing social need, that the measures adopted must be relevant and effective, that the measures must impair the right as little as possible, being carefully designed to protect only a particular legitimate interest, and that the benefit to be gained from the measures must be in proportion with the overall harm they caused to freedom of expression.

Guaranteeing the right to freedom of expression of parliamentarians could not be treated separately from the broader task of guaranteeing that right for society as whole. If a general culture of respect for freedom of expression was built in a society, it would satisfy the needs of parliamentarians, since the general regime, with a few rare exceptions, was comprehensive enough for their purposes. Indeed, as key public officials, parliamentarians had not only rights, but also special responsibilities in that regard, for instance in the area of defamation, where they had a substantial obligation to tolerate criticism.

The main exception to the general regime was parliamentary privilege, which varied in scope from country to country but required at a minimum that parliamentarians had absolute protection for statements that they made in parliament and parliamentary bodies. The purpose of that protection was to safeguard the

integrity and effectiveness of a key democratic body, not to protect individual members. If parliamentarians had to worry about legal consequences every time they took the floor, it would inhibit their ability to speak. To protect that key social interest, some abuse or even illegal statements by parliamentarians was tolerated. However, it was incumbent on parliamentarians to exercise their right responsibly and to refrain from wilfully making defamatory or hateful statements. Such protection extended to witnesses in parliamentary proceedings, and should also extend to fair and accurate reporting of such proceedings, even in the case of defamatory statements. Mention had been made of a somewhat ridiculous rule applied in some countries whereby a parliamentarian could make a statement within parliament but not on the steps of the parliament building. The public needed a fair and accurate account of what their representatives were saying in parliament.

Turning to the issue of relations between parliamentarians and the media, he said that parliamentarians needed the media to reflect their views and policies, while the media needed parliamentarians to fulfil their obligation to report in the public interest. However, tensions between the two were virtually inevitable. It was essential for parliamentarians to exercise a degree of tolerance of media criticism instead of immediately invoking contempt of parliament. It was also important for the media to have easy access to parliament. The media, on the other hand, had a moral and professional obligation – and sometimes a legal obligation – to respect the authority and role of parliament and the privacy and reputation of individual parliamentarians.

## **Mr. Miklos Haraszti, Organization for Security and Co-operation in Europe (OSCE), Representative on Freedom of the Media**

Mr. M. HARASZTI (Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), panellist) said that the OSCE was currently working with 55 parliaments to implement cutting-edge reforms that were long overdue in the area of freedom of expression. Each year on Press Freedom Day, the rapporteurs on freedom of expression of the United Nations, the Organization of American States (OAS), the OSCE and, most recently, the African Commission on Human and Peoples' Rights issued declarations of principle that were intended to serve as soft law and to assist parliaments in their work.

Parliaments that cared about freedom of expression were required at the same time to practise self-restraint. Moreover, the exercise of care proactively was a standard prescription for democracies. It required structural changes, the establishment of institutions and the promotion of channels of information in which pluralist opinion was expressed. The degree to which that kind of pluralism had been developed differed greatly among the 55 OSCE democracies.

Television, which was currently the most important channel of information for most people, was paradoxically the least pluralist medium. In many new democracies it was still largely in government hands, since most had inherited state ownership of all channels of communication. Legislators had a duty to institute reforms, turning state television into an independent public institution that provided political information in a true, fair and objective manner. European law actually required public television to provide objective information. Parliaments should also promote privatization of a substantial portion of broadcasting frequencies and the licensing of private television channels that were financed by

advertising rather than by taxation. That was a painful task because such institutions would be less subject to the legal requirement of providing objective information.

The print media were far more pluralist than television in new democracies, but the press was still weak because of the continued existence of state-owned print media. No old democracy had legislation against state ownership, because such ownership did not exist, inasmuch as taxpayers and journalists were unwilling to tolerate changes in press ownership whenever a new executive took over power. Privatization could not be achieved overnight, but the authorities should at least be prevented from acting in a discriminatory way against the fragile new independent print media.

Access to information was a basic right of parliamentarians which could not be achieved without granting the same right to the general public and journalists.

Content-based restrictions on freedom of speech were a key concern of parliaments. Issues such as hate speech, protection of minorities and protection of religious sensibilities had to be addressed proactively by parliamentarians without exerting a chilling effect on freedom of expression.

Combating terrorism was often cited as a modern dimension of the protection of the national interest. The question arose whether society should be protected from propaganda for terrorism or terrorism itself by restrictions on freedom of speech.

All parliaments had to address the difficult task of regulating the Internet, a global means of communication and a host to many new media categories, without encroaching on freedom of expression.

## Debate

### SCOPE AND LIMITS OF FREEDOM OF EXPRESSION: LEGAL OVERVIEW AND PARLIAMENTARY PERSPECTIVE

“Freedom of expression entails serious responsibilities for parliamentarians.”

Mr. Kinsella, Canada

Mr. N. KINSELLA (Canada, Senator, ex-officio Member of the Senate Human Rights Committee, panellist) said that Article 19, paragraph 3, of the International Covenant on Civil and Political Rights stated that the right to freedom of expression carried with it special duties and responsibilities. It followed, in his view, that freedom of expression for the institution of parliament entailed serious responsibilities for parliamentarians when they exercised the privilege of freedom of expression.

With regard to new frontiers of freedom of expression, he wished to hear more about the implications of the increased flow of information about parliament available through the Internet and its associated new technology.

Mr. B. SOUILAH (Algeria) stressed the importance of self-restraint, both by those exercising the right to freedom of expression and by parliamentarians. Every issue should be addressed with care and

circumspection. Nobody operated in a vacuum; everyone must act on the basis of legal provisions and for legal objectives. At the same time, parliamentary immunity should not be viewed in narrow terms, but in the broader perspective of the role of parliamentarians as representatives of the people and defenders of their interests. Any progress towards freedom of expression, within the limits set by domestic and international law, invariably served the higher interests of society as a whole.

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that there was a clear dividing line between legal restrictions on freedom of expression and the notion of professional or moral responsibilities or duties. While the scope of legal restrictions was circumscribed by the three-part test, professional responsibilities were owed not only to the law but, in the case of parliamentarians, to the electorate. Furthermore, parliamentarians had a duty to be tolerant of criticism. While parliamentary privilege should be absolute in legal terms, it should not be abused, for instance, by parliamentarians who knowingly defamed their colleagues in parliament.

Mr. M. HARASZTI (Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), panellist) said that as a former parliamentarian he knew that there was a difference between severe criticism by adversaries, which ought to be tolerated, and the distortion or even criminal handling of material by journalists. The question arose whether recourse by parliamentarians to the criminal courts was likely to ensure professional conduct by the media. He felt that in most cases it would not.

Internet users who relied on search engines were supplied with a plethora of facts and opinions in response to every consultation. However, many States, even old democracies, were now considering the possibility of restricting the scope of search engines, sometimes in response to civil initiatives, in order to eliminate criminal, offensive and other similar material. While parliaments throughout the world viewed, for instance, child pornography as a crime, they were deeply divided in their attitudes to hate speech. While the problem of hate speech had been handled in the past at the domestic level, since the advent of cable television and the Internet, national action was no longer effective. There was a major dispute in that regard between some European countries and the United States, with the former wishing to impose content-based restrictions, even on the Internet, and the latter seeking to handle the issue by societal means or the means provided by the Internet itself. Parliaments should look into those issues, differentiating for instance between different types of undesirable content. By way of illustration, the Internet company Google now had many locally based search sites which tended to respect national sensitivities regarding content. Such an approach in the press and broadcast media would be viewed as censorship, but Google, as a private company, was free to filter search results.

“Freedom of speech is a cornerstone of democracy since the truth emerges from the cut and thrust of democratic debate .”

Mr. Matuet, Sudan

Mr. A. T. MATUET (Sudan) said that individuals should be free to express their views publicly without interference, and hence also to criticize government policy. Freedom of speech was a cornerstone of democracy, since the truth emerged from the cut and thrust of democratic debate. In countries where the status quo was unassailable, opposition was driven underground. However, the right to freedom of expression was not absolute, but subject to the law of defamation, libel, blasphemy and sedition. People

were not free to abuse others, to spread communal or class hatred or to advocate the violent overthrow of the government or the social order. Article 32 of the Sudanese Constitution protected the right to freedom of expression of parliamentarians, both inside and outside the National Assembly. The deliberations of the Assembly were covered on television, and members of the public could follow the proceedings from the public gallery.

Mr. A. BORGINON (Belgium) contested the view that the distinction between making a statement within parliament and outside was ridiculous. There was a difference between the public's right to know what was being said within the premises of parliament and the question of whether parliamentary privilege should be extended beyond the confines of parliament. In Belgium, detailed reports were issued on both plenary and committee sittings, and the public had access to 95 per cent of sittings and to audio and video recordings, also on the Internet. Journalists could quote parliamentarians' statements literally. He conceded, however, that in countries where such broad access to information did not exist, it should be possible for parliamentarians to repeat their statements outside the premises. On the other hand, undue expansion of the scope of parliamentary privilege carried the risk of restricting the rights or freedoms of other members of society.

Mr. E. GUIRIEOULOU (Côte d'Ivoire) asked Mr. Mendel to explain what he meant by "pressing social needs" as a possible justification for restrictions on freedom of expression, since such a justification could, in his view, be easily abused.

**"Parliamentarians should seek to establish machinery to guarantee the independence of the media, regardless of their source of funding."**

Mr. Guirieoulou, Côte d'Ivoire

Mr. Borignon had recognized that not all countries were in a position to provide full public access to information regarding parliamentary proceedings. In such circumstances, parliamentarians were duty bound not only to inform the general public about the content of debates, but also to account for the positions they adopted on certain issues. If they could not rely on parliamentary privilege, their ability to keep the electorate informed would be considerably restricted.

Mr. Guirieoulou wondered whether freedom of expression depended in all cases on who controlled the media. Mr. Haraszti had noted that in old democracies the print media were no longer owned by the State. He pointed out, however, that in many developing countries the State had been compelled to assume responsibility for the publication of newspapers and journals because the companies concerned were unprofitable. It was therefore unwise to adopt a dogmatic position. Instead, parliamentarians should seek to establish machinery to guarantee the independence of the media, regardless of their source of funding.

**"If privatization of the national media benefits the friends of those in high places, the media in question will be likely to be even more subservient to the Government than formal state media, which are subject to legal norms."**

Mr. Jurek, Poland

Mr. M. JUREK (Poland) stressed the importance of both the legal provisions governing freedom of expression and the sociological conditions in each country, especially the extent to which the media's reporting on the government and opposition was balanced. The media, as the main forum for democratic political debate, should be wide open in all countries.

Social peace was endangered not only by defamation of politicians by individual journalists but, more importantly, by government campaigns in the media against politicians, for instance in post-communist countries such as Belarus, where the dictatorial Government was spearheading a hate campaign against the democratic opposition. Legal guarantees in such circumstances were mere eyewash. Furthermore, if the privatization of the national media benefited the friends of those in high places, the media in question would be likely to be even more subservient to the Government than formal state media, which were subject to legal norms. The new democracies in Central and Eastern Europe were not being built from the ground up. They were being built on the foundations of totalitarian societies and many institutions were still imbued with past habits and prejudices.

**“The independence of public broadcasting is a very complex question and parliamentarians have a professional duty to devise a system whereby appointments to the boards of public broadcasting companies and appointments of, for instance, broadcast regulators and information commissioners ensure both independence and accountability to the public interest.”**

Mr. Mendel, Article 19

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) expressed concern about statements by some speakers that freedom of expression was fully protected by their country's legislation. In his own country, Canada, there had been numerous court decisions over the past 10 years to the effect that the country's laws or the actions of public officials had been in breach of the constitutional guarantee of freedom of expression. He submitted that there was an ongoing evolution in all countries towards more advanced and effective forms of democracy. The situation was still very much in flux, also in terms of cultural values and levels of tolerance of criticism. Moreover, unless they were continuously monitored, governments would invariably seek to control the expression of views.

He had not meant to suggest earlier that parliamentarians should enjoy immunity for everything they said outside parliament, but only for a fair and accurate report of what was said. If a member of parliament used privilege to defame someone in parliament and repeated the same abuse elsewhere on the assumption that he or she enjoyed immunity, the criterion of fair and accurate reporting would not be met.

Vehicles for the dissemination of parliamentary information such as audio and video recordings were salutary and should be encouraged. However, for the ordinary citizen the print and broadcast media were the primary vehicle for effective access to fair and accurate reporting of parliamentary debates.

Commercial broadcasters were clearly not free of bias or independent of influence. Moreover, in some countries the curtailment of diversity by the private media was a greater menace than government-led threats. The independence of public broadcasting was a very complex question, and parliamentarians had a professional duty to devise a system whereby appointments to the boards of public broadcasting companies and appointments of, for instance, broadcast regulators and information commissioners ensured both independence and accountability to the public interest.

**“Reliable public television requires built-in pluralism, and legislators should also facilitate external pluralism by providing for a minimum number of independent sources of information. Independence and professionalism can be demanded from the media, but they can be achieved only in a landscape where there is external pluralism.”**

Mr. Haraszti, Organization for Security and Co-operation in Europe

With regard to Belarus, the Council of Europe and other bodies had recognized that the laws on freedom of expression in that country were not in conformity either with the Constitution or with international norms. Where a country’s whole legal system was out of kilter with international standards, including with regard to the independence of the judiciary, there was obviously no foundation for ensuring respect for freedom of expression.

In the case of countries in transition, a series of complex issues related to historical and political habits of secrecy and intolerance of criticism needed to be addressed at the very outset in order to move towards democracy.

When referring to pressing social needs, he had meant the legitimate restrictions on freedom of expression set forth in the International Covenant, i.e. the rights and reputations of others, national security, public order, public morals and public health. The requirements of necessity and proportionality further narrowed the scope of those restrictions.

Mr. M. HARASZTI (Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), panellist) said that the key requirement for freedom of expression was access to a plurality of information. The question of ownership of the media would be less important in cases where variety of ownership offered scope for the expression of a variety of views. He did not dispute the fact, however, that governments in some countries had the dual responsibility of ensuring institutionalized pluralism of the media through sound privatization legislation and at the same time investing funds for the public benefit in the creation of a viable press.

Twenty years previously, the United States had been the one country in which all broadcast media were in private hands, and it was only in the 1980s that commercial television channels had been permitted to operate in Western Europe. The current advance in privatization in most countries was largely due to public demand. The ideal situation was perhaps a mixed system that combined state television, converted into truly independent public television, with pluralist, privatized television channels. The process of privatization should, of course, be independent of government interests.

Thus, reliable public television required built-in pluralism, and legislators should also facilitate external pluralism by providing for a minimum number of independent sources of information. Independence and professionalism could be demanded from the media, but they would be achieved only in a landscape where there was external pluralism.

The era when television was provided only through terrestrial frequencies, with each country having access to a limited number of frequencies, was over. The era of digitalization would multiply frequencies and allow true independence of the broadcast media, with no government interference. Broadcasting would become an activity similar to publication of a newspaper, involving a simple registration process.

Mr. U. REINSALU (Estonia) said that freedom of expression was closely linked to freedom of entrepreneurship and of marketing. Many countries had already imposed restrictions on advertising for cigarettes and alcohol, thus restricting to some extent people's freedom to receive information. In the United States, the sending of spam messages, which accounted for two in every twelve e-mail messages, could give rise to criminal prosecution. In the years ahead, parliaments would undoubtedly have to debate the right of access to the Internet as a basic human right. In the forthcoming general election in Estonia, people would have the option of voting via the Internet. Any form of abuse of their right to vote through that channel could be treated as a criminal offence.

Individuals should enjoy the right to file complaints to constitutional courts regarding legal limitations on freedom of expression, and the courts should be competent to make findings of unconstitutionality where there was no legal ground for such restrictions, or where existing legislation failed to protect the right to freedom of expression.

Although every limitation on freedom of expression should, in theory, be based on law, that principle was unlikely to be respected in practice, for instance in the case of civil servants or the freedom of expression of children or religious organizations. The parliamentary ombudsman should be alerted to the need to monitor such grey areas and to promote a broad interpretation of the concept of freedom of expression.

With regard to pluralism and media balance, the question of pluralism in the global media, which played a major role in shaping attitudes, needed to be addressed. One of the main challenges to parliaments was the need to regulate unbalanced global media influence owing to existing monopolistic trends.

Ms. A. M. MENDOZA DE ACHA (Paraguay) said that the freedom of expression enjoyed by the media in Paraguay could be more accurately characterized as "libertinism". The country had emerged 15 years previously from an era of dictatorship during which the press had been muzzled. The reaction to that situation had unfortunately led to excesses on the part of certain media professionals who showed no respect whatsoever for the privacy of parliamentarians. It was important to ensure that respect was preserved in the context of a culture of freedom of expression.

Whether the media were publicly or privately owned was not particularly important. Some privately owned media in Paraguay, for instance, served powerful economic and political interests, and the information they provided was distorted. Legislators had a duty to provide a framework for freedom of expression before conflict situations developed.

Mr. S. ALI RIYAZ (Islamic Republic of Iran) said that his country had enacted sound legislation on basic freedoms, including freedom of expression for parliamentarians, based on fundamental Islamic principles. The provisions of the Constitution adopted after the Islamic revolution laid solid foundations for the freedom of expression of all branches of government, including the legislative branch. As a member of parliament, he enjoyed full legal protection and was free to comment on all issues and to criticize ministers and other members of the executive and demand clarifications without interference from any quarter. All sittings of parliament were broadcast live on radio. Parliamentarians could communicate requests for reports through the media and the President of the Islamic Consultative Assembly. They dealt with some 80 media correspondents representing all political persuasions. There was a specially reserved gallery for the general public and the press.

Mr. A. R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights, panellist) said he was concerned about whether parliaments, especially

African parliaments, were sufficiently aware of international human rights norms in general, and of freedom of expression in particular. The existence of laws restricting freedom of expression on various grounds indicated that they were not. While it was gratifying to note that some African parliaments now had human rights committees, their impact and that of existing human rights ministries was still debatable.

With regard to the conversion of state television channels into independent public channels, he stressed that for developing countries the crucial medium was still radio, so that the issue of conversion of state-run radio stations should also be addressed.

Mr. G. FODOR (Hungary) said that freedom of expression was the most fundamental human right and one that had been greatly feared by the former communist regimes in Eastern Europe. The first democratically elected governments in the 1990s had inherited that fear, and had sought to control the media. Privatization had transformed the situation, but as already noted, the crucial issue was whether private media had links to the government. Another important point was that some media proprietors in the new democracies were afraid of the consequences of providing information on political activities, and focused instead on trivial matters. He wondered what steps parliaments could take to address that problem.

Mr. J. CORRAL JURADO (Mexico, Senator, panellist) said that he agreed with Mr. Haraszi that media independence depended on pluralism, but pluralism depended in turn on economic competition and on the imposition of limits on media ownership, including cross ownership, regardless of whether such ownership was public or private. The legal regime for granting operating licences had a vital role to play in that regard. Many discretionary licensing systems exerted indirect control or pressure on freedom of expression.

The current digitalization process would lead to the demise of television based on analogical signals and provide access to an unprecedented variety of channels. Rules governing the redistribution of radio and television frequencies would have to be devised in order to ensure freedom of access to information through equitable access to the frequency spectrum. Unfortunately, undemocratic distribution practices had to date left a disproportionate share of frequencies in the hands of powerful operators.

Mr. M. S. HERZALLAH (Algeria) said that the endeavour to achieve freedom of expression was an ongoing struggle. Algeria's struggle had begun under the French colonial regime. Many newspapers reflecting a great variety of political and religious viewpoints had been launched during that period; hundreds had been launched and hundreds closed down by the French authorities. As a result, pluralism had survived and the struggle for freedom of expression had continued even under the single-party system established after independence. On its replacement by a multiparty system in 1989, the media, both public and private, had once again flourished, despite a crackdown that had been imposed on security grounds in the late 1990s owing to the rise of violent terrorist movements. There was currently a large number of newspapers and journals, mostly privately owned, and the law invariably came to the defence of journalists when their right to freedom of expression was at risk of being violated. The relationship between parliament and the media in Algeria was also warm and friendly, since journalists were viewed as a channel for conveying parliamentarian's views to the general public.

