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Plenary Panel I: Freedom of Information: Current status, Challenges and Implications for News Media

Thoughts from the Panel

Toby Mendel
Executive Director
Centre for Law and Democracy

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This paper presents some thoughts on the general issues raised in the first Plenary Session of the UNESCO World Press Freedom Day 2010, titled: Freedom of Information: Current status, Challenges and Implications for News Media. These are drawn from comments made by the presenters, from the background paper prepared by the organisers and from the wider literature and practical experience on these issues. The paper does not address the specific country-comments made by some of the panellists.

The paper is divided into four sections, namely from freedom of information to the right to information; legislative issues; implementation issues; and the role of the media. The scope of issues outlined in the background paper for the panel was very wide. Consistently with this, the paper presents a range of thoughts on these issues, rather than exploring individual issues in great depth.

1. From Freedom of Information to the Right to Information

When earlier generation laws giving a right of access to information held by public bodies were adopted, they generally went by names like freedom of information or access to information laws. They were motivated by a desire to bring about governance reform, and specifically by goals such as improving accountability and combating corruption, and perhaps fostering participation and thereby greater ownership over development initiatives. The theory behind these laws was sound and, to a greater or lesser extent, they did achieve these goals.

In more recent years, however, there has been a profound shift in the way these laws are viewed, by legislators and also by civil society. They are no longer seen as governance reforms but, rather, as implementing a fundamental human right, namely the right to information. Even if the basic structure and characteristics of the laws has not changed that dramatically, this shift in underlying rationale has very important implications.

It is now widely accepted that access to information held by public bodies is a fundamental human right. In her opening address to the 2010 UNESCO World Press Freedom Day Conference in Brisbane, the Director-General of UNESCO, Irina Bokova, stated as much. The same has been asserted by a host of leading international human rights and freedom of expression experts, and in many authoritative international statements.

Perhaps most conclusively, both the Inter-American Court of Human Rights and the European Court of Human Rights have held that the general guarantees of freedom of expression in the regional human rights conventions they interpret encompass the right to information. The Inter-American, in the now famous September 2006 case of *Claude Reyes and Others v. Chile*, was strong and unequivocal, holding not only that there is a right to information, but also that States are obliged to adopt legislation to give effect to this right. In *Társaság A Szabadságjogokért v. Hungary*, adopted in April 2009, the European Court also held that the right to information was protected by the European Convention, but employing perhaps slightly less forceful language.

The chronology of these events is not a coincidence; indeed the European Court had long refused to recognise a general right to access information held by public bodies and it seems to have been prompted to do so at least in part by the decision of the Inter-American Court of Human Rights. This reflects global dynamics on this issue, and fact that leadership is terms of recognising the right to information has come not from Western countries but from the global South.

Recognition of the right to information has important legal implications, some of which are explored in the next section. But, in those countries in which the right has been fully embraced, by civil society and by other social actors, including politicians, this also has important social and political ramifications. The incredibly vibrant civil society movements around the right to information in India perhaps exemplify this best, but the right has also been embraced in other countries, including some countries in Latin America, most prominently Mexico, and a number of countries in East and Central Europe.

The impact of recognition of a right to information has been manifested in many ways. In India, for example, the government has so far been unable to introduce amendments to the law to provide for an exception to protect so-called file notings, advice provided by civil servants as a file is reviewed by them. The exception sought by the government, at least initially, was undoubtedly too broad but, at the same time, almost all right to information laws do provide some protection for internal advice. The active civil society movement for the right to information in India refuses to back down, however, claiming a right to information and highlighting rampant abuse by officials of secrecy in the past.

In Bulgaria, in 2007, some members of parliament sought to introduce amendments to the right to information law which would have required proof of an interest in the

information being sought, increased fees and timelines for responding to requests substantially, and done away with the rule on severability. Due to a well-organised civil society campaign, backed by a public which strongly supports the right to information, these negative proposals were all rejected and, in their place, a set of amendments to enhance access – including by requiring both national and local public bodies to appoint information officials and to establish proper reading rooms for purposes of granting access to information – were adopted.

In Mexico, also in 2007, a comprehensive reform of the constitutional provisions on access to information resulted in the adoption of the most comprehensive and detailed constitutional guarantees of this right to be found anywhere. Article 6 of the Constitution now contains seven detailed provisions on the right to information including, among other things, recognition of the right in accordance with the principle of maximum disclosure, free of charge and through expeditious mechanisms. The article also requires public bodies to maintain their records in good condition and calls for independent specialised oversight bodies.

2. Legislative Issues

Recognition of access as a fundamental right raises a number of issues for right to information legislation. Many of these have been the subject of recent debate over the right to information, including in countries which have not yet recognised this domestically as a human right.

One issue is the question of what fees should be charged for making a request for information. In many countries, there is no fee simply for filing a request, while in others a fee is levied. Amendments to the law in Ireland in 2003 introduced substantial new fees, including a 15 Euro application fee and a 75 Euro fee for internal reviews. This lead to an 83% drop in requests from journalists over a period of just one year and very significant drops in the rate of requests from other categories of requesters.

