

## ***Global Trends on the Right to Information***

### **International Seminar on the Right to Access Public Information: Implementation Challenges for Law No 18.381**

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Thank you. It is my pleasure to be here, although I have to apologise as I believe I am the only person in the room who does not speak Spanish, and I will have to give my presentation in English. I am going to address three issues today: developments regarding the right to information (RTI) over the last 20 years; the implications of recognition of access to information held by public bodies as a fundamental human right; and, finally, I will present some futuristic thinking about the right to information.

#### **Developments Over the Last 20 Years**

Let me start by highlighting some of the developments that have taken place over the last 20 years in this area, because they are quite remarkable. In 1990, only a handful of countries – 13 to be precise – had passed access to information laws. Almost all of these countries were Western democracies although one country in Latin America, Colombia, was in the group. No inter-governmental organisation (IGO) or international financial institution (IFI) had adopted a policy on openness or information disclosure. There were no authoritative international statements of note addressing the issue. And there were almost no NGOs working on this issue, outside of a few national groups in those countries which had adopted RTI legislation.

The picture today is very different indeed. Today, some 85 countries have passed laws giving individuals a right to access information held by public bodies and another 30 or so are in the process of doing so. This latter group includes both of Uruguay's large neighbours, Argentina and Brazil. Many of the numerous new constitutions adopted since 1990 protect access to information as a fundamental human right. All of the multilateral development banks, starting with the World Bank in 1994, have adopted information disclosure policies and even purely financial institutions, such as the IMF, have adopted rules on information disclosure.

There are now a plethora of authoritative international statements on this issue and a growing body of international and national case law. Indeed, Latin America can legitimately claim to be a leader in this area, with the first definitive court decision recognising the right to information as a fundamental human right coming from the Inter-American Court of Human Rights. This has been followed up by a set of principles on the RTI adopted by the Inter-American Juridical Committee and an OAS Model Inter-American Law on Access to Information. Finally, there are now literally 100s of NGOs focusing on access to information – both nationally and internationally – linked by a number of different networks and email lists.

I do not think it is an exaggeration to call this a revolution. Indeed, in my opinion, developments relating to the right to information are among the most significant human rights developments in recent years.

I identify three key reasons for these developments. First, there has been a significant growth in recent years in demand for participatory governance. Citizens are no longer content to participate in elections every four or five years and then to stand aside and let those elected govern on their behalf. They are increasingly insisting on being involved in the process of governing. And they need to be able to access information to do this.

Second, it is undeniable that technologic developments in the area of information have provided an important driver for these changes. There has, in particular, been a massive democratising trend in terms of access to information and ability to disseminate information, which in turn has fuelled demands for access across the board, including from government.

Third, globalisation has contributed to a wider process of global democratisation, including in relation to access to information. Outside of a few exceptions, such as China, it is no longer possible for States to participate in the global economy successfully while they do not respect human rights, including the right to information. Together, these forces have come together to create a strong impetus in favour of recognising the right of individuals to access information held by public bodies.

### **Implications of Recognition as a Fundamental Human Right**

Recognition of access as a fundamental human right has two very different sorts of implications. First, the language and power of human rights creates a very strong mobilising force in support of the right to information. We might, to illustrate this, contrast my own country, Canada, with India. In Canada, access to information continues to be seen as a governance reform, something which promotes effective, responsive government, rather than as a fundamental human right. This results in a situation where the public does not, by and large, insist on this as a right, or express outrage when it is denied, as they might when the rights to equality or freedom from torture are breached.

In India, in contrast, access to information has long been regarded as a fundamental right, both in its own right but also as an underpinning of other rights, including the right to life.

This has resulted in very powerful social movements around the right to information, which have proven themselves able to fight back government attempts to limit the right.

Second, recognition of access as a fundamental right raises a number of legal issues. Notwithstanding global and often national recognition of access as a right, the drafting of legislation continues to be influenced mainly by the power of campaigners to negotiate concessions from government, as well as historic rules embedding in existing RTI laws, rather than a more organic process of extrapolating from human rights principles. As a result, many laws have not really been tested for compliance with the right to information. This is the more so due to the very limited amount of constitutional litigation which has taken place, even in countries with strong and comprehensive direct constitutional guarantees, like Mexico.

International law only permits very limited restrictions on the right to information, namely where these are provided for by law and are necessary to protect one of a short list of overriding public or private rights. Application of these standard should have an important impact on existing right to information laws.

For example, the scope of the right of access in terms of the bodies which are subject to openness obligations has 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 possibility 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.

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. For example, some exceptions to the right of access do not appear to serve goals which are considered legitimate under international law. 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 as well as exceptions which are not clearly linked to one of the overriding interests which under international law may justify a restriction on the right to freedom of expression.

The requirement that restrictions be necessary to serve a legitimate aim implies that it is only where disclosure of the information would pose a serious risk of harm to a legitimate interest that that information 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 interest. This requires RTI laws to incorporate a public interest override, so that information must be released even if it would harm a legitimate interest where, overall, the public interest would be served by this.

Many right to information laws contain exceptions which are not harm-based and/or which are overbroad, and which would, as a result, breach this standard. A good example of this is the overbroad definitions of internal deliberative documents found in many right to information laws. 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 harm 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 require greater proof of this risk than is currently the case.

### **Some Forward-Looking Thoughts**

Ten years ago, almost no one talked about access to information as a fundamental human right. I can even remember being at a conference in Mexico in September 2005, just a year before the decisive Inter-American Court of Human Rights decision on this, giving a speech about the right to information. At the end, one of the discussants criticised me strongly for claiming it was a human right, when, as far as he was concerned, this had not been established. Now, almost no one questions the status of access to information as a fundamental human right. Indeed, if ten years ago, its status as a human right was not yet recognised, in ten years time, we will wonder how anyone could ever have doubted that it was a human right!

I wonder what the situation will be like in 20 or even 30 years. The Internet has so fundamentally changed our relationship with information that young people today have a completely different relationship with information. The phrase 'information is power' is no longer true today. Now, it is possible to access an enormous amount of information, immediately and usually for free. This has led to fundamental attitudinal changes in relation to information.

I will illustrate this with a story about my son. When I was a boy, the very best information resource you could have at home was the Encyclopaedia Britannica, with

some 10-12 volumes of information arranged in alphabetical order. But even this was very expensive and my family did not have this resource at our home.

The other day, I was sitting in our living room when my son walked in carrying the wifi enabled laptop that my three kids share among themselves. I noticed that after about two minutes he was starting to get frustrated, so I asked him what the problem was. He had been unable to locate information about endangered bird species in Nova Scotia, the small province of Canada where we live. His attitude was that whatever he might be looking for should be on the Internet, available to him at his fingertips. And he was right, too. There was masses of information on this topic; he just had not bothered to type in enough key words to get to it.

I wonder what will happen when his generation hold political and economic power. I somehow doubt they will accept the poor excuses our generation of leaders make to justify their extensive levels of secrecy. I do not think they will find it acceptable to wait 30 or even 20 days before their requests for information are answered. And I do not think they would be very impressed if they were presented with a large bill for copying files. Rather, I think the state of access to information held by public bodies will be very different then.