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that freedom of commercial expression was an important component of freedom of expression. However, international instruments recognized that it was less worthy of protection than political expression.

A distinction should be made between restrictions on freedom of expression that were imposed by private parties such as parents on their children and those imposed by the State. There should be no legal grey areas in the latter case.

He did not think that pluralism was related to the number of outlets available. Indeed, he had found, on moving from London, where he could receive only five television channels, to Canada, where he could choose from over a hundred, that his access to diversity in the media had decreased. A more important factor was diversity of content, particularly political viewpoints. Promoting such diversity was a huge challenge. There were serious commercial media threats to pluralism which could not be tackled in the same way as official threats. One way of ensuring diversity was through a strong regulatory regime. In the United Kingdom, for example, the regulatory authority exercised strict control over broadcasters, particularly by issuing licences only to broadcasters who added diversity in terms of programming and content. In a context where the regulator was not independent from government, however, that kind of power could be used to undermine diversity.

With regard to respect for the privacy of parliamentarians, British Prime Minister Tony Blair had lodged a complaint with the United Kingdom Press Complaints Commission regarding an invasion of the privacy of his children, and had won the case. In another case, *The Guardian* newspaper had published an allegation of corruption against the then Minister of Defence, Jonathan Aitken, who had sued the newspaper in court. Owing to the need to protect the confidentiality of its source, the *The Guardian* had only managed to win the case by a stroke of luck. The Minister, on the other hand, had been convicted of perjury. The crucial question of whether protection of privacy was in the public interest was ultimately determined by oversight bodies and the courts. The concept of public interest was so complex and diverse that it defied definition. Society relied for the most part on the instincts and judgement of journalists.

He agreed that there was a need to raise awareness of human rights such as freedom of expression in African parliaments. It was only when parliamentarians understood the implications of freedom of expression that they could take steps to enact the requisite legislation. Furthermore, it was only when civil society as a whole understood such rights that they could be guaranteed in practice.

Mr. M. HARASZTI (Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), panellist) said that independent courts and self-regulating bodies of journalists that monitored professional ethics almost invariably found that more rather than less information was in the public interest than politicians liked to think. On the other hand, the so-called yellow or tabloid press often overstepped the limits of what could be considered acceptable.

His remarks about the conversion of state-owned television channels into independent, publicly-owned channels were equally applicable to radio broadcasting.

With regard to the argument that external pluralism in practice tended to deprive the public of reliable sources of information, he had not intended to imply that pluralism could be guaranteed only by ensuring access to the maximum number of media outlets. What was required was a minimum number of truly diverse sources of information, and it was for each parliament to decide, in the light of local social and market conditions, how best to achieve that aim. No individual outlet was truly independent. Public broadcasting that was subject to statutory requirements of fair and impartial reporting certainly provided quality information, but it had to be supplemented by commercial outlets, even though they might engage in scandal-mongering. In every free country, the market tended to produce at least a few quality dailies and weeklies.

Where digitalization multiplied the number of outlets, parliaments would have to exercise great diligence to prevent undue media concentration and domination of the market by a powerful few. Classic standards of freedom of information required both the definition of relevant markets and an analysis that transcended anti-trust market share regulations in order to ensure external pluralism, i.e. the minimum number of required media outlets.

Debate

## DEFAMATION: LAW AND PRACTICE

### Ms. V. Alaburic (Croatia), Attorney-at-law

Ms. V. ALABURIĆ (Croatia, attorney-at-law, panellist), speaking on defamation law and practice, said that the right to freedom of expression was explicitly guaranteed by all major human rights instruments, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. By ratifying them, States had agreed to bring their legislation and judicial practice in line with those instruments. However, progress had been slow in many States, in particular in the post-communist countries in transition, and much remained to be done.

The right to freedom of expression was not an absolute or unlimited human right, as it could conflict with other legitimate individual and common interests deserving protection in a democratic society. That meant that those who made public statements assumed certain duties and responsibilities. According to international conventions, freedom of expression could be subject to formalities, conditions, restrictions or penalties as prescribed by law and as was necessary in a democratic society inter alia for the protection of the reputation or rights of others. It was essential to strike a balance between the conflicting legitimate interests involved, i.e. between freedom of expression and protection of reputation, and to determine what legal standard should be applied. The case law of the European Court of Human Rights dealing with freedom of expression, which was guaranteed under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights), provided a solid foundation to achieve those objectives. To date, the Court had delivered more than 200 judgements referring to Article 10, and in over two thirds of the cases it had found that contracting States had violated the right of citizens to freedom of expression. Three fundamental premises and six legal standards stemming from those judgements could and should serve as the most authoritative legal source and model for national lawmakers and judges. According to the first premise, freedom of expression was the rule, and its limitations, for example with regard to protection of reputation, were the only possible exceptions to that rule, and they must be narrowly interpreted and cautiously implemented. Hence, freedom of expression as guaranteed by international conventions should take precedence over the protection of legitimate interests set out in Article 10, paragraph 2, of the European Convention on Human Rights. That premise was of key importance in court proceedings. Moreover, protection of

reputation was not guaranteed by the Convention as a separate human right, but as a legitimate aim that could warrant restrictions imposed on freedom of expression. Second, freedom of expression was the cornerstone of a democratic society and a basic condition for its progress and the self-fulfilment of all individuals. Freedom of expression was applicable not only to information or ideas favourably received or considered to be inoffensive or as a matter of indifference, but also to those that offended, shocked or disturbed the State or any segment of the population. Third, journalists and the media should enjoy greater latitude in freedom of expression, i.e., a wider scope of legal protection, because of the vital role they played in a democratic society. In the eyes of the European Court, the press had a duty to impart - in a manner consistent with its obligations and responsibilities - information and ideas relating to matters of public concern without overstepping certain limits, and the public had a right to receive them ("the public's right to know"). Journalistic freedom of expression covered possible recourse to exaggeration or provocation, thus allowing the press to act as a "public watchdog", and any restriction thereon must be convincingly justified.

The Court set the following six legal standards: (1) any restriction on a statement, even if potentially defamatory, made or published in the context of the free flow of information and open public debate on politics and other matters of public concern would be subject to close scrutiny by the Court, and would have to be cogently justified; (2) the definition of acceptable criticism must be much broader for politicians acting in their public capacity than for private individuals. As public figures, politicians should display a greater degree of tolerance to criticism, particularly when making provocative statements; (3) a careful distinction had to be drawn in defamation cases between statements of fact or factual allegations and value judgements or opinions. Whereas the existence of facts could be proven, the truth of value judgements could not. Opinions and ideas were neither true nor false. Therefore, it was impossible to meet the requirement to prove the truth of a value judgement; an attempt to do so would infringe on the freedom of opinion; (4) defamatory statements regarding unnamed persons, based on sufficiently reliable information including "stories" and "rumours", did not have to be proven true if they were so similar and numerous that they could not be considered to be lies, particularly if made or published in good faith and in the public interest; (5) Article 10 of the Convention did not, however, protect the pronouncement of information accusing a person of committing a crime, unless there was a sound factual basis for those accusations; and (6) the press, when contributing to the public debate on matters of legitimate concern, should be able to trust the contents of official reports without having to investigate their reliability, even if they contained information harmful to a person's reputation; otherwise the press's role as a public watchdog could be undermined.

Those legal standards were equally applicable to all defamation cases and should be made part of relevant domestic civil and criminal legislation. Judgements handed down by the European Court and other courts contained minimum legal standards for the protection of human rights and freedoms, and it was not permissible for national legislative and judicial authorities to fail to meet those standards.

Because some national authorities and individuals in power, particularly in transitional countries, abused defamation laws for illegitimate purposes, some non-governmental organizations (NGOs) advocating freedom of expression had formulated a number of principles and standards protecting freedom of expression on a higher level. Article 19's standards for defamation laws were as follows: (1) defamation laws must not be used to prevent legitimate criticism of public officials or the exposure of their wrongdoing or corruption, or to protect the reputation of objects or entities such as the State, nation, religious symbols, flags or national insignia; (2) public bodies of all kinds, including all branches of government, should be prohibited from bringing defamation actions; (3) all criminal defamation laws should be replaced

with appropriate civil defamation laws. Until then, the laws must ensure that the burden of proof of all the elements of the offence was on the party claiming to be defamed; no one should be punished for criminal defamation unless it was proved that the impugned statements were false and made with a specific intention to cause harm to the party claiming to be defamed; public authorities should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the person concerned; and prison sentences, excessive fines and other harsh criminal penalties should not be used as a sanction for defamatory statements; (4) defamation law should under no circumstances provide special protection for public officials, whatever their rank or status; (5) no one should be liable under defamation law for the expression of an opinion; (6) the main purpose of a remedy for defamatory statements should be to redress harm done to the plaintiff's reputation, not to punish those responsible for the dissemination of such statements. Remedies should also include voluntary or self-regulatory systems; (7) the courts should prefer the use of available non-pecuniary remedies to redress any harm to reputation caused by defamatory statements; and (8) pecuniary compensation should be awarded only where non-pecuniary remedies were proven insufficient.

It would take time to incorporate those standards into the domestic legal system. In any case, the adoption of appropriate legislation was necessary, but not sufficient: the standards had to be achieved in practice. The judiciary, as the main guarantor of the rule of law, had to strike the proper balance between the right to freedom of expression and the need to protect a person's reputation. The sooner judges became familiar with those standards, the faster they could be applied in all countries.

### **Mr. Miklos Haraszti, Organization for Security and Co-operation in Europe (OSCE), Representative on Freedom of the Media**

Mr. M. HARASZTI (Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), panellist), said that as a representative of the press, he believed there was an urgent need to establish a national press corps in all countries. What would be the best approach to defamation laws? All human rights defenders believed that taking criminal action against the written word was not necessarily the best way to deal with defamation, and could in fact be counterproductive. It would not help make the press responsible or make it less irresponsibly partisan, defamatory or insulting.

His Organization advocated the decriminalization of defamation, libel and insult offences. Article 10 of the European Convention on Human Rights, the basis of the relevant case law of the Council of Europe and the European Court of Human Rights, allowed for criminal handling of offences that were committed against honour, dignity and privacy, including offences against values and belongings of parliamentarians, but never allowed imprisonment. The Court had ruled in many cases that punishment by imprisonment was by its very definition disproportionate to any kind of harm done to one's dignity or honour, and was harmful to freedom of expression. Some people believed imprisonment was a good way to deal with defamation because it created fear. Imprisonment, however, did not meet the aforementioned standards, promote democracy or protect freedom of expression. The Court's mandate did not allow it to go beyond its case law decisions or to instruct States to repeal laws that were by their very nature disproportionate and harmful to freedom of expression. Civil law provided forms of punishment other than imprisonment. If a human rights body held that the criminal handling of insult, defamation and libel could not be

“Freedom of expression is essential to democracy. When compared with equally legitimate constitutional values, freedom of expression should be considered by parliaments to be more important than other freedoms and recognized as their very foundation...”

Mr. Haraszti, Organization for Security and Co-operation in Europe

banned, then proposing something equal to what civil law provided generated a problem in respect of the rule of law: why should States deal with the same offence by using two instruments of the rule of law? Clearly, civil law alone could deal adequately with such offences, hence the proposal to decriminalize defamation. Roughly 90 per cent of criminal defamation cases dealt with the press. Criminal defamation law was basically a press law about a press offence, mainly in connection with the written word, the printed press and the Internet. In the speaker's view, defamation should not be considered simply as a criminal case. Freedom of expression was essential to democracy. When compared with equally legitimate constitutional values, freedom of expression should be considered by parliaments to be more important than other freedoms, and recognized as their very foundation, and if another instrument, such as civil law, could be applied, then priority should be given to that choice.

As a rule, editors, not journalists, were the target of defamation laws that produced a chilling effect - self censorship - on quality press editors. It generally did not have the same effect on the yellow press or tabloids, as they would tend to prefer the limelight produced by a criminal case, and journalists accused of defamation would become causes célèbres and victimized heroes.

Defamation, libel and insult laws had emerged during the 18th century, when the yellow press had been a lucrative profession that had engaged in reporting false news and harming a person's material interests. It had singled out business people, but never the nobility or upper classes. With time, those laws had begun targeting people in political disputes. Today's defamation laws were aimed at people who committed that offence mostly out of political passion. In many new democracies, newspapers often had dual roles, as sources of information and as mouthpieces of the opposition; they were not truly independent papers, but were often guilty of libel and of speaking out in a partisan manner.

Whether or not members of parliament should be allowed to punish, with imprisonment or another form of criminal punishment, people who were engaged in a political fight presented a stark dilemma. Parliamentarians enjoyed immunity, and were not on equal ground with other members of society. The panellist was not in favour of such punishment because of its overall negative effect on freedom of expression and its lack of any clear advantages. He had been corresponding with ministries of foreign affairs about issues relating to the imprisonment of journalists. His Organization had compiled a database matrix of the usage of criminal libel and defamation laws in 55 OSCE countries. The rule of law procedure was increasingly stifling freedom of the press; sometimes that problem was compounded by the fact that the judiciary was less than independent. Most long-standing democracies no longer enforced criminal defamation laws, and had for example declared moratoria on their reinforcement or issued joint judiciary recommendations not to enforce those laws. One of the speaker's main goals was to convince countries in the European Union (EU) to drop defamation laws from their books, so as to serve as an example to other democracies and prompt a wave of decriminalization, and eventually refer the related offences to the civil courts.

## Mr. Serhij Holovaty, Chairperson, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe (PACE)

Mr. S. HOLOVATY (Chairperson of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe (PACE), panellist) thanked the IPU for the opportunity to speak on behalf of the Assembly, which played a key role in promoting European standards relating to fundamental freedoms and human rights and had brought those standards, in particular with regard to the death penalty, to a level unachieved in other parts of the world. Thanks to the Council of Europe, Europe was the world's only region to benefit from a unique instrument to enforce its judgements: the European Convention on Human Rights and the European Court of Human Rights that it had established. It had recognized in a landmark judgement (*Handyside*, 1976) that freedom of expression was an essential pillar of a democratic society based on pluralism, tolerance and broadmindedness. Freedom of expression applied not only to information and ideas that were "favourably received or regarded as inoffensive or indifferent", i.e., politically correct, but also to those that offended, shocked or disturbed the State or any sector of the population. The public needed the free flow of information to decide on matters relating to policy or to those temporarily in charge of policy formulation and implementation. Further, the media's watchdog role depended on journalists being able to do their work without fear of imprisonment or other heavy sanctions.

**"The abolition of criminal sanctions for defamation is not sufficient to guarantee freedom of speech. Vigilance must be exercised so as to avoid cancelling out the positive effects of such decriminalization by other means, in particular by awarding excessive civil damages."**

Mr. Holovaty, Parliamentary Assembly of the Council of Europe

The existence of criminal defamation laws in various countries was a serious problem. The extent of their chilling effect on the media depended on their actual application, but the uncertainty of the limits of permissible criticism, combined with the possibility of harsh sanctions, acted as a powerful deterrent, forcing journalists to resort to preventive self-censorship. As a result, many countries, including Bosnia and Herzegovina, Croatia, Georgia, Moldova, Ukraine and the United States of America, had decided to decriminalize defamation. The speaker had recently co-sponsored a resolution on that issue in the Parliamentary Assembly of the Council of Europe to spark reflection on the issue. However, the abolition of criminal sanctions for defamation was not sufficient to guarantee freedom of speech. Vigilance should be exercised so as to avoid cancelling out the positive effects of such decriminalization by other means, in particular by awarding excessive civil damages. False information that could cause serious prejudice to individuals, companies or communities was spread by journalists, either by lack of professionalism or by malicious intent; it was possible to deal effectively with such abuses of free speech without resorting to criminal sanctions or civil damages. The best solution was one that offered the most tangible relief to victims of defamation, such as the obligation to publish an apology or a rectification of false allegations. An exception to the rule could, however, be envisaged and justified in cases where such abuses directly threatened human rights that were higher-ranking than the right to freedom of speech. Conceivably, only one right could outrank the right to freedom of speech: the right to life and human dignity, which

could be threatened by hate speech and warrant a threat of criminal sanction, though perhaps not necessarily that of imprisonment. He believed that a recent general policy recommendation on national legislation to fight racism and racial discrimination issued by the European Commission against Racism and Intolerance (ECRI) went too far; it called for penalization of public insults and defamation pronounced against a person or a group of persons on the grounds of race, colour, language, religion, nationality or ethnic origin, and also for the penalization of public expressions with racist aims, of an ideology claiming the superiority of a group, or depreciating or denigrating a group on the same grounds. In addition, it was a matter of concern that novel rights such as the right to a good reputation were being considered as competing rights, to be balanced against the right to freedom of expression. Although the European Court's case law relating to Article 8 of the European Convention on Human Rights had deemed a person's reputation to be a constitutive part of his or her personality and hence a private life right protected under that Article, it was necessary to strike a balance between different rights, case by case. He would plead in favour of the principle of *in dubio pro libertate* in view of the hierarchy of rights and values at stake.

## Debate

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### DEFAMATION: LAW AND PRACTICE

Professor D. BEETHAM (United Kingdom, Fellow, Human Rights Centre, University of Essex) said that when dealing with an oppressive State, one also had to deal with an oppressive, monopolistic, private corporation. If defamation were decriminalized and civil law applied, those who would benefit from the situation would be those who had the most money. For example the longest legal case in English history - seven years - had been brought by McDonald's Corporation to stifle criticism by two private individuals who had claimed that McDonald's products were damaging to the environment and to human health. Much of the thrust of human rights activities and legislation was against the State, because it was the State that had signed the relevant conventions; private corporations did not belong to that sphere, and could act with impunity. Although the European Convention provided grounds for satisfaction, one had to look at the other side of the coin: as a result of globalization and the private market, private firms had gained enormous power to stop and prevent legitimate criticism of their activities. Only after some corporations went bankrupt did it emerge that they had been guilty of wrongdoing, but fear of defamation suits had silenced all criticism.

Mr. O. FANTAZZINI (Brazil, member of the Human Rights Committee of the House of Representatives, panellist), concurring with Mr. Holovaty, said that the only rights that took precedence over the right to freedom of expression was the right to life and the right to equality. Therefore, imprisonment was not an effective remedy for defamation. He asked Mr. Haraszi if the right of response - not necessarily at the request of a court - could be used as a way to ensure that the defamed person could give his or her version of the facts. Reparation for moral injury was a means of making companies and the media think twice before publishing information that could cause prejudice to a person.

Mr. A. R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and People's Rights, panellist) asked for clarification regarding the view that attacks on honour and dignity should not lead to imprisonment. Over and above pecuniary considerations, the impact of defamation varied in different situations. The disadvantage of restricting the form of sanction to damages was that they could be so high as to ruin a person responsible for defamation. A distinction should be made between statements relating to an individual's honour and dignity, and those that might harm a nation at large. Practices differed between the developed world and smaller nations whose legal systems were less developed. If, for example, the effect of a statement was to bring about public disorder and the destruction of property, should such a statement give rise to criminal sanctions? How did the European Court of Human Rights enforce its decisions in practice, and what would occur if a court handed down a decision and a State party ignored it?

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that he had initially been convinced that the removal of imprisonment as an option for the deterrence of defamation would leave nothing other than civil law. However, there were two problems. Firstly, the argument that criminal law had a different, chilling effect would be unsustainable if it provided the same sanction as civil law; the impact on freedom of expression would be the same. Secondly, it was not the same sanction. An illustration thereof could be found in a recent case before the Inter-American Court of Human Rights that had resulted in registering a criminal's name on the criminal register with social and formal sanctions. Hence, there was a need for promoting the full decriminalization of defamation. Commenting on standard 5 presented by Ms. Alaburic<sup>1</sup>, he said that defamation involving an allegation of crime was indeed treated differently in many countries, and that at times it could appear that the European Court might be treating the issue differently, but it was wrong to treat it as a separate category of defamation. There was no difference between an allegation of a crime and any other allegation which tainted one's reputation; they should all be treated in the same fashion.