Fees have also been an issue in Canada, with some provincial jurisdictions increasing fees and then having to drop them back down in the light of public pressure. On the other hand, some campaigners in India justify the relatively modest Rp. 10 application fee (approximately USD0.22) as being justified to ensure that applicants take their requests seriously. Viewed from the perspective of human rights, it is problematical that one might have to pay simply to make a request for satisfaction of a basic right.

On the other hand, almost every country allows for some fees to be charged where a request is satisfied, for example to recoup photocopying and mailing charges. More controversial are situations where public bodies try to recoup the costs of searching for requested information and assessing whether or not it falls within the scope of the regime of exceptions. It seems unreasonable to place the burden of this on the requester, among other things because these charges depend on factors under the

control of the public body (such as the condition in which it maintains its records and the 'diligence' it brings to bear on the question of assessing exceptions).

The scope of the right of access in terms of the bodies which are subject to openness obligations has also been a matter of great debate around the world. One issue has been whether or not the legislative and judicial branches of government should be covered and, if so, to what extent. The problem is neatly captured by a compromise in the Council of Europe's Convention on Access to Official Documents, Article 1(2)(a) of which defines public authorities. The primary definition limits application in respect of judicial and legislative bodies to their administrative functions, but the same article also envisages the possibilities of States extending application to these bodies in their other functions. Under a human rights approach, there would appear to be no warrant for excluding any of the functions of public bodies from the scope of openness obligations.

There has also been debate about the extent to which bodies which are funded or controlled by the State, or which are established by law or which otherwise perform public functions, should also be covered. Once again, a human rights approach can be helpful here, as international law defines with some degree of precision the scope of State responsibility for these kinds of actors. In accordance with these principles, which focus on effective control and the degree of involvement of the State, the scope of responsibility under the right to information should be broad.

Perhaps the most difficult issue for any right to information law is the scope of the regime of exceptions. On the one hand, it is clearly important to protect all legitimate secrecy interests. On the other hand, if these are defined too broadly, this has the potential to seriously undermine openness.

Once again, a human rights approach can provide important guidance. Under international law, restrictions on freedom of expression are permitted only where they meet a strict three-part test. First, the restriction must be provided for by law. This is normally uncontroversial in the context of access to information legislation. Second, the restriction must serve one a number of recognised legitimate interests, namely the rights and reputations of others, national security, public order, or public health or morals. In the case of some exceptions to the right of access, it is not clear what interest they serve. This is particularly true of class exceptions, which rule out whole categories of information or public bodies, such as intelligence bodies. A rights-based analysis rules out such class exceptions.

Finally, and most importantly, the restriction must be necessary to serve the legitimate aim. This implies that it is only where disclosure of the information would actually harm the legitimate interest that it might be withheld. It also implies that exceptions should not be overbroad, in the sense of capturing information whose disclosure would be harmless, in addition to information which is more sensitive. Finally, necessity requires proportionality, in the sense that the harm to the right cannot be greater than the benefit in terms of protecting the legitimate aim. This

requires a public interest override – so that information must be released even if it would harm the legitimate aim where, overall, the public interest would be served by this – such as are found in many right to information laws.

Many right to information laws contain exceptions which are not harm-based or which are overbroad, and which would, as a result, breach this standard. A good example of this is the internal advice exception, noted above in connection with file notings in India. Excluding all internal advice, or worse yet, all internal or working documents, as some laws do, seriously undermines the ability of the public to understand and to engage with government decision-making. In many countries, cabinet documents are totally, or largely, excluded from the scope of the law. A human rights approach requires States to define carefully the precise interests which are to be protected, such as the provision of free and frank advice, or the success of a policy against premature disclosure.

Another exception which a strict human rights approach might affect is protection of national security. This is an interest of the greatest importance, upon which all rights and indeed democracy itself depend. At the same time, it is an exception which has historically been abused to hide information the disclosure of which would not affect national security. Courts have often been willing to take government claims of a risk to national security at face value, while some laws give government ministers the power to issue certificates affirming the national security nature of a document. Under a human rights approach, courts might be inclined to require greater proof of this risk than is currently the case.

3. Implementation Issues

Implementation of right to information laws poses a massive challenge and it is beyond the scope of this paper, and the panel it reflects on, to address them in a comprehensive manner. Rather, a few key implementation challenges that were raised by the panel and in the background paper are highlighted.

One of the key impediments to proper implementation of right to information laws is the culture of secrecy that persists in government, even after the law has been adopted. Notwithstanding the clear legislative intent of most right to information laws, and despite the formal provisions in the law, there is always a strong residual power in civil servants to obstruct access while respecting the letter of the law. Bureaucrats can, for example, imaginatively explore all possible exceptions, use all mechanisms for delay or seek to increase costs or bury relevant information by interpreting requests unduly broadly.

There is really no magical way of addressing this problem. At root, the best solution is probably to work with good civil servants to convince them that proper application of the law will serve their interests by improving relations with the public, by exposing any colleagues that are dishonest or incompetent, and by protecting them against the risk of having to take the blame for something that was

not their fault. High level political support, such as was provided by President Fox in Mexico and by President Obama in the United States, is also invaluable.

Training of officials is also key to addressing the culture of secrecy, which stems, at least in part, from fear of openness and lack of understanding about what it entails. A particular effort should be made to ensure that dedicated information officers are well trained and are able to play a wider promotional role for the right to information within the civil service. Establishing recognised information officer positions, with strong career development potential, can also help. Finally, mainstreaming the right to information as a public service value, and integrating it into core workplace structures, such as performance review systems, can also break down entrenched resistance.

Beyond formal resistance, in many countries, public bodies simply lack the capacity to implement right to information rules. Particular challenges include developing good record management systems so that information can be located and assessed, meeting proactive disclosure obligations, and handling sometimes heavy request loads. Putting in place efficient systems for all three of these challenges can help. Central bodies, such as the information commission or a dedicated ministry, can serve as a locus of expertise on these issues, developing systemic templates, providing advice and so on.

Finally, it is important that the achievements and failures of public bodies in implementing the law be subject to some sort of external monitoring. The legislature can play an important oversight role here, in its capacity of ensuring fidelity to the laws it passes. For this to be possible, however, it is necessary for a reporting system to be put in place to ensure that legislators have the information they require for this task. In many countries, public bodies are required to provide reports to the oversight body or information commission on the actions they have taken to implement the law, including detailed information on the requests they have received and the manner in which they have dealt with them. The information commission then compiles these into a central report, which is provided to parliament.

Civil society organisations can also play an invaluable role in monitoring, as well as supporting other implementation activities. They can engage in active forms of monitoring, such as testing the scope of the law through making requests, and also compare the performance of different public bodies, with a view to trying to lever up the poor performers. Civil society groups can support implementation in a number of other ways, for example by participating in training activities, by helping individuals make requests, by supporting public bodies in their implementation efforts and so on.

4. The Role of the Media

The right to information is a right to be enjoyed by everyone, not just by the media. At the same time, the media are a very important user group, since their core work includes investigating and monitoring the activities of public bodies, for which the right to information provides important support. They also further disseminate their reports to the wider public, creating a multiplier effect. The right to information is often particularly attractive to investigative journalists, because while it can take time to process access to information requests, this also provides a rich vein of information for them.

Despite the benefits of the right to information for journalists, in some countries, media have, at least at first, been reluctant to support general openness campaigns for two reasons. First, they have sometimes feared that a formal system for providing access to information held by public bodies through an access to information law will undercut the informal systems they traditionally rely upon to access this type of information, perhaps introducing rigidities and delays which they do not currently face. Second, journalists have sometimes feared that with open access, their particular role as purveyors of information will be undermined. If everyone can access information, what special role will they play?

Neither of these concerns is borne out in practice. Traditional media sources are rarely affected by the addition of a new means of obtaining information and, indeed, most journalists continue to get most of their information from traditional sources. And distilling and presenting the news in focused media products continues to be an important value added, even if individuals have greater access to public information through direct means.

In many countries, on the other hand, the media have played a leading role in advocating for right to information legislation, and in promoting strong implementation efforts after the law has been passed. One of the positive roles that the media can play is to highlight real right to information successes, for example leading to the exposure of corruption, the reversal of policy or development proposals, or an increase in participation. On the other hand, the media are sometimes attracted to high-profile scandals, which may attract short-term public interest, but which will ultimately fail to build real support for the right to information.

Where the media do not highlight the role of the right to information as a source for their stories, the potential to build public support is lost. In Canada, the exposure of abuses relating to the so-called 'sponsorship programme', initially discovered through right to information requests, eventually led to the downfall of the long-standing Liberal Government. However, the media did not highlight the fact that their stories were possible due to the right to information, and so relatively little support for the system was generated notwithstanding the enormous significance of the result.

On the other hand, in Mexico, there is a real sense that the right to information law works because every week stories are published in the media about releases which actually affect people. For example, the right to information law is widely credited with the almost complete disappearance of the 'aviadores', government employees who would get paid but never actually turn up for work. Highlighting the role of the right to information in these stories can generate significant public awareness dividends.

The last twenty years have witnessed massive growth in recognition of the right to information as a human right, as well as in terms of right to information legislation. These changes are having a dramatic impact on the way effect is being given to this right, legally and in terms of implementation. This paper peruses just a few recent developments and implementation strategies, and how they are affecting enjoyment of the right in practice. It is probably foolhardy to try to predict what will happen in this area over the next ten years, let alone twenty. But widespread recognition of it as a human right suggests that the future for the right to information will be bright.