Mr. S. HOLOVATY (Chairperson of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe (PACE), Panellist) said that the decriminalization of defamation was a complex issue, and one which not all participants were prepared to accept. The legal systems in Europe, however, were widely favourable to the idea. For those who were not yet ready, he suggested that they consider principles that could govern the application of existing information law, for example, the principle that politicians should have a higher tolerance of criticism than other citizens. Another suggestion lay in replacing imprisonment with other penalties provided by criminal law. If decriminalization was not an option, guidelines and principles could be adopted to make the situation less harsh and diminish the chilling effect on journalists. In response to Mr. Chigovera's query regarding enforcement mechanisms provided by the European Convention on Human Rights and the European Court, he said that they included debates and pressure from other member States in the Assembly, sanctions, fines, penalties and at worst, suspension of voting rights in the Assembly, leading to exclusion from the Organization. Very few decisions, in fact less than 10, had not been enforced, as States party to the Convention felt a moral and legal obligation to carry out the Court's judgements. A good example was the Turkish Government's decision to enforce the Court's judgement regarding the separatist leader Mr. A. Oçalan.

1. Article 10 of the European Convention does not protect the pronouncement of information accusing a person of committing a crime, when there is a sound factual basis for those accusations.

Ms. V. ALABURIĆ (Croatia, attorney-at-law, panellist), addressed Mr. Chigovera's comments regarding the possible impact of public statements on national interests and the comparison of such statements to defamation. She emphasized that defamation was just one of many civil or criminal offences that could be committed by publishing articles or public information, including spreading false information that caused public disorder or crime. The topic of discussion was defamation, not other offences that could be caused by the publication of such information. Mr. Mendel's question was closely related to the legitimate aim described in Article 10, paragraph 2, of the European Convention, which addressed the authority and impartiality of the judiciary branch. According to the European Court and the aforementioned fifth standard, no one should be blamed for committing a criminal offence before a judgement was pronounced, unless there was a solid factual basis for such accusations. The standard was not based solely on the principle of the presumption of innocence, but also on that of the protection of authority and impartiality of the judiciary. She was very critical regarding that standard, because there was too much corruption and criminal activity in her own country and in other countries in transition which did not have the means to make investigations. If it were forbidden to speak about such issues, the future of those countries would be jeopardized. She therefore was in favour of broad discussion of those issues, because the ultimate benefit for democracy was greater than the benefit derived from the protection of a person's reputation in such circumstances.

Mr. M. HARASZTI (Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE), panellist) was pleased to announce that Albania, Italy and the United Kingdom were taking concrete steps to decriminalize defamation. In response to Professor Beetham's query, he said that in most countries where defamation was a private accusation, the plaintiffs went to court and asked the court to put the culprit in a state prison. The criminal procedure was just as class-dependent and money demanding as that of civil law. For example, because of their social status, politicians could afford to file defamation suits. Responding to the query posed by Mr. Fantazzini, he said that the right of response was a good institution, and that it was featured in many civil law regulations. A civil law resolution or verdict could stipulate that part of the damages should include a defendant's right to answer, which was acceptable. In public radio and television, the right of response was recognized by complaints commissions as part of an institutionalized order for the provision of fair information. It was also the hallmark of a quality press: if an error was committed, it should be corrected, and that would include a right of response. With regard to freedom of expression, an editor should not be punished for denying the right to respond under either civil or criminal law.

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*Debate*

“Access to information which gives the media, political parties, organizations and the general public the right to receive and disseminate credible and reliable information on issues of interest to them and to the nation is even more important for parliamentarians who rely thereon.”

Mr.Chigovera, African Commission on Human and People's Rights

## ACCESS TO INFORMATION

### Mr. Andrew Ranganayi Chigovera, Special Rapporteur on Freedom of Expression, African Commission on Human and People's Rights

Mr. A. R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights, panellist) spoke on parliamentarians' access to information. Freedom of expression included the right to receive and impart information. Freedom of expression and the free flow of information, including free and open debate regarding matters of public interest - even if it involved criticism of individuals - was crucial to a democratic society, to an individual's personal development, dignity and fulfilment, to the progress and welfare of society and to the enjoyment of other fundamental human rights.

Access to information, which gave the media, political parties, organizations and the general public the right to receive and disseminate credible and reliable information on issues of interest to them and to the nation, was even more important for parliamentarians who relied thereon to make informed decisions and to debate effectively in parliament. It was essential for the consolidation of democracy, because it provided an opportunity for citizens to make educated choices; moreover it promoted accountability and transparency by enabling citizens to challenge government policies and activities.

Various international and national instruments, in particular the International Covenant on Civil and Political Rights, referred to the scope of, and limitations on, freedom of information and access to information as part of their treatment of freedom of expression. The African Commission on Human and Peoples' Rights had in 2002 adopted at its thirty-second Ordinary Session, held in Banjul, the Declaration of Principles on Freedom of Expression in Africa and appointed a special rapporteur on the protection of freedom of expression in Africa to ensure proper understanding by the States party to the African Charter on Human and Peoples' Rights of their obligations and to help them align their jurisprudence with the International Covenant on Civil and Political Rights and with other instruments. The Declaration, a major breakthrough for the African human rights system, aimed to protect the right to freedom of expression and access to information, which at the national level had been incorporated into constitutions and other acts of parliament, and was being promoted by many NGOs. Although several African countries had a framework within which to protect freedom of expression, and some constitutions referred to access to information, the practice of protecting the latter varied from country to country, and simply did not exist in some African countries.

When parliamentarians adopted laws that impacted on the exercise of the right of freedom of expression, they had to ensure that such laws not only reaffirmed the protection of that right, but would also withstand

the test of time and address the people's needs to access information. It was imperative to have laws in place that governed the protection of freedom of expression in general and the access to information in particular. The Internet provided one means with which parliamentarians could access information, but that was of little relevance in poor countries which had no access to that technology. The print and electronic media also provided reliable information parliamentarians could use, but the print media in some African countries was state-controlled and it was unclear how far it could disseminate information of general public interest, as opposed to spreading information that advanced the policies of the people in power. In most African countries and the developing world, radio was the most effective way to spread information because of its low cost, but radio broadcasters too were state-controlled. To what degree should members of parliament be accountable to their constituents, and what mechanisms, for example forums or offices within constituencies, did they have to allow them to exchange information and views on national issues with their constituents, especially those living in rural areas, with limited access to radio and no access to the print media, television, and the Internet? Public debates were a useful tool for gaining access to information. They provided a forum where issues related to society and government could be discussed. NGOs too were useful, as their mandates often addressed the rights of citizens and government accountability. By monitoring governments' performance, they were often the first to voice concerns when democratic principles were not being followed. Parliamentarians could obtain timely information from NGOs on what was happening in a country. Another effective tool was citizen participation in discussions of national issues, which could be ensured through public forums in parliamentarians' constituencies. Members of parliament should take advantage of their relationship to government to access information from government departments and ministries in order to enable themselves to hold meaningful discussions in parliament. Because most African countries did not have registers of international human rights treaties ratified by States, in Africa it was advisable to set up a human rights institution in parliament to allow its members to familiarize themselves with human rights treaties, and thus give them the means to debate bills that impacted directly on the freedom of expression.

“Because most African countries do not have registers of international human rights treaties ratified by States, in Africa it is advisable to set up a human rights institution in parliament to allow its members to familiarize themselves with human rights treaties, and thus give them the means to debate bills that impact directly on the freedom of expression.”

Mr. Chigovera, African Commission on Human and People's Rights

Most English-speaking Commonwealth countries in Africa had a dualist system; therefore, courts could not apply an instrument unless its provisions had been made part of the national law. Article 9 of the African Charter on Human and Peoples' Rights granting all individuals the right to receive information and express and disseminate their opinions within the law was one of the provisions most abused by States aiming to restrict freedom of expression. The African Commission on Human and Peoples' Rights believed that guidelines should be established for the correct interpretation of that article, and in order to circumvent secrecy laws. According to the Declaration, the public had the right to obtain information of public interest from public and private institutions, such as the right to know about possible food shortages. With no diversity of the media in much of Africa, ensuring pluralism was imperative. It was

also necessary to transform public broadcasters into public bodies and allow private broadcasters, including community radio stations, to operate. Restrictions on the print media included unduly stringent licensing requirements, such as prohibitive licensing fees (exceeding one country's foreign currency reserve), censorship, the submission of news for approval prior to publication and retaliatory measures against publications expressing criticism of public bodies or private corporations, such as the cancellation of subscriptions to a publication or withdrawal of advertising support. The private media had trouble surviving, whereas the government-controlled media benefited from vast resources.

### **Mr. J. Corral Jurado, Senator, Mexico**

Mr. J. CORRAL JURADO (Mexico, Senator, panellist) thanked the IPU for the opportunity to speak on the progress, obstacles and challenges relating to access to information for parliamentarians in his country. Article 19 of the Universal Declaration of Human Rights adopted in 1948 had played a fundamental role in developing human rights at the international and domestic levels and had made the full complexity of freedom of expression very clear. Freedom of expression should not be restricted, and people should be able to obtain, receive and transmit information. To enjoy it fully an individual had to have something to say, which required access to sources of information giving him or her an opportunity to expand his or her ideas. Access to public information was an essential component of the right to information in general. Freedom of information meant that parliamentarians were entitled to access public government information; otherwise the right to freedom of expression could not be fulfilled. Moreover, they needed access to information to do their jobs, and had a responsibility to society to provide information on their work. Great strides in transparency had recently been made in Mexico compared with the closed society of the twentieth century, but much remained to be done.

There were two main acts relating to parliamentarians' access to information in Mexico: the Act establishing the Mexican Congress, and the Act on transparency and access to public government information, based on Article 93 of the Constitution, which stipulated when the chambers could summon public officials to hearings to discuss a law or their particular activities. The law also established that parliamentarians could form commissions to consider the way in which the civil service was working. The President and civil servants had an obligation, set out in Article 87 of the Constitution, to report annually to Congress on the way in which things were being run. If an official failed to appear at a hearing, particular sanctions should be set out in the law. An amendment to the Organic Law of the General Congress (1998) marked an advance with respect to the right of deputies and senators to request information and investigate complaints. In May 2001 the executive branch had issued guidelines on its cooperation with Congress, recognizing that the exchange of effective, respectful, accurate and timely information between the two branches of government was essential to promote democracy and enable the country to accomplish its higher goals. Public officials were to maintain open and effective channels of communication with Congress, attend meetings and grant requests for information. The federal Act on transparency and access to public information from government sources had gone into effect in June 2003, providing citizens with guarantees of access to information. Once they had exercised that right, citizens could also provide information to parliamentarians. Since the adoption of the statute, some 75,000 requests for information had been received. The Act recognized that information was public unless explicitly designated as non-public under the law, i.e., information that might jeopardize people's health or integrity, or endanger the nation's security, defence, or economic stability. The Act respected

“Members of parliament must ensure full accountability, a notion central to modern democracies, and provide more information on the national budget, their activities and the work of parliamentary committees. Because of the very nature of its work, parliament must be open to public scrutiny and serve as a model of transparency and openness.”

Mr. Corral Jurado, Mexico

reservations imposed by other laws, such as the recognition of secrecy pertaining to commercial information, law enforcement or banking secrecy. Any citizen or his or her representative could request unclassified information from any branch of government without prior justification. A new institution - ideally an autonomous constitutional body similar to the National Commission for Human Rights, which would make recommendations relevant to all three branches of government - established under the Act could compel state bodies and offices to provide information. Further, the judiciary and legislature had an obligation to comply with the Act. Some citizens had called for public circuit court hearings. Members of parliament should ensure full accountability, a notion central to modern democracies, and provide more information on the national budget, their activities and the work of parliamentary committees. Because of the very nature of its work, parliament should be open to public scrutiny and serve as a model of transparency and openness. For 60 years the Mexican Congress had been distant from its citizens, paying lip service to the Government; today it was a full player in a democratic society, interacting with other branches of government and subject to public scrutiny. It was necessary to strive for tolerance in society, which was vital to democracy. Freedom of expression should be respected, and parliamentarians' responsibilities recognized. It was important to adopt laws that guaranteed freedoms and ensured that all members of society were fully involved and had a full understanding of parliamentary activities. The Mexican Congress had recently opened its debates to the public via a parliamentary television channel called *La Visión del Diálogo*. Television could thus make a valuable contribution to the culture of democracy, and counter the censorship and manipulation of private media organizations. Information was not always in keeping with the interests of Mexican television magnates, and that led to censorship. Legal instruments enabling access to information were an indicator that provided information on a country's level of democracy and quality of life. Mexico had made a huge effort in terms of accountability, but it was important to have an archives law, because documents provided the raw material for access to information, and also a data protection law, to protect the privacy of individuals and to regulate the use of personal data for political or commercial use. Much remained to be done, but significant progress had been made.

## Debate

### ACCESS TO INFORMATION

Ms. R.-M. LOSIER-COOL (Canada) said that the treaties to which the Canadian Government had acceded were not well known. She asked what could be done to further enhance public awareness of the conventions, stimulate media interest (lawyers could perhaps do so by mentioning the conventions more often) and make them better known to parliamentarians, and suggested that the IPU could perhaps play a useful role by running a public awareness campaign on the issue.

Mr. L. FOMBO (Togo) thanked the Union for organizing the seminar. He said that governments in French-speaking countries in Africa had signed a number of treaties or conventions, which had been transmitted to their parliaments. However, no attempts had been made to amend legislation. He was sceptical about the existence of freedom of expression. Parliament had to accept a signed convention whether or not it was in agreement with its provisions.

Mr. N. KINSELLA (Canada, Senator, ex-officio Member of the Senate Human Rights Committee, panellist), responding to Mr. Fombo, said that members of parliament should recognize the level of operational effectiveness of international instruments, particularly as applied to freedom of expression and the right to access information. Under the Covenants, the right to freedom of expression guaranteed by Article 19 was not protected from non-derogation by Article 4 of the European Convention on Human Rights

The right to freedom of expression was self-executory in the sense that if no one interfered with freedom of expression, people would enjoy it, whereas the right to have access to information, the corollary to freedom of expression, was not self-explanatory; it was a programmatic right, requiring programmes and legislatures to enact laws on access to information. Parliamentarians should be doing more work as ombudsmen and should exercise their freedom to access information themselves, which was indeed a paradox. He expressed concern over the threat posed by anti-terrorism legislation to access to information, and hence to freedom of expression. That was a new area for parliamentarians, but a very important one.

Mr. NGO ANH DZUNG (Viet Nam) said that all people must enjoy access to sources of information, such as the press, radio, television and the Internet. It was necessary to educate the people, who needed to know also about the activities of the executive branch, and not just the legislative branch. Illiteracy was a problem in many regions because it prevented access to the printed word. Parliamentary debates (question time) in Viet Nam had been broadcast live for several years and provided a good source of information for citizens. It would be useful to hear how information was provided to citizens in other parliaments. A mechanism was needed that would guarantee all people access to information; good laws did not suffice.

Mr. K. SASI (Finland) said that the question of whether the public had the right to information was important. During the 1990s there was no overall access of information in the European Union, but one could claim that right on certain grounds. Today, it was assumed that everyone had access to all documents and information, unless specific reasons were given to the contrary, for example where classified information was concerned. In Finland, the public enjoyed wide access to information, and parliamentarians had even wider access. Parliamentary committees could obtain classified information if it was deemed necessary to their work, and that system worked very well.

Ms. E. SANDOR (Slovakia, Secretary of the Committee on Human Rights, Minorities and Status of Women) said that the legislation on free access to information in her country was very similar to that of Mexico and Finland, and had had an interesting impact on state and semi-state institutions. Since the specific exercise of the right to access information by citizens would create an additional burden on the staff of those institutions, it had been decided that all information, except that which was confidential, would be posted on the Internet. In Slovakia it was not necessary to create new institutions or a parliamentary commissioner to provide information, because if an institution refused to provide such information, the public could go to the courts. Regarding the need to make a distinction between restrictions on freedom of information imposed by States and those imposed by other bodies, there were interesting cases pending before the Slovak High Court relating to government agreements with foreign

investors. Foreign companies in Slovakia were seeking state support for their investments, and there were legitimate grounds for respecting the confidentiality of business interests. The Government, however, had made public part of the agreements as a gesture of good faith, out of respect for the right to access to information.

Professor D. BEETHAM (United Kingdom, Fellow, Human Rights Centre, University of Essex) said that the impact of regional human rights commissions on individual countries varied from region to region and that regional bodies were often more effective than the United Nations in exerting pressure on governments and raising human rights standards. He wondered what mechanism was being employed in Africa to improve implementation of the right to freedom of expression in individual countries.

Mr. A.R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and People's Rights, panellist), responding to the question asked by Ms. Losier-Cool, said that some African parliaments had set up human rights committees or committees on justice to further parliamentarians' debate on conventions. Where ratification of a convention simply required approval by the parliament, parliamentarians should insist on a full debate instead of simply rubberstamping the agreement so as to enable them to gain an understanding of the convention with, for example, the Minister of Justice giving full background information on the convention. Furthermore, the convention should be published in the press to enable citizens to make their views known to members of parliament. When a convention was ratified by the parliament itself, its members should insist on a full debate rather than taking positions along party lines.

**"Parliamentarians must be aware that as a party to a convention, the State has additional obligations, and they must be able to find out whether the government is complying with the convention, in particular with its reporting obligations and the duty to provide access to information."**

Mr. Chigovera, African Commission on Human and People's Rights

Replying to Mr. Fombo, he said that it was common for various countries not to follow up on conventions once they had been signed. English-speaking countries in Africa had a dualist system, in which no information was given to the public on conventions and governments' obligations with regard to conventions they had signed. However, parliaments could take up such issues. It was important for governments to disseminate to parliamentarians information on any conventions they proposed to sign and ratify so that their parliaments would be able to debate them and become familiar with their contents. Parliamentarians should be aware that as a party to a convention, the State had additional obligations, and they should be able to find out whether the government was complying with the convention, in particular with its reporting obligations and the duty to provide access to information.

With regard to Mr. Kinsella's comments, he agreed that freedom of expression was self-executory, but access to information was not. International instruments placed an obligation on States parties to comply and to respect the right to access information. Most international and regional conventions, including the African Charter on Human and Peoples' Rights, obliged States parties to take necessary legislative measures to give effect to obligations stipulated under the Charter. Members of parliament could therefore

play an important role by encouraging their countries to give effect to the Charter by putting the requisite legislation in place. In Africa it was unusual for parliamentarians to promote private members' bills. By taking proactive action, members of parliament could encourage governments to move forward in the area of human rights.

In response to Prof. Beetham's query, he said that Africa had recently instituted the special rapporteur mechanism. Unlike the United Nations system, in which such a mechanism had been created by decision of the membership, no resolution had been introduced in the African Union for that purpose; the mechanism had been established at the initiative of the African Commission on Human and Peoples' Rights. Article 19 played a key role in providing resources for the Commission, and supported the Special Rapporteur on Freedom of Expression. The Special Rapporteur could take up issues with the States parties concerned. Each commissioner of the African Commission on Human and Peoples' Rights had responsibilities, such as promoting the African Charter on Human and Peoples' Rights throughout Africa and submitting a biannual human rights report to the African Union. Commission activities required deep commitment and good faith from States parties concerned.

Mr. J. CORRAL JURADO (Mexico, Senator, panellist) agreed that it was necessary to promote awareness of treaties. The Mexican Congress had before it one third of all international human rights instruments for ratification and enabling legislation, of which there was little awareness, a problem common to many Latin American parliaments. Parliamentarians were not involved in any of the treaty negotiations or follow-up activities, and Mexico had the dubious distinction of being last in adopting enabling legislation relating to the right of response. He proposed that a Latin American summit of legislators be organized by the IPU to review pending treaties and conventions and learn how States had enforced them, as that would be an effective way to spread awareness of those instruments. The key to public access to information lay in legislation and in ensuring that that State fulfilled its obligation to provide information. Public information from the government should not be mistaken for publicity, social communication or the image of parliament. The Internet was one of the most effective tools of transparency, but access to it was limited to those who had the resources to install a telephone line. It was important to develop libraries, global data centres and archives in parliaments. He agreed with Mr. Kinsella that information could be classified on grounds of national security. The Mexican Congress was in the process of reviewing and clearly defining the concept of access to information in the light of developments since the September 11th attacks to ensure that the right of access to information would not suffer moral prejudice in the same manner as the right to freedom of expression, and that relevant legislation would be effective.

Mr. A.B. JOHNSSON (Secretary General of the Inter-Parliamentary Union) said that the Union was strongly committed to working with parliaments on human rights issues. He urged participants to consult the IPU website for information on their parliaments and to point out any errors and update information. The Union intended to continue its human rights activities, and hoped that parliamentarians would continue to support its endeavours. A human rights publication to be issued jointly by the IPU and the Office of the United Nations High Commissioner for Human Rights (OHCHR) entitled *Human rights: A handbook for parliamentarians* would provide parliamentarians with a succinct guide focusing on rights, instruments and parliamentary mechanisms to ensure that those rights were enforced on a national scale.

In response to Mr. Corral Jurado's proposal, he said that it would be important to have parliamentary representation at the upcoming World Summit on the Information Society (WSIS), to be held in Tunis in November 2005. The IPU would hold a meeting in Tunis on 17 November on the occasion of the

Second Phase of the World Summit on the Information Society; it would focus on access to information. Parliamentarians should attend international meetings where agreements were negotiated not to replace negotiators, but to enable themselves to work more knowledgeably and effectively at home, in particular when called upon to ratify such conventions. The Union was engaged in a host of regional and subregional activities, particularly relating to women's political rights. Similar initiatives could be envisaged with respect to human rights, but they required time. Recommendations stemming from the present seminar would be used to plan a programme on some aspects of human rights.

Debate

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## **FREEDOM OF EXPRESSION AND THE ADMINISTRATION OF JUSTICE: LAW AND PRACTICE**

### **Mr. Param Kumaraswamy, former United Nations Special Rapporteur on the Independence of Judges and Lawyers**

Mr. P. CUMARASWAMY (Former United Nations Special Rapporteur on the Independence of Judges and Lawyers, panellist) said that the Vienna Declaration and Programme of Action adopted in 1993 by the World Conference on Human Rights had stressed the importance of an independent judiciary and legal profession for the full and non-discriminatory realization of human rights. The right to a fair and public hearing by an independent and impartial court was set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The press and the public could be excluded by the court only on grounds related to public order or moral or national security considerations, to protect the privacy of the parties or to prevent publicity prejudicing the interests of justice. Moreover, Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary required judicial decisions to be taken without any restrictions, improper influences, inducements, pressures, threats or interferences.

For the most part, independent courts upheld the right to freedom of expression. In 1992, for instance, the Chief Justice of the Supreme Court of Sri Lanka had stated that the consent of the governed in a democracy should be grounded on adequate information and discussion, aided by the widest possible dissemination of information from diverse and antagonistic sources. Freedom of expression, as he saw it, was not just politically useful, but indispensable to the operation of a democratic system. In 1993, the Supreme Court of Ghana had criticized the State-owned media for serving as the mouthpiece of government. Democracy in such circumstances, it stated, was no more than a sham.

Protection of the right to a fair trial, on the other hand, was frequently a source of conflict between the courts, however independent, and the media or even lawyers and laypersons. A violation of the sub judice rule, for instance through publication of interviews with accused persons or witnesses, pressuring of litigants to forego their rights, or speculation on the outcome of a trial, could entail conviction for

"In many common law jurisdictions, the fair and accurate reporting of judicial proceedings held in public is privileged, and cannot be held to constitute contempt or defamation, since the public has a fundamental right to know through the media what happens in courts of law."

Mr. Kumaraswamy, former United Nations Special Rapporteur on the Independence of Judges and Lawyers

contempt of court and a criminal penalty. The wider the dissemination of the material, the greater the potential prejudice to the fair conduct of current or impending legal proceedings. In the so-called "thalidomide case" in the British House of Lords in 1973, Lord Reed, referring to both imminent and current proceedings, had stated as a general rule that fair and temperate criticism was usually legitimate where pressure was put on a litigant, but that even fair and temperate criticism might involve contempt in a case involving witnesses, a jury or magistrates.

Criticism of judges and courts was known in common law as "scandalizing the court". According to the High Court of Australia, it was important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity of courts or judges. Such attacks might include allegations of corruption or lack of integrity, propriety or impartiality, or allegations of susceptibility to influence from pressure groups, bodies such as trade unions, government authorities or wealthy or powerful individuals. However, attacking a judge's non-judicial activities or personal reputation would not constitute the offence of scandalizing the court.

In many common law jurisdictions, the fair and accurate reporting of judicial proceedings held in public was privileged, and could not be held to constitute contempt or defamation, since the public had a fundamental right to know through the media what happened in courts of law. However, precisely what constituted a fair and accurate report had been the subject of litigation. Newspapers were certainly not required to ascertain the veracity of every statement by counsel or witnesses. The Federal Court of Malaysia had recently held that a newspaper could even report extracts from a pleading that had not been read out in court. In his own first report to the Commission on Human Rights in 1995 as Special Rapporteur on the independence of judges and lawyers (E/CN.4/1995/39), he had stated that in an era of rapidly developing communication technology, a fine balance between the competing rights to freedom of expression and a fair trial must be sought, if necessary by developing additional standards of protection.

The powers of courts to grant injunctions known as "gag orders" and to make mega-awards in defamation suits were a further source of concern for the media. When it came to striking a balance between the competing interests of the administration of justice and freedom of the press, courts often found themselves cast in the role of both party and arbiter. In 1999, for instance, a Kenyan newspaper editor had in his newspaper accused Supreme Court judges of impropriety. Three of the judges he had criticized had subsequently sat on the panel that had heard his case. The editor had been sentenced to six months' imprisonment, and the publishers had been fined.

The summary invocation of contempt by the Sri Lankan Supreme Court in the Michael Fernando case in 2002 had attracted severe domestic and international criticism for its chilling impact on the freedom of expression of both the public and the legal profession. The unrepresented litigant had objected in court to the presence on the bench of the Chief Justice, a named respondent in the proceedings, as presiding judge. He had been sent to prison for a year for contempt of court, but had subsequently

prevailed in a case brought against Sri Lanka under the Optional Protocol to the International Covenant on Civil and Political Rights. In its Views on the case, the United Nations Human Rights Committee had called on the Government to compensate Mr. Fernando and to make legislative changes. It had furthermore dismissed the argument that the State was not accountable for the actions of the judicial branch of government.

In 1995 the Indian Supreme Court had restrained the Bombay Bar Association from holding an emergency general meeting to discuss allegations of corruption involving the Chief Justice of Bombay on the ground that, pursuant to the Constitution, the conduct of judges in the performance of their duties could be discussed only in the context of a parliamentary motion for a judge's removal. That judgement had been misguided, since the constitutional provision was designed to prevent parliamentarians from using their privilege to attack judges with impunity. Members of the public, who did not enjoy such privilege, should be free to criticize judges subject to the laws of contempt and defamation, in other words constructively, in temperate language and without undermining public confidence in the courts and judges. The veracity of allegations of impropriety on the part of a judge was generally not admitted as a defence against accusations of contempt of court. The time had come to make truth permissible as a defence.

Mega-awards in defamation actions had been a blot on freedom of expression. The European Court of Human Rights had struck down the £1.5 million award in the *Tolstoy* case in England as a violation of Article 10 of the European Convention on Human Rights. It had been fashionable in Malaysia until five years previously to award huge sums in damages for defamation. A judge of the Court of Appeal, who had stated in 1995 that such awards were needed to send a message to journalists and others that a person's reputation could not be injured with impunity and that libel did not come cheap, had changed his mind six years later and held that using defamation proceedings as an engine of oppression was contrary to the constitutional guarantee of freedom of expression. Awards were now comparable to those made in personal injury cases.

He was pleased to note that in many countries, such as Sri Lanka, laws criminalizing free speech had been repealed. The Malaysian Penal Code, however, still contained such an offence. Moreover, in Thailand, an eminent journalist had recently been charged with criminal defamation by Constitutional Court judges whose ruling he had criticized in a certain case. However, the Criminal Court had acquitted him of the charge, a result that had been hailed as a victory for freedom of expression.

Personally, he would support a campaign to abolish offences such as scandalizing the court in contempt cases. However, a United States Supreme Court judge had upbraided him for adopting such a line at a seminar attended by judges from different regions.

A group of 40 legal experts and media representatives convened by the International Commission of Jurists in 1994 had produced the Madrid Principles on the Relationship between the Media and Judicial Independence. Article 19 had also been active in the formulation of standards. The trend seemed to be towards greater protection of free speech by the judiciary in the light of calls for greater transparency and accountability of judicial bodies.

While courts needed power to deal with external threats to a fair trial and public confidence in them, journalists and publishers needed to know how far their freedom of expression extended. Uncertainty tended to lead to self-censorship. The judgements most frequently cited in connection with a judge's duty to strike a balance in court proceedings between the competing interests of freedom of expression and the sound administration of justice were still those pronounced by Lord Atkin in 1936 and by

Lord Denning in 1968<sup>2</sup>. More judges of their calibre were needed today – hence the importance of applying international and regional standards in the selection and appointment of judges.

## Mr. Andrew Ranganayi Chigovera, Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights

Mr. A. R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights, panellist) said that the independence of the judiciary was guaranteed, *inter alia*, by Article 14 of the International Covenant on Civil and Political Rights and Article 26 of the African Charter of Human and Peoples' Rights. Both independence of the judiciary and freedom of expression played a vital role in ensuring respect for the rule of law, good governance and the preservation of public confidence in the administration of justice.

Judges, by the nature of their profession, spoke only in court and were not at liberty to defend their decisions in public against attacks by the press or other parties. But without public trust in the integrity of judges, the judiciary could not function properly and the rule of law was placed at risk. The dividing line between genuine criticism of the judiciary and language likely to have an impact on the course of justice had grown thinner over the years. Lord Atkin had stated in 1936 that no wrong was committed by any member of the public who exercised the right of criticizing in good faith an act done in the seat of justice, and that justice must be allowed to suffer scrutiny, as well as respectful, though outspoken, comments. Thus, courts, like politicians, had to be tolerant of criticism.

The law of contempt was primarily designed to balance freedom of expression with the judiciary's attempt to maintain its authority and safeguard public order. Both freedom of expression itself and the restrictions imposed on freedom of expression by the judiciary to preserve its image, honour and integrity should serve a legitimate aim. Underlying contempt law was an abiding fear of "trial by newspaper", but the courts now tended more and more to give due weight to the public interest in obtaining fair and accurate information.

In many jurisdictions, African courts had tended to keep pace with modern thinking in that regard. For instance, a Kenyan lawyer, Feroze Nawrojee, had protested in strong terms against a judge's delay in deciding a motion to stay proceedings in a case in which a prominent critic of the Kenyan Government

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2. Lord Denning said: "This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make *faire comment*, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done. So it comes to this. Mr. Quintin Hogg has criticized the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the utmost." (R.V. Metropolitan Police Commission *Ex parte*. Blackburn (No. 2) (1968) 2 All. ER. 319 at 320.)

had been killed, claiming, inter alia, that such conduct would erode trust in the impartiality of the country's judges. The aggrieved judge's attempt to prosecute Nawrojee for the offence of scandalizing the court had been frustrated by the High Court, which had held that courts could not use their contempt power to suppress mere criticism of a judge, but only to punish scurrilous abuse when necessary in the interests of justice. The High Court stressed that judges should scrupulously balance the need to maintain authority with the right to freedom of speech.

In *Goodwin v. UK* (1996), the European Court of Human Rights had endorsed the fundamental right of journalists not to disclose the identity of confidential sources of information, stating that without such protection sources might be deterred from assisting the press in informing the public on matters of public interest. The Court had held that an order of disclosure could not be compatible with Article 10 of the European Convention unless it was justified by an overriding requirement in the public interest. Thus, by implication it had held that the right to freedom of expression included the right to remain silent.

In more repressive regimes, however, the administration of justice continued to be used to stifle dissent though prosecution and the imposition of heavy penalties. Where the judiciary was corrupt, contempt proceedings could be used to shield judges from public scrutiny.

The African Commission on Human Rights had attempted to establish freedom of expression standards through its communications procedure, which allowed aggrieved individuals to file complaints under the Charter, inter alia against courts that violated their rights through contempt proceedings or in other ways. While the jurisprudence was still scanty, it was hoped that with the adoption of the Declaration of Principles of Freedom of Expression the applicable standards would be streamlined. While the Declaration did not expressly deal with contempt issues, the general limitations it set forth were applicable in all circumstances, including, for instance, in camera court proceedings from which the public and the press were unjustifiably excluded.

The question of the abolition of the offence of scandalizing the court should be approached with caution because of the need to weigh carefully the desirability of freedom of expression against the need to protect the integrity and independence of the courts. The circumstances under which the offence was prosecuted should perhaps be strictly circumscribed and sentences of imprisonment replaced by fines. However, acts characterized as scandalizing the court could in some cases have extremely serious consequences in terms of undermining confidence in the courts and the administration of justice.

The police were part of the apparatus of the administration of justice. There were indeed serious problems in the handling of criminal investigations by the police, not only in dictatorial regimes but also in modern democracies. Inadequate training was frequently to blame. Many police officers resorted to torture, undue influence and intimidation of suspects to extract confessions or to get them to sign statements. The fear of being subjected to such practices restricted the suspect's freedom of expression in court. The African Commission had developed guidelines on the prohibition and prevention of torture, but they relied on government commitment to reform and effective training of the police in human rights and in investigation techniques.

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that a historical flaw in the area of law under discussion was the assumption on the part of judges that members of their profession acted virtually always with integrity and professionalism. The European Convention on Human Rights recognized two grounds, related to the authority of the judiciary and the impartiality of the judiciary, in which freedom of expression could be restricted.

The authority of the judiciary was worthy of protection so that society as a whole accepted the role of courts as the final arbiter of disputes. As public bodies, the courts were in some measure accountable to the public, and therefore open to criticism. Protection of freedom of expression was a more effective way of protecting the courts' authority than the use of contempt law. Although judges could not speak out in public against unwarranted allegations, there were other organs of society that could and should speak out if a free press was properly guaranteed. The second way of preserving the authority of the judiciary was for courts to conduct themselves with dignity, and for judges to act transparently and produce well reasoned decisions.

In a case in Canada, a lawyer who had lost a case in court had stormed out of the courtroom, and on the steps of the court had announced to the media that the court decision had been a mockery of justice, and that he had lost faith in the judicial system. Although that was not temperate criticism, the Canadian courts had held that it had not amounted to contempt, since the courts were not "fragile flowers that would wither in the heat of controversy". He therefore strongly supported the idea that the offence of scandalizing the courts should be abolished.

The issue of impartiality of the courts was a far more complex issue. Judges sometimes needed to protect themselves against undue influence. For instance, a Tanzanian judge had held the Government to be in contempt of court in a case in which it had put pressure on the national broadcasting company to attack the judge, and to compel him to hand down a judgement in the Government's favour.

Mr. H. SHEIK HOESLAM (Islamic Republic of Iran) said that the Iranian parliament, the Islamic Consultative Assembly, had both a legislative and supervisory function. Parliamentarians were required to oversee the executive, the judiciary and the legislature itself. Article 90 of the Constitution authorized citizens to complain in writing to the Assembly against the manner in which any of the three branches of government was carrying out its duties. The Assembly Committee on Article 90 was charged with monitoring legislation and court orders and with examining complaints. If the complaint related to the executive or the judiciary, the Assembly was required to demand an investigation and a response from the branch concerned and to announce the result within a reasonable period. As Assembly proceedings were broadcast live, the general public was kept informed of the outcome.

Approaches to the question of whether freedom of speech in respect of judicial proceedings and other matters should be given primacy differed from country to country. The crucial requirement was to provide the public with a mechanism such as the Committee on Article 90 that could be used to secure effective oversight by legislators.

Mr. A. LO (Senegal) said that the press had played a major role in the transfer of power that had occurred in 2000 in Senegal, both during the electoral campaign and afterwards, by making the results known immediately to the general public. The journalist Abdou Latif Coulibaly had written a book in which he had criticized President Wade. When a parliamentary commission of inquiry had been set up to investigate the matter, the author had refused to disclose his sources, and even to appear before the commission.

He wondered whether the very process of allowing greater freedom of speech, including criticism of judges, might actually undermine the independence of the judiciary, since judges would feel obliged to take account of public opinion even where it was manifestly manipulated by political parties.

Mr. Y. MAGANAWÉ (Togo) said that Togolese parliamentarians had difficulty in ensuring ratification of treaties because parliamentary debates on the subject were often mere window-dressing.

The concept of freedom of expression embraced the right to information, which had cultural and social dimensions. Information did not come in a single size that fitted everybody. People were not endowed with the same powers of discernment, or even understanding.

When a bill was debated, a parliamentarian's personal point of view might have to be suppressed in favour of the stance of his or her party or parliamentary group. Moreover, at both the committee and Assembly level, the view of the majority group invariably prevailed. In subsequently explaining the outcome of the debate to his or her constituents, the parliamentarian was compelled to defend what had now become part of the country's legislation.

The concept of defamation as defined at a meeting the previous day had been somewhat restrictive in his view. Insufficient account had been taken of the lifelong psychological damage that might be inflicted through defamation. Moreover, defamation of political figures could lead in some countries to civil war or ethnic strife. A few months previously, defamation by the press had been decriminalised in Togo. But to do their work efficiently, journalists needed proper training, especially in countries where the opposition press sought to undermine the Government as a matter of principle. As a result, deliberately distorted information was published, which might even adversely influence judges and law enforcement agencies.

Mr. M. BEDDOES (Fiji) said that Fiji was currently recovering from its third overthrow of a duly elected Government. High-profile individuals such as politicians and former and serving cabinet ministers were facing charges in the courts pertaining to the coup of May 2000. The Government of Fiji was that day introducing in Parliament Bill No. 10 of 2005 on reconciliation, unity and intolerance, which redefined the crime of treason so that an amnesty could be granted to individuals involved in the overthrow of a duly elected Government. Such individuals would have to prove to a commission set up by that Bill that they had been politically and not criminally motivated. Persons serving sentences would be released forthwith, and their criminal records would be erased. Moreover, the Bill allowed the commission to halt any High Court proceedings involving persons involved in such an overthrow. The opposition was attempting to prevent the Bill from being enacted, on the grounds that it would probably encourage the Fijian military to mount yet another coup, and also because such legislation would have an adverse impact on public confidence and on the economy.

Mr. A. R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights, panellist) said that if the offence of scandalizing the court was decriminalized, the courts would be unprotected and public confidence in their ability to dispense justice and in the authority and impartiality of the judiciary would be undermined. A possible alternative was for parliament to spell out clearly the circumstances in which a person could be held in contempt. That would prevent conflicting interpretations of the concept by different jurisdictions.

On the issue of whether courts might be unduly influenced by biased views set forth in the press, one had to assume that persons of integrity and of sufficient competence to be appointed to judicial office would resist such pressure. It was unclear whether the publication of material calculated to influence cases that were sub judice would amount to contempt of court.

Debate

## PARLIAMENTARY IMMUNITIES AS A MEANS OF PROTECTING FREEDOM OF EXPRESSION

Mr. Noel Kinsella (Canada), Senator, ex-officio Member of the Senate Human Rights Committee

Mr. N. KINSELLA (Canada, Senator, ex-officio Member of the Senate Human Rights Committee, panellist) congratulated the Union and Article 19 for having organized an interesting, timely meeting. His presentation focused on three areas that would serve as a basis for the discussion on parliamentary immunity: (1) a study conducted by Mr. Robert Myttenaere, Secretary General of the Belgian House of Representatives, called *The Immunities of Members of Parliament*, adopted at the 1998 Moscow Session of the Association of Secretaries General of Parliaments (ASGP); (2) the Westminster model of parliamentary immunity as applied to freedom of speech for parliamentarians and (3) a decision handed down in May 2005 by the full Supreme Court of Canada.

The first, a study on parliamentary privilege, was a vehicle through which immunity could be claimed by members of parliament, focusing on free speech. The concept of parliamentary privilege based on freedom of speech was commonly defined, though applied differently by a vast majority of countries included in the study, as the protection that members of parliament enjoyed from legal action resulting from an opinion expressed or a vote cast varied significantly. In most countries the principle was guaranteed by the Constitution, but in others, such as New Zealand, it was ensured by statute law, in Sri Lanka by an act of parliament, and in the Russian Federation by a federal act on the status of deputies of the Council of Federation and the status of deputies of the State Duma. In the United Kingdom and Canada freedom of speech had not been explicitly codified, and in Australia parliamentarians could respond to negative statements by having their replies inserted in the meeting record. Most countries did not have a recent codification regarding freedom of speech. The British Defamation Act of 1996 stipulated that members of parliament could renounce their privileges in cases of slander, libel and defamation. The Government of Ireland had passed a new law for those giving evidence before parliamentary committees. The French Government had produced a new approach to jurisprudence based on two theses: first, that every political action considered to be carried out by a parliamentarian in the exercise of his or her duties should be protected, and second, only those actions necessary for the exercise of the parliamentary mandate should be covered by parliamentary privilege. In 1989 the second thesis had been confirmed by a Constitutional Council decision. The study clearly showed that there were various parliamentary models and approaches, but that the objective was a common one. Parliamentary privileges and immunities with respect to freedom

of expression were based on the Westminster model of parliamentary democracy, which had begun in Great Britain as part of a long struggle between Parliament and the Crown. Hindering members and their work was a means of undermining the parliamentary system. The British House of Commons had continuously claimed its right to do its work free from interference from the Crown or the courts, and that right had eventually been acknowledged. Privilege also prevented actions of any kind carried out by persons outside parliament against its members. The privilege of freedom of speech ensured that parliamentarians could not be sued for slander, contempt of court or treason, provided their statements were part of parliamentary proceedings. Members were not totally unrestrained, however, as there were limits, and it was the Speaker's duty to restrain those who abused the rules. In addition, parliamentarians traditionally imposed restraints on themselves, for example by observing the sub judice rule whereby matters before the courts were not generally discussed in parliament. Immunity conferred by the privilege of freedom of speech also applied to witnesses appearing before parliamentary committees and to other persons taking part in parliamentary proceedings, such as clerks and reporters. Under the Westminster system, the privilege of freedom of speech applied only to things said during parliamentary proceedings. Members of parliament enjoyed a special immunity and freedom on the floor of the chamber and in committee meetings, but at other times were bound by the same rules and laws as other citizens. At the start of each session of the British and Canadian Parliaments it was still customary for the Speaker of the House of Commons to lay claim to the parliamentary privileges of the House and its members. Freedom of speech, the best known, most fundamental privilege, also had the most practical importance. It had been legally acknowledged, along with other rights of parliament, in Article 9 of the 1689 Bill of Rights which held that freedom of speech and parliamentary debates or proceedings should not be impeached or questioned in any court or place outside of Parliament. Freedom of speech, claimed as early as 1523, was still a cornerstone of parliamentary democracy, and parliamentary privilege was a fundamental right without which members of parliament would be hampered in the performance of their duties, and which enabled them to speak freely in the House. In Canada, parliamentary privilege was considered in relation with a Charter of Rights and Freedoms, incorporated in 1982 into the constitutional law of Canada. In a court case opposing the press and Parliament, in which the press claimed the right to televise Parliament's proceedings, the Canadian Supreme Court had found that Parliament had the privilege to exclude strangers in order to maintain the dignity and efficiency of the House, and that parliamentary privilege was inherent and constitutional in nature. In addition, one part of the Constitution, i.e. the one dealing with parliamentary privilege, could not be abrogated by another, i.e. the Charter of Rights and Freedoms. In the aforementioned Supreme Court ruling, it had been decided that parliamentary privilege enjoyed the same constitutional weight and status as the Constitution itself, and that if the existence and scope of privilege was not authoritatively established, then the Court would be required to test the claim for privilege and immunity against the doctrine of necessity, which was the basis of all parliamentary privilege and immunity. The Court had defined parliamentary privilege as the powers of the House necessary to ensure its proper functioning and maintain its dignity and integrity. The Court's review function on immunity included two steps: first, to determine that the powers claimed needed to exist (the necessity test), and second, to determine that the exercise of those powers was necessary to ensure the proper functioning of the House and to maintain its dignity. The Court had recalled that parliamentary privilege was also defined as that which distinguished members of parliament from ordinary citizens. However, that privilege should not take precedence over freedom of speech. Privilege did not encompass and protect activities of individuals. Parliamentary privilege was the sum of immunities, privileges and powers enjoyed by the two houses of parliament and by each member individually, without which they would not be able to carry out their duties.

Parliamentarians had to consider the *prima facie* claim to privilege. The proof of necessity, rooted in the Westminster system and many others, was required only to establish the existence and scope of a category of privilege. Once established, it was up to the parliament, not the courts, to judge whether in a particular case the exercise of that privilege and immunity would be necessary. Clearly, the scope included freedom of speech. He invited participants to share their thoughts about the exercise under their own systems of the protection of freedom of expression through privilege, and in turn, the claim of immunity.

## Debate

### PARLIAMENTARY IMMUNITIES AS A MEANS OF PROTECTING FREEDOM OF EXPRESSION

Mr. B. BAROVLÆ (Slovenia) questioned the notion of immunity as a genuine privilege, for he wondered whether there were more responsibilities involved than rights. Should one be in favour of immunity or not? If so, where, when, why and how should it be conferred? Was it possible to establish rules for all parliaments for a type of immunity that encompassed freedom of expression, pluralism and democracy? In his view, parliamentary immunity was not advisable if that privilege was intended to cover words spoken in parliament only. Because parliamentarians were subject to media coverage 24 hours a day, whether in or out of parliament, they should be entitled to around-the-clock immunity; if not, fear of defamation suits would act as a strong deterrent to their freedom of expression, and they would simply keep their thoughts to themselves.

Mr. K. SASI (Finland) said that it was interesting to learn that the Westminster model bestowed freedom of speech to witnesses appearing before parliamentary committees. He asked Mr. Kinsella if he was aware of any such cases. A broad discussion was being held in the Finnish parliament on whether civil servants testifying before such committees should be allowed to state their own views, or solely those of the government. In his opinion, they should not be punished for expressing their own opinions.

Mr. S. FITTIS (Cyprus) said that parliamentary immunity in his country was conferred by Appendix D, Article 83.1, of the Cypriot Constitution. He concurred that freedom of expression was related to freedom of information, which itself was related to freedom of access to information. Parliamentarians in many countries, particularly in Cyprus, often had a conflict or a coexistence of interests, since they could be journalists or publishers at the same time. They had the right to inform the public of what was happening in parliament, even when confidential matters were concerned. If views expressed in camera were published in the media, were they covered by parliamentary immunity?

Mr. A. BORGINON (Belgium), commenting on the difference between freedom of speech and parliamentary immunity, said that they were both parliamentary privileges, but their scope varied. Freedom of speech exempted parliamentarians from the consequences of their actions in the exercise of their duty. There were also consequences on the impact of their right to function. Parliament could not deny a member's right to freedom of speech, but it could lift his or her parliamentary immunity for prosecution. The aim of the two types of rights differed: one was to protect parliamentary activities; the other was to protect parliamentarians in the way they functioned. Freedom of speech and the protection derived from parliamentary privilege extended well beyond a parliamentarian's term of office, but parliamentarians would lose protection and become subject to prosecution as soon as their terms ended.

Mr. P. SANTER (Luxembourg) said that parliamentary immunity should not be an absolute privilege, but should be limited and subject to removal. He wondered what body, political or parliamentary, would be empowered to remove such privileges. Whatever the case, such an action would prompt a debate, depending on whether the parliamentarian represented the majority or minority party. If, for example, there were to be an exchange of defamatory statements between a member of parliament and an ordinary citizen, the former could sue the latter. It would, however, appear to be discriminatory for a member of parliament to bring action against an ordinary citizen for defamation, when the latter would have to go through the process of lifting parliamentary immunity before filing suit against a parliamentarian.

Mr. O. FANTAZZINI (Brazil, member of the Human Rights Committee of the House of Representatives, panellist) said that in his country parliamentary immunity, while an important privilege, had been established after a long military dictatorship, and had allowed members of parliament to commit serious crimes and act with impunity. Parliamentarians had fought for many years to change the law, and in 2003 the House of Representatives Human Rights Committee had finally succeeded in doing so. Formerly, courts had had to request permission from the parliament to try a member, even for purposes of criminal prosecution. Today, the courts could initiate the trial, and the political party of the parliamentarian in question could only request a suspension of the proceedings, but that would require a majority vote. He wondered how countries that were considering parliamentary immunity legislation could avoid reaching a situation of uncontrolled impunity similar to what had occurred in Brazil.

Mr. A.T. MATUET (Sudan) said that parliamentary immunity in his country covered a parliamentarian's statements, but such statements had to be reasonable, and were subject to restrictions: defamatory, seditious or blasphemous statements, for example, were prohibited. If parliamentarians were supposed to speak freely and responsibly, how did that make them different from ordinary citizens? In his view, the procedural avenue was the only means of making parliamentarians accountable.

Mr. J. CORRAL JURADO (Mexico, Senator, panellist) concurred with Mr. Fantazzini's views regarding impunity. The Mexican constitutional system specified that members of parliament could not be punished for expressing their views, but limited that privilege to the performance of their duties. Therefore, such opinions had to relate to tasks or activities in the parliament. Round-the-clock immunity would afford them that privilege unjustly, for example where private matters were concerned. The basic difference between members of parliament and ordinary citizens lay in the process of lifting immunity. It was important to clarify the concept of freedom of expression and immunity as it related to the development of a parliamentarian's duties. Immunity could not be an absolute privilege for members of parliament, just as freedom of speech could not be an absolute privilege for ordinary citizens.

Ms. A.M. MENDOZA DE ACHA (Paraguay) agreed that parliamentary immunity leading to impunity was a matter of growing concern, especially in Latin America. If parliament was empowered to evaluate the right to immunity, was that done according to an ethical internal code of law? If not, how?

Mr. E. GUIRIOULOU (Côte d'Ivoire) said that for the past two years a rebellion had been under way in his country. Members of parliament were faced with an unusual political situation in which they were elected by constituencies controlled by rebel forces and were prohibited by them from entering their constituencies if they expressed opposition to those forces. In addition, some parliamentarians had suffered from retaliatory measures, such as the denial of visas, from the French Government if they expressed their opposition to it in any way. Those actions ran counter to the spirit of parliamentary immunity, and restricted freedom of expression. It was a matter of concern to Ivorian parliamentarians, and he wondered if there was anything the IPU could do.

Mr. N. KINSELLA (Canada, Senator, ex-officio Member of the Senate Human Rights Committee, panellist) said that in most Westminster systems parliamentary privilege was indeed extended to witnesses appearing before parliamentary committees, and to reporters and assistants writing the report as well. The key point was that the privilege of free expression should benefit from protection and immunity when it was directly related to the work of the parliament. For example, a Canadian parliamentary committee examining the safety of meat had heard testimony from public health inspectors, who had consequently been disciplined by their government employer for testifying. The parliamentary committee exercised its right to extend parliamentary privilege to witnesses, and the employer was required to withdraw the sanction of dismissal. In the aforementioned case, parliamentary privilege also served as a whistle-blowing mechanism and met the necessity test for establishing privilege.

Freedom of expression was critical to parliamentarians' work. The privilege that was granted to do that work had been recognized in parliamentary procedural literature and in jurisprudence. Once that privilege had been established, one could ascertain that immunity came into play, but only for a specific activity relating to parliamentary business. To his knowledge, there had been no documented cases in procedural literature of the extension of privilege beyond what was necessary for the work of parliament. He recommended the IPU publication by Mark van der Hulst entitled *The Parliamentary Mandate*, which had been published in 2000 and which was available in several languages, it contained an excellent account of parliamentary immunity.

Mr. A.B. JOHNSON (Secretary General of the Inter-Parliamentary Union) said that parliamentary immunities could be confusing. In parliamentary law and practice there were two basic schools of thought, one inspired by the Westminster system and the other by the French Revolution and the 1789 Declaration of the Rights of Man and of the Citizen. In the British system there were certain natural rights, including parliamentary privilege, that did not have to be enshrined in law; they had only to be claimed. The French did not seek to confirm a set of existing rights; they proclaimed new rights and aspirations for people, and those rights had to be codified. Rights were not the outcome of a consensus-building approach, but of a revolution, and mechanisms had to be devised to protect the right to speech, hence the notion of immunity. In developing an approach to parliamentary immunity, more countries had been inspired by the French system than by the British one. There were two major components of immunity: non-accountability and inviolability. The former, a traditionally British principle, was present in the French system as well. The aforementioned study had found that each country adopted its own system, but it was commonly agreed that the words of a parliamentarian spoken in parliament would be protected, and immunity should relate to work done to represent the people. The scope and the people protected (ministers, witnesses appearing before parliamentary committees, assistants and the like) differed, but the time period of protection generally corresponded to the parliamentarian's mandate. Once a parliamentarian was outside parliament, immunity could be lifted so as to compel him or her to respond to charges, especially in the event of criminal accusations. Inviolability referred to the doctrine whereby a person should not be violated and should be able to continue performing his or her duties. The rationale behind it was to prevent the temptation to silence the opposition, and indeed, some 95 per cent of cases referred to the IPU Committee on the Human Rights of Parliamentarians involved members of the political opposition who had been subjected to human rights violations. Although there was a need for additional protection, it should not lead to impunity, and should not provide protection from prosecution if a member of parliament committed a crime. Generally, in the event of criminal charges, permission had to be requested from the parliament to summon one of its members for questioning. Parliament's only duty was to establish whether the proceedings were fair and well-founded. If those conditions were met,

then it had a duty to lift the parliamentary immunity, a privilege that was indeed sometimes misused. Parliamentarians should not be placed in a position where they were put on a pedestal before the public, because if that happened they would stand to lose the faith of the electorate. However, they did need some form of special protection to enable them to perform their duties and to serve the people effectively. An important question to be considered was whether the scope of non-accountability should apply only within the walls of parliament, or outside as well. Parliamentary immunity was merely a procedure for parliament to satisfy itself that an individual would not be subjected to political and personal persecution. It was important to know what was meant by “immunity”, because it was a complex notion, with many different components.

Mr. N. KINSELLA (Canada, Senator, ex-officio Member of the Senate Human Rights Committee, panellist) pointed out that if the rule of law was to continue being the cornerstone of democracy, it must apply to all citizens, including parliamentarians. The law of parliament, which included immunity and privilege, was part of the overall corpus of law.

Mr. F. HAMDI (Libyan Arab Jamahiriya) said that in the long term, the privilege of immunity should be broadened within society to include not just parliamentarians but citizens as well. He agreed with the participants from Luxembourg and Sudan that there was an element of discrimination in parliamentary immunity, and added the notion of inequality, whereby only a minority, i.e. members of parliament, and not their constituents, benefited from immunity. It was necessary for constituents to be able to express their ideas so that they could be conveyed to members of parliament.

Mr. S.M. MADANI BAJESTANI (Islamic Republic of Iran) said that freedom of expression was a goal of the prophet Mohammed. Information and communication empires and former colonial powers were detrimental to freedom of expression as they issued defamatory statements about some nations. Such obstacles had to be examined closely when finding mechanisms with which to preserve the right to freedom of expression, such as parliamentary immunity. All persons should be equal before the law; that principle was enshrined in Articles 19 and 20 of the Iranian Constitution. In addition, under Article 22 of the Rules of Procedure of the Iranian parliament, parliamentarians had to be protected. Special committees should be formed to defend that right. Officials appearing before parliamentary committees who did not provide information as requested were in breach of the law. Freedom of expression included the right of parliamentarians to issue reports to the press; it was also their duty to hold public hearings and to broadcast them.

Mr. A.R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights, panellist) said that the discussion had centred on the ideal definition of immunity, but legal provisions in some countries had a limiting effect on parliamentary immunities, hindering members of parliament from discussing certain issues in parliament. In addition, some constitutions prohibited the formation of any political parties based on ethnicity, with the aim of preserving national unity. The formation of NGOs or interest groups advocating the rights of disadvantaged groups was also prohibited by some. The Union could play a useful role by providing information on parliamentarians' positions and the problems they encountered in different countries with a view to producing uniform standards for all parliamentarians and pinpointing areas that inhibited the freedom of expression in parliament.

Ms. M. MALY (Cambodia) said that three senators in her country had recently been dismissed from the Senate, not on grounds related to their freedom of expression, but because of gaps in the legal system. In Cambodia, all senators had to be members of the winning party. The Government had not yet stipulated

"It is vital that citizens hear what parliamentarians are saying in parliament, and for that reason it is necessary that fair and accurate reports of parliamentary debates be protected outside of parliament."

Mr. Mendel, Article 19

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how long a political party could have such an impact on candidates for parliament. She asked whether that constituted an abuse of freedom of expression and parliamentary immunity.

Mr. B. INDOUMOU-MAMBOUGNOU (Gabon) said that Article 38 of the Gabonese Constitution stipulated that no member of parliament could be taken to court, arrested or tried for opinions expressed in the exercise of his duties, or arrested on criminal grounds, unless caught in the act or unless parliament was involved in that decision; any trial would be postponed until the end of his term, unless parliamentary immunity was lifted. He asked about the procedure to lift parliamentary immunity. The right of parliamentarians to vote was private and personal, and they should be able to express their views in parliament without being arrested, for they had to represent the people. Immunity should not be extended to all citizens, because if that were the case, justice would never be served.

Mr. A. LO (Senegal) described three recent cases that had arisen in his country's parliament, two of which concerned the lifting of parliamentary immunity, and the other which dealt with the resignation of a group of members from a parliamentary group. Since there was only one parliamentary group in the National Assembly, it had been decided that such a resignation would be tantamount to resigning from the relevant political party. He asked for comments regarding the independence of parliamentarians with respect to their parties or party groups.

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that it was vital that citizens hear what parliamentarians were saying in parliament, and for that reason it was necessary that fair and accurate reports of parliamentary debates be protected outside of parliament. Live broadcasts of those debates, a practice which existed in various countries, was not possible unless parliamentary protection was extended to broadcasters as well.

Mr. J. NARANJO ORTIZ (Chile) agreed that parliamentarians should enjoy immunity in order to perform their duties effectively. That right did not belong to parliamentarians per se, but through them, to the sovereign power - the citizens who had voted the parliamentarians into office and had given them the right to enjoy that privilege.

It was not good to go to extremes. Some parliamentarians insisted on 24-hour immunity, and there were isolated cases of impunity based on abuse of that privilege. Those extremes should not lead to people questioning the importance of immunity, because without it members of parliament could not do their work. It would indeed be serious if parliamentarians lost their immunity. With regard to freedom of expression, it was important for citizens to keep abreast of developments in parliament and of parliamentarians' work. In many developing countries restraints had been imposed on parliamentarians' immunity. The media had an important role to play by making freedom of expression possible. Some political regimes, however, did not guarantee freedom of expression. To guarantee that right to parliamentarians, it was necessary that they should have their own means of communication or media designed to inform the people. That was already the case in some countries.

He noted that most of the seminar participants came from countries such as his own, i.e. from Latin America or countries in transition in Eastern Europe, where democracy had been virtually unknown owing to years of dictatorship, and where market economies had been adopted as a result of globalization. Ignorance of democracy and the difficulties ushered in by a market economy had led to the birth of a consumer society, which the present generation had fully embraced, showing no interest in taking part in political life or accessing information. People and democracy had been marginalized in society, spurring the growth of the drug trade.

Mr. N. KINSELLA (Canada, Senator, ex-officio Member of the Senate Human Rights Committee, panellist) observed that the Chilean National Assembly did not have the authority to lift parliamentarians' immunity, unlike many other parliamentarians. He asked the previous speaker whether the issue had been raised in his parliament, and if there was an interest in having such authority.

Mr. J. NARANJO ORTIZ (Chile) said that the issue was the subject of a broad debate in his National Assembly. The privilege of immunity was essential if parliamentarians were to work effectively. If a member of parliament were to be charged with an offence, however, the lifting of parliamentary immunity involved a lengthy legal process, which was considered to be a sanction in itself. It was easier to forgo such a process by voluntarily giving up one's immunity. Chile's parliamentarians did not want to lose their immunity.

**"The real challenge for all parliaments and parliamentarians today is to convey the message of what they are doing in the interest of their people, to improve their quality of life and to ensure that the message is not undermined by those people more interested in making money than in making sure democracy is working."**

Mr. P. Mooney, Ireland

Mr. P. MOONEY (Ireland) noted that a fundamental tenet of democracy was that there should be a free and independent press. However, having a parliamentary information office or public relations office in a free and democratic country was no guarantee of accurate reporting. In the end, the editors decided what would be published. Admittedly, there was no real concept of public service obligation in many of the countries represented at the seminar. Some broadcasters, such as the BBC for example, did not present a balanced view of what was happening in parliament. He stressed the importance of impartial, objective reporting of parliamentary proceedings, which was just as important as retaining parliamentary immunity. Regardless of the system under which they had been elected, parliamentarians had to face the challenges which the evolving world media was creating in connection with the younger generation, which was disinterested in politics. The media was dumbed down and "infotainment" had become the norm with the advent of worldwide deregulation in the broadcasting world. The real challenge for all parliaments and parliamentarians today was to convey the message of what they were doing in the interest of their people, to improve their quality of life and to ensure that the message was not undermined by those people more interested in making money than in making sure democracy was working.

Mr. F.Y.K. GLEGLAUD (Côte d'Ivoire) referred to the relationship between freedom of expression and parliamentarians' social and material conditions. In the words of former President Houphouët-Boigny, the man who ruled was not free, and the same applied to parliamentarians. When politicians attempted to obtain the required majority to pass a law, the balance or configuration of parliament could encourage

them to attempt to buy the conscience of parliamentarians. Developing countries did not have sufficient resources to provide their members of parliament with financial compensation sufficient to avoid corruption.

Ms. M. ROTH-BERNASCONI (Switzerland) said that in her country newspapers derived 90 to 95 per cent of their income from advertisements. That meant that negative reporting could result in the withdrawal of ads by sponsors cast in an unfavourable light, and it also meant that severe financial pressure could be brought to bear on the media. There was a need not just for political independence, but for financial independence as well. While no country could claim to have a perfect constitution, Switzerland had a direct democracy with a system which had proven itself over time. Regrettably, women in the last Swiss parliamentary elections had had less access to the media and were not quoted in the press as often as their male counterparts.

Mr. A.B. JOHNSON (Secretary General of the Inter-Parliamentary Union) said that Ms. Maly had raised an important point about immunity. When discussing the relationship between freedom of expression and members of parliament it was also necessary to speak of the role of political parties, which were the vehicle through which members of parliament entered into parliament. Historically speaking, there had been two types of parliamentary practice in the world: the free representative mandate, in which irrespective of the manner in which the representative was elected, he or she represented the people and could speak his or her own conscience; and the imperative mandate, which was more closely controlled because the political party serving as an avenue to parliament could recall its representative if it so desired. During the second half of the twentieth century, the free world had embraced the free representative mandate, while the communist bloc had adopted the imperative mandate. The latter had serious repercussions on freedom of speech, because parliamentarians had to watch what they said if they wanted to stay in parliament. The free representative mandate had been adopted universally at the end of the cold war. However, a new phenomenon had emerged at the same time: Cambodia in 1993 and South Africa in 1994 had reintroduced the imperative mandate because they had just emerged from situations of deep political strife. When drafting the electoral laws, and in the interest of maintaining party balance in parliament, the respective governments had decided that once a person was elected on a party ticket, he or she could not change allegiance. Doing so would be grounds for expulsion from parliament. In a similar vein, in India it had been decided that crossing over party lines after elections would threaten stability in government. Therefore, parliamentarians who changed their political allegiance could lose their seats. There was a trend in a growing number of countries whereby if a political party decided to expel a parliamentarian, he or she would lose his or her seat in parliament. That raised an important issue, because political parties could thus control freedom of expression in parliament.

Another important point was the relationship between freedom of expression and the administration of justice. The IPU believed that the sub judice rule was overapplied in parliaments. It was always distressing for the Union when members of parliament were involved in a court case. But when that happened, they should be entitled to a fair trial and have the opportunity to express themselves, if only before a minister of justice.

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Debate

# Part 2

## **FREEDOM OF EXPRESSION: A HUMAN RIGHT ESSENTIAL TO THE PROMOTION OF TOLERANCE**

- Defining hate speech: Relevant international norms and state obligations
- Parliamentary practices and strategies to curb racist appeals and to promote a tolerant society
- Parliaments and the media: Working together to combat racism

## DEFINING HATE SPEECH: RELEVANT INTERNATIONAL NORMS AND STATE OBLIGATIONS

Professor Kevin Boyle, University of Essex, United Kingdom

Professor K. BOYLE (United Kingdom, University of Essex, panellist) said that hate speech was a particularly complex issue. A handbook similar to the IPU *Guide to International Refugee Law* should be published on international law and abusive speech, in order to provide answers to typical problems faced by parliamentarians. The term “hate speech” referred to problematic types of speech and actions which promoted hatred against so-called “races” on the basis of colour, ethnicity, religious beliefs and affiliations, sexual orientation and other status. The use of hate speech raised the question of whether in a democracy that guaranteed the right to freedom of expression and association a political party or organization could be legitimately suppressed on the basis of its views. A balance must be struck between the right to freedom of expression and association on the one hand and the right of the individual to be protected against discrimination on the other. There was an increasing opinion that a restriction of the advocacy of racial superiority, inferiority, or hatred on the basis of race or ethnicity was legitimate.

“The existence of hate speech reflects the existence of hatred, and from the perspective of freedom of expression, any law prohibiting hate speech must be a means to achieve a wider goal: eliminating hatred.”

Professor Boyle, University of Essex

The issue of hate speech became increasingly complex when religious groups advocated discrimination against persons on the grounds of sexual orientation. The existence of hate speech reflected the existence of hatred, and from the perspective of freedom of expression, any law prohibiting hate speech must be a means to achieve a wider goal: eliminating hatred. Although many governments believed that criminalizing hate speech was all that needed to be done, legislation on hate speech must principally be used for the promotion of human dignity and understanding. Although the general view was that hate speech was reprehensible and should be condemned, disputes had arisen on the question of how governments should respond and what legislative or regulatory measures should be taken. A consensus had been reached on certain issues, such as the need to punish the use of the media for incitement to mass killings. In that regard, several Rwandan radio broadcasters had been tried for incitement to genocide following the events of 1994 in that country.

According to the standards applied by the United States of America, advocacy of immediate violence must be established in order for speech to be legitimately suppressed. The United States Constitution and jurisprudence robustly prioritized freedom of expression above other competing rights and interests. In one civil case brought in the United States against the Aryan Nations white supremacist group, the defence lawyer had stated that demonizing Jews was “still legal under the first amendment” and that it was legal in that country “to be a bigot”. Such standards differed, on the whole, from international standards and the domestic standards applied in the majority of other countries.

● "A society that aims at democracy must protect its citizens' right to freedom of expression and their right to freedom from discrimination."

Professor Boyle, University of Essex

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Hate speech was a problematic issue, since it caused conflict between two rights that were fundamental in democratic society: the right to freedom of speech and the right to freedom from discrimination. Both the right to freedom of expression, including freedom of the press, and the value of political equality were fundamental for democracy. A society that aimed at democracy must protect its citizens' right to freedom of expression and their right to freedom from discrimination.

From the perspective of international standards, there was no hierarchy of rights. The right to freedom of expression and the right to freedom from discrimination were interdependent and indivisible, and the challenge to all States was to harmonize and balance those rights. Hate speech was a specific type of political speech, the central purpose of which was to deny equality to a particular, targeted group. Racist groups used freedom of expression to fight against others who were struggling for equality and recognition.

In the context of colonialism, in the nineteenth and early twentieth centuries, racism and the ideology of white superiority had been prevalent. Prejudice against Jews had stemmed from centuries of Christian views, both Protestant and Catholic. Many contemporary racist groups were in fact protesting the abandonment of those prejudices by the majority.

The most relevant international treaty with respect to ethnic discrimination was the International Convention on the Elimination of All Forms of Racial Discrimination, which required all States parties to declare the following to be offences under criminal law: the dissemination of ideas based on racial superiority or hatred; incitement to racial hatred; and incitement to violence on grounds of race; and to declare illegal all organizations that promoted or incited racial discrimination. The challenge faced by States parties to that Convention was to criminalize the dissemination of ideas advocating racial superiority or based on hatred, and to prohibit racist organizations. Many States had submitted declarations under that treaty, stating that they would have due regard for other rights, including the right to freedom of expression. The exact requirements of the Convention were not defined, and some States had argued for the imposition of measures other than criminalization in order to try to reconcile the rights to freedom of expression and protection against discrimination.

The International Covenant on Civil and Political Rights required States parties to prohibit any advocacy of racial or religious hatred that constituted incitement to violence. Other international legislation included laws against negationism and denial of the Holocaust. In some European countries it was a criminal offence to deny that the Holocaust had taken place, since it was considered that such a denial constituted a modern form of anti-Semitism. Persons had been prosecuted and convicted under such laws.

Historically, freedom of expression had stemmed from freedom from state interference in the media, which itself had been born of freedom of religion. In the Western context, freedom of expression had not been possible before the freedom to challenge religious orthodoxy, which had been achieved when the Church had granted the right to publish the Bible in languages other than Latin. The struggle for equality had emerged after the Second World War, in the struggle for self-determination and the struggle against colonialism. International standards proposed the reconciliation of freedom of expression and protection from discrimination. Such standards recognized that such a complex issue could lead to the abuse of freedom of expression by States that could use limitations on such rights to interfere with political speech.

## Ms. Agnès Callamard, Executive Director, Article 19

Ms. A. CALLAMARD (Executive Director, Article 19, panellist) said that over the past 10 years change in the global situation had accelerated. International society and national societies alike were under stress caused by recent events, such as the terrorist attacks in New York on 11 September 2001, the global security agenda and the war on terror, as well as gradual changes, such as globalization, climate change, demographic trends, the information communication technologies revolution and migration. Her organization had monitored those changes with interest and increasing concern. In particular it had noted increases in anti-terrorism and state security laws, and increasing media censorship, self-censorship and media bias. The United Nations Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression had stated that many anti-terrorism laws had a negative impact on certain rights, including freedom of expression. Article 19 had also noted increased hostility against minority groups that were thought to be linked with terrorism. Patterns of such hostilities were evident across the world. The United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance had noted that the legitimate struggle against terrorism had led to new forms of racial discrimination and the growing acceptance of traditional forms of racism. There was also an increase across the world of racist political platforms, which were gradually being assimilated by political parties. The world was currently witnessing an increase in racist and xenophobic discourse that constituted a threat to democracy. In certain cases, there was an intellectual legitimization of racism and xenophobia through the media and works of literature.

Article 19 was concerned about an increase in community-based censorship imposed the use of mob violence. In certain cases, artistic free expression had been targeted on the grounds that a work of art was considered offensive or insulting. Such cases had occurred throughout Europe and elsewhere, and the most serious among them had resulted in the death of the artist. The defence of freedom of expression and curbs on hate speech must be addressed in that context, and particular consideration should be given to how people in an increasingly diverse and multicultural society could be protected from insult.

Over the course of the seminar, participants should consider the following questions: should a cartoon that mocked the Pope be censored? Should a cartoon that mocked Mohammed be censored? Should one person be allowed to mock another's religious beliefs? Should a television channel be permitted to broadcast internationally a claim, for example, that Israel had been spreading HIV in the Arab world? Were blasphemy laws protecting or violating religious rights? From whom were blasphemy laws protecting a population? Should Nazi groups be able to set up internationally accessible websites? Should statements be tolerated which justified the perpetration of violence against women by their husbands? What about the statement that a woman was half a man, or that a homosexual was an animal? Answers to such questions were extremely complex.

**“Equality and dignity, as well as free speech, are best advanced by the use of the most stringent possible restrictions on hate speech. Such laws must be clear and precise, contain narrow definitions of the most dangerous phenomena, and aim to achieve equality and non-discrimination.”**

Ms. Callamard, Article 19



“Eradicating the institutional practice of hatred must be a priority for all.”

Ms. Callamard, Article 19

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Curbing freedom of expression was a very blunt instrument, and could not be used lightly. Once repression had begun, it could easily lead to totalitarianism. Quoting Umberto Eco, she said that to be tolerant, one must set the boundaries of the intolerable. Her organization’s research had showed that laws restricting hate speech were often abused by the authorities at crucial moments. Such legislation, which was required under international law, must be used with great care. Equality and dignity, as well as free speech, were best advanced by the use of the most stringent possible restrictions on hate speech. Such laws must be clear and precise, contain narrow definitions of the most dangerous phenomena, and aim to achieve equality and non-discrimination. Governments must tackle hate speech in accordance with their own countries’ historical contexts, and must be able to justify the use of laws against hate speech.

Article 19 had also found that combating hatred and curbing hate speech were not one and the same thing, and proactive measures were required to combat hatred, rather than concentrating on hate speech alone. Although being offended was an occupational hazard in a democratic society, being hated was not. Fighting hate speech rather than hatred itself was a poor demonstration of leadership, and many human rights organizations, including Article 19 considered that the current global crisis was, in fact, largely the result of a crisis in global and national leadership. Attempts to curb freedom of expression were often part of an intolerant, self-serving, hegemonic agenda executed by leaders for economic, ideological or religious gain. How could a government justify, for example, the creation of blasphemy laws to protect the Muslim community, while tolerating the torture of British Muslims at the Guantanamo Bay naval base? Eradicating the institutional practice of hatred must be a priority for all.

## Debate

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### DEFINING HATE SPEECH: RELEVANT INTERNATIONAL NORMS AND STATE OBLIGATIONS

Mr. O. FANTAZZINI (Brazil, Member of the Human Rights Committee of the House of Representatives, panellist) said that the Brazilian Government had taken measures to address the issue of incitement to discrimination in television programmes by establishing a system for the review of all programmes considered to contain racial, religious or gender-based discrimination or violence. The public could inform the authorities of programmes that caused concern, and those programmes would be reviewed. One particular programme had been censored, since it had portrayed the image that homosexuality was wrong and the result of bad parenting. The Government had recommended that the executive of the television company meet with members of the homosexual community to discuss how best to address issues relating to homosexuality in television programmes. The Government hoped that open dialogue with minority and vulnerable groups would make a positive contribution to the elimination of discrimination and hatred.

Mr. B. INDOUMOU-MAMBOUNGOU (Gabon) said that the experts invited to speak during the seminar had focussed on the experiences of some regions more than others. In future, perhaps each parliamentarian should give a summary of the situation in his or her country at the beginning of the seminar in order to achieve a more global view of the problem to be discussed. Although intolerance of homosexuality, for example, must be addressed in Europe, it was not a problem in Africa. Genital mutilation, which was not a problem in Europe but was indeed an issue in Africa, had not been mentioned during the seminar.

Turning to the issue of negationism, he said that although he agreed that denial of the Holocaust should indeed be punished, the international community had not yet officially recognized the violence that had resulted from colonialism in Africa, evidence of which still existed, such as the African cultural legacy. Although the issue had been raised in the United Nations, answers had not been found. Even in expert discussions between parliamentarians at the international level, only national issues could apparently be addressed.

The question of the role of parliamentarians in the protection of freedom of expression and the promotion of tolerance and democracy was particularly important. Democracy was not a state of being, but rather a process that must take account of the current situation in a given country. In countries that had high poverty levels, few people had access to the Internet, and there were high illiteracy rates. The dissemination of racial propaganda on the Internet was therefore a problem that was almost completely exclusive to rich, developed countries.

The parliament of Gabon had recently adopted a draft law on trafficking in children, since many children in the country did not attend school and fell victim to traffickers. The Government had also promulgated a law on the establishment of a national human rights commission. With increasing liberalization in certain countries, large numbers of new political parties were emerging. In some cases, owing to the repressive nature of certain communist regimes, the idea of prohibiting communist parties had been put forward. He wished to know how the prohibition of such parties could be considered part of democratization.

Ms. A.M. MENDOZA DE ACHA (Paraguay) said that there was no discrimination or hatred in Paraguay. However, she agreed that those problems could not be tackled through anti-discrimination legislation alone, but must be addressed through the renewal of the basic human values of tolerance, solidarity, friendship and family. Those values must be instilled in society through actions as well as words. Priority should be given to providing positive examples and role models, rather than to criminalizing and prohibiting of certain activities, in order to uphold the ideal of tolerance. She agreed that there was a leadership crisis and an absence of positive role models for young people. Good leadership built healthy societies, whereas negative leadership destroyed humanity.

Mr. U. REINSALU (Estonia) asked whether a definition of hate speech could be universally applied to all categories of people, including for example the wealthy. He wondered whether a law that deprived a certain group of people of their rights could be considered tantamount to hate speech.

Mr. P. MOONEY (Ireland) said that although Northern Ireland and the Republic of Ireland were small countries, Northern Ireland bore all the hallmarks of a fractured society. Although much had been done to heal the wounds of 300 years of religious conflict, a subtle form of racism and intolerance still existed in Northern Irish society, despite the parameters set by legislation. Ireland had not been a colonizing power, but had in fact been colonized. There was great awareness in Western Europe of the need to right

the wrongs of colonialism, and the European Union was currently discussing possible ways of increasing its development aid for Africa.

He agreed with Ms. Callamard that it was better to offend than to hate, since that was a fundamental aspect of democracy. However, it seemed ironic that in contemporary society, although it was commonplace to speak out against the Catholic Church, criticism of Islam was not tolerated. The restriction of freedom of expression led to totalitarianism, fascism and events such as the Holocaust. Anti-terrorism legislation was currently being used to erode the achievements of the long-fought battle for the protection of human rights. The like-minded States in the coalition that had supported the United States in its actions in the Middle East were now introducing legislation under the pretext of protecting their societies against terrorism, but they were in fact depriving people of their fundamental human rights. Owing to the United States media, the population of the United States had a very different view than the rest of the world of their country's actions. There were increasing problems with democracy in the United States, where it was currently considered unacceptable to criticize the Government. The United States had long been considered as a benchmark for democracy in the rest of the world, and the current situation in that country could affect the thinking and attitudes of the whole international community. Although the President and several speakers had expressed the view that the global situation was improving, he wondered if that was really the case.

Mr. A.T. MATUET (Sudan), responding to Ms. Callamard's question on whether a statement that homosexuals were animals constituted hatred or incitement to hatred, said that in certain societies homosexuality was considered unnatural. Indeed, homosexuality was criminalized in some African countries, and therefore a statement that homosexuals were animals would not be considered hate speech. He wished to know whether the expression of differences of opinion between societies on particular issues, such as homosexuality, constituted hate speech.

“Although equality laws are only effective after a considerable period of time, they assert a moral position in society, promote equality and make clear the fact that those who attempt to deny equality will be prosecuted.”

Professor Boyle, University of Essex

Professor K. BOYLE (United Kingdom, University of Essex, panellist) said that he agreed with Mr. Fantazzini that positive efforts must be made to include previously excluded groups in society and to recognize social diversity. Brazil was not a European country. It had taken a leading role in the international dialogue on sexual orientation and on the treatment of minorities. Turning to the issues raised by the representative of Gabon, he said that the key idea in human rights in the second half of the twentieth century had been that of equality, and that every person was entitled to human dignity. Gender equality and the struggle against racism and colonialism had been the primary focus of human rights since the Second World War. More recently, other excluded groups had begun to receive attention in respect of human rights, such as the disabled and homosexual, bisexual and transgender persons. Homosexuality had previously been criminalized in European countries, and the same laws currently prohibiting male homosexuality in the anglophone parts of Africa had existed in Ireland. Changes of attitude and opinion had led to the abolition of those laws in Western Europe.

Regarding the universality of the definition of hate speech, he said that advocating the killing of all rich people would indeed constitute incitement to violence, and should be prevented. It was important to note that those who opposed equality often did so for political reasons. Although equality laws were only effective after a considerable period of time, they asserted a moral position in society, promoted equality and made clear the fact that those who attempted to deny equality would be prosecuted.

Ms. A. CALLAMARD (Executive Director, Article 19, panellist) said that consideration should be given to how best to combat the increasing intolerance that had been caused by the rapid changes in society at the national and global levels. Positive changes had already taken place: many subjects that had not been tolerated in the past had become accepted and tolerated, and a recently broadcast British television programme on media censorship had demonstrated a considerable change over the past 50 years in what was considered acceptable in Britain. Civil society activists and legislators should endeavour to have a high level of tolerance.

Turning to the issue of the prohibition of homosexuality in some African countries, she said that Western countries had also, in the past, prohibited homosexuality. The fact that homosexuals in Zimbabwe, South Africa and Uganda, among others, had established civil society organizations to fight for their rights demonstrated that the problem was not simply one of culture, and was not an exclusively Western issue. Political will was required to address the issue of intolerance of homosexuality, which in certain cases was not an issue that was openly discussed. Although considerable political courage would be required to ensure the protection of homosexuals in such societies, their human rights and dignity must be protected.

Current trends in the restriction of freedom of expression and in combating racial and religious intolerance were dominated by the fight against terrorism and the global security agenda. Draft laws and proposals on those issues must be analysed and contextualized in order to ensure that the root causes of contemporary problems were adequately addressed.

*Debate*

## **PARLIAMENTARY PRACTICES AND STRATEGIES TO CURB RACIST APPEALS AND TO PROMOTE A TOLERANT SOCIETY**

**Ms. Boël Sambuc, Vice-President of the Swiss Federal Commission against Racism**

Ms. B. SAMBUC (Swiss Federal Commission against Racism, panellist) said that in Switzerland, the issue of human rights had been marginalized and devalued in parliament following the parliamentary elections held in 2003. Since the 1960s the Government had based its policies on multilingualism and the inclusion of minorities in society. The Minister of Justice and Police had an important role in promoting

"In the case of Switzerland and other European countries, the word 'democracy' is being confused with the concept of the reign of the majority. Democracy must, in fact, be based on the reign of the majority, but it also calls for respect for social, ethnic, linguistic and religious minorities."

Ms. Sambuc, Swiss Federal Commission against Racism

tolerance, and was responsible for guaranteeing respect of international treaties to which Switzerland was party, the Constitution and the Criminal Code, which criminalized racism. The present Minister appeared indifferent to discrimination, and had tried several times to abolish Article 261 of the Criminal Code on the criminalization of racism. He had requested the suppression of the Federal Commission against Racism on the grounds that racism did not exist in Switzerland. Such an acceleration of nationalist sentiment was also being witnessed in other European countries.

The use of referendums had always been common practice in Switzerland. Draft laws of any type and concerning any matter could be put to a referendum at public request. The people of Switzerland had been proud that Article 261 of the Criminal Code had been accepted by the majority of the population, despite a campaign that had been waged against it and in favour of greater freedom of expression by certain members of the populist movement. The establishment of the Swiss Federal Commission against Racism had been requested by the United Nations as a prerequisite for accession to the International Convention on the Elimination of All Forms of Racial Discrimination. The adoption of Article 261 and the establishment of the Commission had been recognized as positive steps and as a statement that Switzerland would not tolerate racism. Unfortunately, the actions of the new Government were discrediting that hard work and progress. Human rights activists had been nicknamed "Gutmenschen" (goody-goodies), which was an expression that was also used in relation to those fighting for human rights in Germany. Efforts should be made to remove that label and discredit the opinions that were being broadcast that human rights activists were naïve and excessively conscious of politically correctness.

Since the government review of the Asylum Act in March 2005, asylum seekers were being deprived of their right to food and housing. The situation was deteriorating rapidly, despite the remarkable institutions that had been established in Switzerland. If respect for the human rights of certain groups continued to diminish, the country's human rights protection system would cave in, which would lead to self-repression. The morning after the Asylum Act had been revised, an NGO had been found to be in breach of the Constitution for providing emergency aid, including bowls of rice and mattresses, to homeless asylum seekers. In the case of Switzerland and other European countries, the word "democracy" was being confused with the concept of the reign of the majority. Democracy should, in fact, be based on the reign of the majority, but it also called for respect for social, ethnic, linguistic and religious minorities. Parliamentarians in Switzerland required the support of other parliaments, European Union representatives and civil society in order to rectify the situation before it was too late.

## Ms. Marie-José Laloy (Belgium), Senator, Chairperson of the Human Rights Committee of the Belgian Parliaments

Ms. M.-J. LALOY (Belgium, Senator, Chairperson of the Human Rights Committee of the Belgian Parliament, panellist) said that the Belgian Government had a strategy to fight racism and promote tolerance. Racism, xenophobia and non-respect for human rights were pertinent issues in Belgium, and the Government was taking measures at the legislative and constitutional levels, as well as establishing targeted programmes to address those issues. The role of the Government was to combat the restriction of fundamental freedoms of individuals and communities, and several specific measures had been taken; legal provisions had been adopted regarding xenophobia and anti-Semitism. Although Belgian legislation did not define hate crimes or hate speech, incitement to hatred could not be justified as free expression, and could be considered an abuse of the law. Belgian anti-racism legislation criminalized incitement to hatred, racism, and all discrimination. In February 2003, a bill had been adopted for the creation of the Centre for Equal Opportunity and Action to Combat Racism. That law also strengthened penalties for crimes motivated by discrimination based on ethnicity, religious beliefs, social or economic status, disability or any other personal characteristic.

Regarding anti-Semitic propaganda, a law on negationism had been passed which criminalized any denial or justification of the use of gas chambers or genocide committed by the Nazis during the Second World War. The Belgian parliament was currently debating the possibility of broadening the scope of the provisions of that law. A law had been adopted in March 2003 which specified the circumstances in which restrictions could be placed on the free circulation of information on the Internet by sources in other States members of the European Union. That law aimed to protect minors and reduce incitement to hatred. The Belgian Government had ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1975, and had signed but not yet ratified the European Convention on Cybercrime and its Additional Protocol. The Government hoped to complete the ratification process by the end of 2005, and was already implementing the provisions of those two instruments, which criminalized all incitement to hatred through the dissemination of information on the Internet.

In Belgium, cases involving the press were tried in the Court of Assize, unless they involved incitement to racism, in which case they were heard before ordinary tribunals.

Targeted measures taken in Belgium against Internet crime and incitement to hatred included the drafting of a federal action plan on racism, anti-Semitism and xenophobia, the main principles of which had been adopted by the Belgian parliament in 2004. The plan gave priority to combating incitement to hatred, racism and anti-Semitism on the Internet through the evaluation of the effectiveness of legislation and through the creation of a draft agreement. The agreement, to be signed by all the interested parties would create a specific partnership for the monitoring of racist messages on the Internet.

The Centre for Equal Opportunity and Action to Combat Racism had been established in 1993, and although it was funded by the State, it remained fully independent. The Centre's mandate was to promote equal opportunities and combat all forms of discrimination, exclusion, restriction or preference based on race, colour, descent, ethnic background, sexual orientation, civil status, social status, birth, age, present or future state of health, disability, or religious affiliation. The Centre operated in a spirit of dialogue and cooperation with other institutions or bodies that worked to prevent discrimination. It monitored respect for human rights in other countries and cooperated with all interested parties for the effective integration

of migrants into Belgian society. It was also responsible for taking measures to combat human trafficking. Further written information on the Centre and its work could be distributed to participants who required it.

In the effort to combat child pornography and paedophilia, the judicial police had established an Internet monitoring system which had recently been extended to monitor information posted on the Internet for racist content and incitement to hatred. The Belgian legislation on freedom of press stipulated that Internet service providers could be held accountable for racist messages posted on the Internet. The Belgian Internet Service Providers' Association had drafted a protocol for cooperation with the Ministry for Communications and Infrastructure and the Ministry of Justice, under which providers were committed to reporting to the police any use of the Internet for racist purposes and to take measures at their request. The Association also worked in cooperation with neighbouring countries and other Internet service providers' networks to combat the use of the Internet for the dissemination of racist and xenophobic messages. Hotlines had been established to give advice to and receive complaints from victims of racism, discrimination and anti-Semitism.

In the event that the Internet was used to promote racism, the Centre for Equal Opportunity would first attempt to have the relevant Internet site removed. The Centre only brought an official complaint before the Federal Police or the Prosecutor's Office if the Internet was used for the dissemination of a flagrant form of racism or negationism. A particularly worrying phenomenon that had developed recently was the use of mass e-mails for disseminating discriminatory information against specific nationalities and groups of migrants. Once the Centre for Equal Opportunity had received a complaint, it could institute legal proceedings. The Centre was a pivotal instrument in Belgium in the struggle against Internet-related offences.

The Belgian police had been involved in a campaign in schools for raising awareness of the dangers of the Internet. Written information on Internet use had been distributed among young people, and the Ministry of Education had organized a national day of awareness on safe Internet use. Law enforcement officials received training on Internet-related risks, and a campaign entitled "Safer Internet Belgique" was being run to raise awareness and promote safer Internet use, particularly among minors.

The Belgian parliamentary and other authorities were promoting the sovereignty of the people, public interest and social cohesion. Parliamentarians had a moral obligation to do everything possible to eliminate discrimination and incitement to hatred. The emergence of new information communication technologies must be incorporated into legal provisions. The Government of Belgium was aware of the challenges to the information society posed by all forms of intolerance, and the country's positive experiences in that regard had resulted from in-depth dialogue between the Government and civil society. Although progress had been made, the Belgian National Front still received a certain amount of popular support. While that was important for democratic discussion, efforts must be made to ensure the existence of a healthy democracy, without abuse of freedom of expression.

## PARLIAMENTARY PRACTICES AND STRATEGIES TO CURB RACIST APPEALS AND TO PROMOTE A TOLERANT SOCIETY

Mr. M. JUREK (Poland) said that extremism was one of the broadest problems in relation to the non-respect of human rights. Pope John Paul II had said that one of the greatest problems of contemporary society was the opposition between the civilization of death and the civilization of life. That “civilization of death” referred not only to abortion and euthanasia, but also to the expression of all types of hatred, which occurred frequently in modern society. One recent example of intolerance was the restriction of the veil in French schools, which was a violation of the right of young Muslim girls to manifest their religion. The genuine promotion of tolerance required a return to the basic notions of respect and human dignity.

“Parliaments must reflect the multicultural diversity in their societies... Political parties too must be encouraged to ensure a fair representation of ethnic, national and religious minorities. A human rights perspective must be integrated into all parliamentary activity, in particular into the work of specialized bodies that do not deal directly with human rights issues.”

Ms. Dretcanu, Romania

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Ms. D. DRETCANU (Romania) said that the fight against discrimination should be included in national policies for development, democratic consolidation and the promotion of social cohesion. In order to be effective, any strategy in that field required the input of state bodies, national parliaments and civil society. Romania had been the first country in Eastern Europe to adopt a specific law that was generally enforceable for the prevention and punishment of all forms of discrimination. In line with European Union requirements, the Romanian parliament had also adopted a law prohibiting fascist, racist and xenophobic organizations and symbols.

In 2006 it would be five years since the adoption of the Durban Declaration and Programme of Action, the results of which had so far not been very positive. There was still a considerable gap between international legislation and the practices of States and societies. Parliamentary action was essential to meet the challenge of bridging that gap. Parliaments must reflect the multicultural diversity in their societies, and the Government of Romania had taken measures to ensure the best possible representation of its national minorities in parliament. Political parties too should be encouraged to ensure a fair representation of ethnic, national and religious minorities. A human rights perspective should be integrated into all parliamentary activity, in particular into the work of specialized bodies that did not deal directly with human rights issues.

“Under no circumstances must Internet service providers be responsible for regulating website content. Internet regulation is particularly complex, and must be approached from two angles: first, self-regulation by service users must be strengthened; and second, judicial systems must be involved in Internet regulation, with training for legal officials in ways of prohibiting the dissemination of hatred on the Internet while protecting freedom of expression.”

Ms. Callamar, Article 19

She believed that the IPU had a central role to play in the continuation of cooperation and exchanges of information and best practices between parliaments on specific topics, and the development of the knowledge and expertise of parliamentarians on tolerance-related issues.

Mr. U. REINSALU (Estonia) said that Belgium’s experience in establishing a legal framework for addressing discrimination, hate speech, the denial of the Holocaust and revisionist speech was particularly positive. However, in the context of crimes against humanity, there had been a far more revisionist attitude towards the crimes committed by communist regimes than towards those of the Nazis during the Second World War. Although the European Union had taken specific measures to prevent the use of the swastika and other Nazi symbols, there had been no discussion on how to address the racist and anti-Semitic crimes committed across the world by communist regimes. The international community must admit that there was a grey area in international legislation in that regard, and should take measures to rectify that situation.

Ms. B. SAMBUC (Vice-President of the Swiss Federal Commission against Racism, panellist) said that although the ideological aspect of the fight against racism was very important, the everyday, latent and institutional forms of racism were equally important. Swiss legislation applied to the negation of any genocide, but that issue was only a fraction of the fight against racism. Racism manifested itself in inequalities in everyday issues such as employment, housing and education. Each country should fill the legislative gaps that allowed for such discrimination. The fight against racism was taking place at the international, regional and national levels, and emphasis should not be placed merely on one aspect of that fight.

Racism stemmed from the economic exploitation of certain groups, and should not be confused with other types of discrimination. Although efforts should be made to combat all forms of discrimination, the fight against racism should not be diluted. Religious intolerance was not always the same as racial intolerance. All aspects of discrimination must be taken into account when making provisions to prevent intolerance, and attention should also be paid to addressing multiple discrimination. In her view, the culture of death was totalitarianism, and the culture of life was democracy, with respect for all minorities.

Ms. A. CALLAMARD (Executive Director, Article 19, panellist), turning to the issue of Internet regulations to prevent the dissemination of hatred, said that in the Netherlands a test had been conducted whereby an organization had posted a text attributed to an eighteenth century writer on a variety of Internet sites. The organization had then sent anonymous e-mails to all of the Internet service providers concerned, stating that the text had not been written by the author in question, and therefore must be

removed from the websites. All of the service providers had removed the text immediately, without carrying out any further investigations. Such an experiment demonstrated that Internet regulations must be approached with care.

Article 19 believed that under no circumstances should Internet service providers be responsible for regulating website content. Internet regulation was particularly complex, and should be approached from two angles: first, self-regulation by service users must be strengthened; and second, judicial systems must be involved in Internet regulation, with training for legal officials in ways of prohibiting the dissemination of hatred on the Internet while protecting freedom of expression. Internet regulation was a particularly thorny subject that must be addressed with extreme care.

Mr. A.R. CHIGOVERA (Special Rapporteur on Freedom of Expression of the African Commission on Human and Peoples' Rights, panellist) asked how, in Belgium, a balance was achieved between the need to punish those responsible for hate speech and parliamentary privileges.

In the African context, racism traditionally meant differentiation by colour. However, the definition of racism went further than that, to ethnicity. During colonialism and the division of Africa, ethnic groups were split, which had led to conflicts such as those that were currently taking place between people in southern and northern Cameroon and in the Great Lakes region. The ethnic dimension of racism tended to be ignored in Africa, and efforts must be made to ensure that in the fight against racism and racial discrimination, all ethnic groups received adequate protection. In some African countries, although the constitutional provisions could not be considered hate speech per se, they effectively suppressed the expression of certain groups, denying them a voice under the guise of national unity. An example of that was the general denial of ethnicity in Rwanda, where the Constitution denied the right of marginalized groups to form associations and to promote their own rights. Certain African constitutions tended to promote the dominance of one group over another, which could lead to serious consequences. He wished to know how the panellists thought parliaments could assist in preventing such consequences and in ensuring that such barriers were removed.

Ms. B. SAMBUC (Vice-President of the Swiss Federal Commission against Racism, panellist) agreed that Mr. Chigovera's definition of race was very important. Racial discrimination was not simply discrimination on the basis of colour, but rather on the basis of a social construct. It began by the isolation of a certain group on the grounds of colour, ethnicity or gender, followed by the development of a social hierarchy on those grounds, and the use of force to the detriment of the selected group. The isolated group was chosen on the basis that it was "different", despite the fact that there might be no physical distinction whatsoever between that group and the rest of the population.

Useful tools against racism did, however, exist, and the work of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and other related intolerance, in particular his reports on country visits, was particularly important. The recommendations made by the Committee on the Elimination of All Forms of Racial Discrimination and recommendations made at the European level were also important in the global fight against racism.

Ms.M.-J. LALOY (Belgium, Senator, Chairperson of the Human Rights Committee of the Belgian Parliament, panellist), responding to the point raised by the representative of Estonia, said that although Belgian legislation on negationism was currently limited to the crimes against humanity committed by the Nazis during the Second World War, the Government was currently debating the possible extension of that legislation to recognize all crimes against humanity.

Turning to the issue of parliamentary privileges, she said that in Belgium, parliamentarians had the right to total freedom of speech in parliament. They would, however, be treated in the same way as any other citizen if found to be inciting hatred outside parliament. In one particular case, the Belgian Government had cancelled the funding of a political party that was considered to be inciting hatred in its propaganda and party manifestos. Although that was a positive step towards eliminating incitement to hatred by parliamentarians, it was insufficient, and further measures must be taken.

Ms. R.M. LOSIER-COOL (Canada) said that at the request of the United Nations, the Canadian Government had adopted a plan of action against racism in order to combat discrimination against indigenous peoples. Such plans should be drafted by the Government in collaboration with all concerned partners, and must be flexible in order to evolve in parallel with changes in legislation. Canada's plan of action was the result of close collaboration between parliamentarians, law enforcement officials and civil society organizations.

Mr. JOHNSON (Secretary General of the Inter-Parliamentary Union) said that although in theory parliamentarians could not be held accountable for what they said in parliament, they were not totally unrestricted. Mechanisms existed to maintain order and discipline in parliament. Many parliaments had rules of procedure according to which a speaker could be interrupted in the name of order.

Ms. B. SAMBUC (Vice-President of the Swiss Federal Commission against Racism, panellist) said that in the Swiss parliament, a mechanism existed whereby parliamentarians could request that their colleagues' immunity be lifted if they were considered to be in violation of the law. Unfortunately, that mechanism had not been used on recent occasions when a particular parliamentarian's discourse had amounted to a violation of article 261 of the Criminal Code, which prohibited incitement to racial hatred.

*Debate*

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## **PARLIAMENTS AND THE MEDIA: WORKING TOGETHER TO COMBAT RACISM**

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### **Mr. Orlando Fantazzini (Brazil), Member of the Human Rights Committee of the House of Representatives**

Mr. FANTAZZINI (Brazil, Member of the Human Rights Committee of the House of Representatives, panellist) said that in 2002, a national human rights conference had been held by the Human Rights Commission of the Chamber of Deputies of Brazil on the theme of overcoming violence through the use of the media. The media, particularly television, could often stimulate discrimination, and the Government had therefore decided to enter into a dialogue with broadcasting companies. In Brazil, during the military dictatorship, television had been used by the State as a means of informing the population of the Government's activities. Since television had been used in support of the dictatorship, it had acquired considerable power in Brazilian society. In 1988, with the adoption of the new Constitution, the

"The Ministry of Justice has a team of 25 people who systematically monitor the content of television programmes, and in 2004, the Government had declared a national day against low quality television, during which the public was encouraged to turn off their televisions from 3 p.m. to 6 p.m., in protest against programmes with inappropriate content. During that time, the Council for Television Programming had held a meeting with all state television producers. The protest had resulted in 15,000 households turning off their televisions that afternoon, which was a clear demonstration of public support for improving legislation and, more importantly, ensuring the effective implementation of both new and existing laws. Efforts are being made to make the population fully aware of its rights, since consumers must be able to say what they do and do not want to see on television."

Mr. Fantazzini, Brazil

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communications media lobby had been an obstacle to progress, particularly in television. Politicians had been involved in the running of all four of Brazil's major television channels at that time, and licences for the establishment of new channels had been approved by parliament. Currently, 37 per cent of Brazilian senators and 21 per cent of deputies had public concessions for television and radio stations. That had led to difficulties in passing new legislation on the media.

Although Brazil was party to all the relevant international instruments on the elimination of discrimination and racism, and had the necessary domestic legislation at its disposal, that regulatory framework was not being implemented. Television was considered to have the most prominent power over society, since television programmes could influence people to change their values and behaviour in order to match those of an elite few. Television was controlled by eight families, who were responsible for deciding what the public should or should not be allowed to see. True freedom of expression therefore only existed for media company owners.

At the Brazilian Human Rights Conference, efforts had been made to seek a means of entering into a dialogue and to encourage the public to share its opinions on the content of television broadcasts. An Internet site and a hotline had been set up, and people who felt that their rights had been infringed by the content of television programmes could write or call to make their opinions known. There were also questionnaires available in all post offices which the public could use to file complaints. Every four months, the information received from the public was used to compile a list of the worst television programmes, which was published with the support of the written press. The Government made efforts to enter into dialogues with those involved in the making of such programmes and their sponsors to try to rectify the situation.

Although the majority of Brazilians did not have regular Internet access and did not have the financial means to buy a daily newspaper, 90 per cent of the population had regular access to a television, which was why emphasis was being placed on regulating the content of television programmes rather than information from other media sources. Efforts were being made to prohibit all programmes that were contrary to national or international laws on discrimination and intolerance. A Council for Television Programming had been established; it included representatives of a wide range of religious groups, women's organizations and gay rights organizations, psychologists, journalists, lawyers and academics. That council received and considered complaints, and compiled reports on those that it considered to be well founded, which were sent to the relevant ministries. The reports were also sent to the relevant television broadcasters

and programme sponsors, with a request for a dialogue. In some cases, programme sponsors had argued that they provided programmes that were popular, and could not be held responsible for the fact that the ratings of such programmes were high. Similarly, advertising companies had claimed that they only provided airtime for advertisements, and were not responsible for the content of what was broadcast. In other cases, however, sponsors had withdrawn the funding of certain television programmes, and advertising companies had been willing to enter into a dialogue with the Council, and had taken certain advertisements off the air.

The Attorney-General's Office was making efforts to come to agreements with advertisers and programme sponsors on what should and should not be broadcast in an attempt to ensure that they were aware that programmes that violated human rights and the Brazilian Constitution were unacceptable. Other measures included a system of fines to be paid by television producers for each scene that was broadcast and that was found to be contrary to human rights and dignity. The Ministry of Justice had a team of 25 people who systematically monitored the content of television programmes, and in 2004, the Government had declared a national day against low quality television, during which the public was encouraged to turn off their televisions from 3 p.m. to 6 p.m., in protest against programmes with inappropriate content. During that time, the Council for Television Programming had held a meeting with all state television producers. The protest had resulted in 15,000 households turning off their televisions that afternoon, which was a clear demonstration of public support for improving legislation and, more importantly, ensuring the effective implementation of both new and existing laws. Efforts were being made to make the population fully aware of its rights, since consumers should be able to say what they did and did not want to see on television.

Television producers had a considerable social responsibility, and an important role to play in building a democratic society and a culture of peace and tolerance. A particularly positive result of the Government's efforts was that all television programmes with homosexual content were discussed thoroughly with the Brazilian Association of Gays, Lesbians and Transvestites before being aired. Unfortunately, problems with racism and religious intolerance did still arise in television, despite the progress that had been made. One such incident involved the Universal Church of the Kingdom of God, which had used its considerable profits to purchase a television channel and had broadcast programmes that spoke out against religions of African origin. A case had been brought against that church for moral injury, and the preliminary decision of the courts had been that the channel should prepare a series of programmes on African religions, to be broadcast every day for a week, and incur the costs of inviting representatives of those religions to participate. Since the Brazilian justice system was slow, efforts were being made to solve the problem of discrimination in the media through national dialogue and awareness-raising measures.

In an effort to reduce discrimination against indigenous peoples, a series of television programmes promoting indigenous cultures had been broadcast. Although the majority of the Brazilian population was black, they did not enjoy the same rights and opportunities as the white population, and black women often suffered from double discrimination. The portrayal of black people as butlers, chauffeurs, criminals, prostitutes and domestic workers in television programmes had increased discrimination against them in society, and resulted in a considerable amount of violence.

Efforts were being made to prevent advertising and propaganda aimed at children, since it could lead to crime and other social problems. Public hearings would be held to discuss the problems caused by such advertising. Although the Government was aware that progress would be slow, it would continue to take steps to change the situation of the media, which otherwise could pose a serious threat to democracy.

## Mr. Gorgui Wade Ndoeye Elhadj, BBC World Service, Geneva

Mr. G.W. NDOYE ELHADJ (BBC World Service, panellist) said that racism, discrimination, tolerance and intolerance were societal issues. Journalists had the responsibility of observing their society and criticizing it, at the risk of making life difficult for parliamentarians, with a view to making society as humane as possible. He considered that the word “tolerance” suggested forced acceptance, and he therefore preferred to use the word “respect”. Racism and intolerance were often based on language, a recent example of which were the riots that had taken place across the Muslim world following a report in the American magazine *Newsweek* that had stated that American interrogators had desecrated copies of the Koran while questioning detainees at the Guantanamo Bay naval base. Although each individual jealously guarded his or her own freedom of expression, it was particularly important that the concomitant responsibilities not be forgotten.

The International Criminal Tribunal for Rwanda was competent to try three crimes: genocide, crimes against humanity and war crimes, and could try any person accused of having committed those crimes on Rwandan territory between 1 January and 31 December 1994. Discussions were currently under way to extend the competence of the Tribunal to judge Rwandan citizens who were accused of being involved in such crimes, but who resided outside Rwanda during that time period. Individuals could be brought before the tribunal as instigators, perpetrators or accomplices. Thus, it was not surprising to know that many journalists had rightly been brought before the Tribunal as they had been accused of direct incitement to genocide. In Rwanda, radio was the most commonly used form of media, and at the time of the genocide a radio station had been established by an extremist political party, which spoke out against the Tutsi population. During the genocide, journalists had revealed the names and addresses of Tutsis and disseminated the message that no Tutsi must survive. The main legal question that arose from that situation was whether such a message could be considered permissible in the name of freedom of expression. As far as he knew, no regime, including that of the United States, which had the most liberal approach to freedom of expression, would tolerate such discourse.

“The demarcation line was clear: one person’s freedom must stop where the denial of the existence of another began.”

Mr. Ndoeye Elhadj, BBC World Service



In the United States, freedom of expression was protected under the Fourth Amendment, which allowed such organizations as the Ku Klux Klan to publicly incite hatred and disseminate ideas that were tantamount to Nazism. However, since the events of 11 September 2001, there had been a change of opinion regarding types of discourse that should not be tolerated. The International Criminal Tribunal for Rwanda made allowances for freedom of expression, and those who had disseminated messages of ethnic consciousness, but had not directly incited genocide, had not been convicted. The demarcation line was clear: one person’s freedom must stop where the denial of the existence of another began. However, beyond the legal implications of freedom of expression, a moral issue arose: if discourse was tolerated in the name of freedom of expression, and that freedom was abused, those words would be translated into action. A single word from George Bush could have a considerable practical impact on the New York Stock Exchange. Words united the masses. Hitler had captivated populations with political

“Cooperation between the media and parliaments must be used in a positive move to eliminate hate speech and eradicate hatred, by building a culture of respect for difference.”

Mr. Mendel, Article 19

discourse, which was why in legal cases relating to the media, judges had clearly stated that words could do more damage than bullets or cannons.

The genocide in Rwanda had been supported by the continuous dissemination of the message that the work must be completed, the “work” being the elimination of the Hutus, or the Tutsis, or others. There had been no violation of freedom of expression or freedom of conscience, but freedom had not been stopped before the denial of another’s existence.

Turning to the issue of journalism in Côte d’Ivoire, the speaker said that in a recent interview, the Secretary-General of the organization *Rapporteurs Sans Frontières* had stated that the issue of whether the organization should defend all journalists was very complex, particularly in view of the fact that professional discipline and standards were not always upheld. Although the United Nations had stated that journalists should not be subjected to prison sentences, that did not mean that his organization supported everything that appeared in the press. Many journalists played with fire, and in Côte d’Ivoire, some were contributing to the increasing instability. He had warned local journalists in the country that they would be in no position to complain that they were being mistreated if they abused their professional position to disseminate propaganda. He had said that pluralism of information only strengthened democracy if the press acted responsibly. Journalism could only help to strengthen respect for rights if journalists themselves respected the rights of others and fulfilled their professional responsibility to report in an impartial, precise and objective manner. Public authorities should not dictate how journalists carried out their work, and should allow for real press freedom, while engaging in dialogue with media representatives. The role of journalists was to seek out information, analyse it and present it to the public. If the public and the authorities had confidence in journalists, the press could play a vital role in bringing about positive changes in society.

## Debate

### PARLIAMENTS AND THE MEDIA: WORKING TOGETHER TO COMBAT RACISM

Mr. T. MENDEL (Law Programme Director, Article 19, panellist) said that cooperation between the media and parliaments could be used in a positive move to eliminate hate speech and eradicate hatred, by building a culture of respect for difference. Although public broadcasters should be independent from parliaments, they had a significant role to play in promoting tolerance. One successful example of that was the role played by the BBC, which in the United Kingdom used programmes to raise and discuss certain issues, including racism and stereotypes, as part of the national effort to tackle those problems.

Ms. A. CALLAMARD (Executive Director, Article 19, panellist) said that self-regulation was particularly important in journalism. Although parliamentarians had certain responsibilities to their constituents,

their desire to regulate the media must itself be regulated. Parliamentary or legislative intervention in the work of the media should occur only in the specific context of incitement to hatred. The situations that Mr. Fantazzini had described in Brazil did not constitute hatred. It would be useful to encourage self-regulation among the media in Brazil, since that was more effective than bringing lawsuits against television producers. Article 19 had published a study on self-regulation in the media, and had printed an article on a particular case in Azerbaijan, where journalists had instituted self-regulation and successfully established a new newspaper, based on the principles of professional standards and responsibilities.

Mr. B. INDOUMOU-MAMBOUNGOU (Gabon) stated that Gabon had a National Communications Council that regulated the audiovisual and written media, ensured political impartiality and prohibited the broadcasting of television programmes with vulgar content. Turning to the issue of the responsibility of journalists, he said that all journalists were citizens of a State, and must therefore be treated equally to all other citizens of that State in the event that they violated its laws.

Mr. S. ALI RIYAZ (Islamic Republic of Iran) said that true freedom of expression manifested itself in mutual respect, the concept of which was enshrined in the Iranian Constitution. Racism was unacceptable according to Islam, and therefore did not exist in the Islamic Republic of Iran. The principal difference between members of the Iranian population was faith. Under Article 14 of the Constitution, good moral relations and the principles of justice must be applied to people of all religions and beliefs. Although Farsi was the official language of the Islamic Republic of Iran, local languages were also considered an important part of the country's culture. All Iranian citizens were equal before the law, irrespective of their religious beliefs, and there was no racism or discrimination on the grounds of colour or religion. Turning to the issue of women's rights, he said that the Constitution provided for the protection of the rights of women and their personal status as individuals, mothers and heads of households, and offered them protection during pregnancy. The Constitution also provided that there could be no interference in a person's religious beliefs, and that all citizens must be guaranteed freedom of worship.

Ms. D. SILISTRU (Romania) said that the subject of freedom of expression and combating discrimination through the media should be viewed in the context of terrorism; which was one of the greatest challenges that faced contemporary society. By freely circulating information and ideas promoting tolerance, the media could play an important role in the prevention of and the fight against terrorism. Parliamentarians must therefore ensure that the media were able to fully exercise their freedom of expression. Journalists who worked in high-risk areas often paid a high price for their efforts, and three Romanian journalists had recently been held hostage for 55 days in Iraq. Fortunately, they had been released, and Romania was particularly grateful to all the countries and institutions that had shown their support during that difficult time. The kidnapping of journalists in conflict areas was an attack against their freedom of expression and the right of the public to receive direct and accurate information. Parliamentarians should do all they could to prevent such violations of human rights and raise the awareness of the public and the international community through the effective use of domestic, bilateral and multilateral cooperation mechanisms.

She wished to know whether the panellists believed that new, more coherent and effective measures could be introduced to improve security for journalists, and thus protect the free circulation of information. She also wished to know whether they believed that the introduction of a code of ethics for journalists would improve self-regulation and reduce the dissemination of discriminatory materials.

Ms. R.M. LOSIER-COOL (Canada) said that it was particularly important to build a culture of collaboration between parliamentarians and the media, since parliamentarians were the representatives of the people, and the responsibility of the media was to provide information to the people.

Ms. A.M. MENDOZA DE ACHA (Paraguay) said that the situation in Paraguay was very similar to that in Brazil, as described by Mr. Fantazzini. Latin American countries were new democracies, and the democratization of the media was at a very early stage of development. The relationship between parliamentarians and journalists therefore needed to be handled with care. That relationship was not always harmonious, particularly since journalists did not always demonstrate an appropriate level of professionalism. She agreed that the monitoring of national television broadcasts was particularly important, and asked how it was possible to monitor international broadcasting.

“To solve problems such as discrimination, their existence must be acknowledged. Discrimination and religious, racial and gender stereotyping exist in all countries. By admitting the existence of problems and sharing experiences, the international community can work together to overcome those difficulties and cultivate a more tolerant society.”

Mr. Fantazzini, Brazil

Mr. O. FANTAZZINI (Brazil, Member of the Human Rights Committee of the House of Representatives, panellist), responding to the issue raised by Mr. Mendel, said that in Brazil, commercial television stations were a way of earning money. Parliamentarians were stakeholders in those television companies, and were therefore not interested in public broadcasting, since they could use commercial television for their own personal gain. Self-regulation of the media would be particularly difficult to achieve in Brazil, since commercial television had dictatorial power, and self-regulation among journalists was opposed by broadcasting companies. The President of Brazil had been forced by media pressure to withdraw a bill on self-regulation from parliament. State-run television was a very small industry in Brazil, and had very few viewers.

Racial discrimination existed in Brazil, particularly against the black and indigenous populations, and further efforts were needed to rectify that situation. In Brazil there were attempts to reach a consensus on a code of ethics for journalists which would set the limits of the profession and the details of the penalties that would be imposed in the event that individuals went beyond those limits. Although such legislation would be important, anti-discrimination laws already existed in Brazil. However, they were not being implemented effectively.

Transparency and equality in society were of the utmost importance, but achieving them would require further efforts and cooperation from all sectors of society. To solve problems such as discrimination, their existence must be acknowledged. Discrimination and religious, racial and gender stereotyping existed in all countries. By admitting the existence of problems and sharing experiences, the international community could work together to overcome those difficulties and cultivate a more tolerant society.

“Although freedom does not always result in the improvement of certain situations, servitude always results in problems getting worse. If parliamentarians and the press work together to address social problems such as discrimination and hatred, it will be to the benefit of all.”

Mr. Ndoye Elhadj, BBC World Service

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Mr. NDOYE ELHADJ(BBC World Service) said that freedom was based on free ideology. Although politicians needed to advance their own causes and careers, the role of journalists was not to flatter them, incite hatred or become involved in propaganda. Journalists must use their freedom responsibly, and although they could incite debate on political issues, they must remain within their code of ethics. In some countries, people entered into journalism as a money-making scheme. Such individuals could easily be corrupted. Parliamentarians had a role to play in avoiding corruption by understanding journalism as a profession and the role of journalists in society. Journalists were not in opposition to politicians, but rather served as social mediators, informing the public of government activities. The most effective way of ensuring democratic journalism was to allow journalists total freedom, but to ensure that they were accountable. Senegal had a peer-review system for journalists which was more effective than government criticism.

Democracy and the press must go hand in hand. The public was the best judge of journalists. People would not buy articles they did not want to read. It was therefore in the best interest of the Government, the press and civil society to build a culture of transparency. If journalists had not travelled to Iraq for reasons of personal safety, the public would not have been informed about the situation in that country. The public was largely aware that the war in Iraq had been unjust, thanks to the work of journalists on the ground. In order for a society to be democratic, the population must have free access to all information. A free press could have positive and negative outcomes, but a restricted press resulted in a lack of democracy and freedom of expression. Although freedom did not always result in the improvement of certain situations, servitude always resulted in problems getting worse. If parliamentarians and the press worked together to address social problems such as discrimination and hatred, it would be to the benefit of all.



# **FREEDOM OF EXPRESSION, PARLIAMENT AND THE PROMOTION OF TOLERANT SOCIETIES**

SEMINAR FOR CHAIRPERSONS AND MEMBERS OF PARLIAMENTARY HUMAN RIGHTS BODIES  
ORGANIZED JOINTLY BY THE INTER-PARLIAMENTARY UNION AND ARTICLE 19 **GENEVA, IPU HEADQUARTERS, 25-27 MAY 2005**

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# What is the IPU?

Created in 1889, the Inter-Parliamentary Union is the international organization that brings together the representatives of Parliaments of sovereign States.

In October 2005, the Parliaments of 143 countries and seven international parliamentary assemblies as Associate members were represented.

The Inter-Parliamentary Union works for peace and co-operation among peoples with a view to strengthening representative institutions.

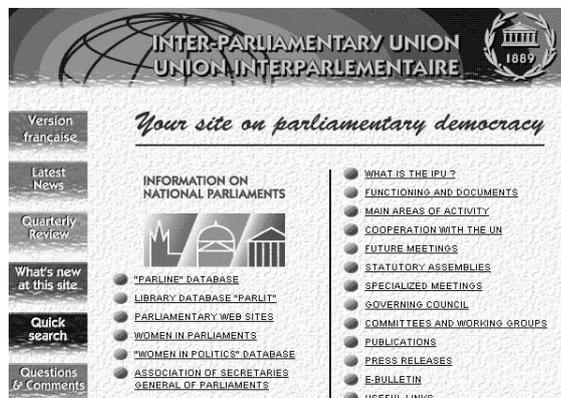
To that end, it:

- fosters contacts, co ordination and the exchange of experience among parliaments and parliamentarians of all countries;
- considers questions of international interest and expresses its views on such issues with the aim of bringing about by parliaments and their members;
- contributes to the defense and promotion of human rights, which are universal in scope and respect for which is an essential factor of parliamentary democracy and development;
- contributes to better knowledge of the working of representative institutions and to the strengthening and development of their means of action.

The Inter-Parliamentary Union shares the objectives of the United Nations, supports its efforts and works in close co-operation with it.

It also co-operates with the regional inter-parliamentary organisations as well as with international, intergovernmental and non-governmental organisations which are motivated by the same ideals.

<http://www.ipu.org>



The screenshot shows the homepage of the Inter-Parliamentary Union (IPU). At the top, there is a header with the IPU logo and the text "INTER-PARLIAMENTARY UNION UNION INTERPARLEMENTAIRE" and "1889". Below the header, the tagline "Your site on parliamentary democracy" is displayed. The main content area is divided into several sections: "INFORMATION ON NATIONAL PARLIAMENTS" with a list of links including "PARLINE" DATABASE, LIBRARY DATABASE "PARLIT", PARLIAMENTARY WEB SITES, WOMEN IN PARLIAMENTS, "WOMEN IN POLITICS" DATABASE, ASSOCIATION OF SECRETARIES GENERAL OF PARLIAMENTS, WHAT IS THE IPU?, FUNCTIONING AND DOCUMENTS, MAIN AREAS OF ACTIVITY, COOPERATION WITH THE UN, FUTURE MEETINGS, STATUTORY ASSEMBLIES, SPECIALIZED MEETINGS, GOVERNING COUNCIL, COMMITTEES AND WORKING GROUPS, PUBLICATIONS, PRESS RELEASES, E-BULLETIN, and USEFUL LINKS. On the left side, there are navigation links for "Version française", "Latest News", "Quarterly Review", "What's new at this site", "Quick search", and "Questions & Comments".