

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

### **Atelier de travail sur l'accès à l'information**

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Thank you. It is my pleasure to be here. I am going to address four issues today: developments regarding the right to information (RTI) over the last 20 years; why the right to information is important; the legal status of the right to information; 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. 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, of course, includes Morocco. 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. 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.

### **Importance of the Right to Information**

The primary rationale for right to information is that public bodies hold information not for themselves but as custodians of the public good. As such, this information must be accessible to members of the public in the absence of an overriding public interest in secrecy. In this respect, right to information laws reflect the fundamental premise that government is supposed to serve the people.

### Democracy

There are, however, a number of more utilitarian goals underlying widespread recognition of the right to information. The international human rights NGO, ARTICLE 19, Global Campaign for Free Expression, has described information as, “the oxygen of democracy”. Information is essential to democracy at number of levels. Fundamentally, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies, for example of the public

educational and/or health services, to mechanisms for commenting on draft policies or laws.

Effective participation at all of these levels depends, in fairly obvious ways, on information. Voting is not simply a technical function. For elections to fulfil their proper function – described under international law as ensuing that “[t]he will of the people shall be the basis of the authority of government” – the electorate must have access to information. The same is true of participation at all levels. It is not possible, for example, to provide useful input to a policy process without access to the policy itself, as well as the reasons it is being proposed.

#### Accountability

Democracy is also about accountability and good governance. The public have a right to scrutinise the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

#### Corruption

The right to information is also a key tool in combating corruption and wrongdoing in government. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted: “A little sunlight is the best disinfectant.”

#### Dignity

Commentators often focus on the more political aspects of the right to information but it also serves a number of other important social goals. The right to access one’s personal information, for example, is part of basic human dignity but it can also be central to effective personal decision-making. Access to medical records, for example, often denied in the absence of a legal right, can help individuals make decisions about treatment, financial planning and so on.

#### Business

Finally, an aspect of the right to information that is often neglected is the use of this right to facilitate effective business practices. Commercial users are, in many countries, one of the most significant user groups. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. This is an important benefit of right to information legislation, and helps answer the concerns of some governments about the cost of implementing such legislation.

### **The Legal Status of Access to Information**

In those countries that have passed access to information laws, the right to information is obviously a legal right. Where the right is enshrined in the constitution, it has a more

profound status, as a human right. I would to talk about the status of the right to access information held by public bodies under international law. This right finds its basis in the right to freedom of expression, which includes the right to seek and receive information.

In the early international human rights instruments, the access to information was not set out separately but the right to freedom of expression does include the right to seek, receive and impart information. In 1948, the UN General Assembly adopted the *Universal Declaration of Human Rights* (UDHR). Article 19, which guarantees freedom of opinion and expression, states:

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.* [Emphasis added]

The *International Covenant on Civil and Political Rights* (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966. The corresponding provision in this treaty, Article 19, guarantees the right to freedom of opinion and expression in very similar terms:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputation of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Morocco acceded to the ICCPR on 3 May 1979. Many commentators also view the guarantee of freedom of expression in the UDHR as universally binding, as a matter of customary international law.

Within the UN system, the Special Rapporteur on Freedom of Opinion and Expression has repeatedly referred to the fundamental right to access information held by public bodies. In 2002, for example, that mandate, in common with the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, adopted a resolution which stated, among other things:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

At the regional level, the *Declaration of Principles on Freedom of Expression in Africa* very clearly identifies access to information as a basic human right. The *Inter-American Declaration of Principles on Freedom of Expression* similarly identifies access to

information as a basic human right. This is backed up by a resolution of the OAS General Assembly which, while it falls a bit short of calling access a human right, does refer to it as a freedom and a “requisite for the very exercise of democracy”. It also notes that States are “obliged to respect and promote” access to information.

Significantly, a case decided just over a year ago by the Inter-American Court of Human Rights – *Claude Reyes et al. v. Chile* – held very clearly that access to public information was a fundamental right. The case involved an application by an environmental group for information related to a major logging project. In a very significant victory for right to information campaigners, the Inter-American Court, in a decision of 19 September 2006, held that the right to seek and receive information, as protected under Article 13 of the Inter-American Convention on Human Rights (which is very similar to Article 19 of the ICCPR), includes the right to request and be given information held by public bodies. In an unequivocal ruling, the Court held:

Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it.... The information should be provided without the need to prove direct interest or personal involvement in order to obtain it. (para. 77).

The Court recognised that the right to information, like all aspects of the right to freedom of expression, may be restricted. However, any restriction must be set out clearly in law and serve one of the limited set of legitimate aims recognised in Article 13 of the Convention (which are identical to those recognised under the ICCPR). Importantly, the Court also held the following in relation to any restrictions on the right to information:

Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right. (para. 91)

The remedies imposed by the Court were also very significant. Although there was some disagreement about the basis and scope of the ruling among the judges, they were unanimous as to the remedies. These included the obvious ones of providing the information to the victims, awarding costs to the petitioners and publishing key parts of the judgment in the official gazette and a national newspaper with wide circulation. But the Court also directed the State to “adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information” and, even further, to provide training to public officials on the implementation of this right.

A 2002 resolution by the Committee of Ministers of the Council of Europe recognises the importance of access to information, and calls on States to adopt legislation guaranteeing it, but does not refer to it as a right. Recent developments in Europe, the birthplace of the idea of a right to access public information, have been more encouraging. In November

2008, the Council of Europe adopted a legally binding treaty on access to information, the Convention on Access to Official Documents. This has the potential to be a very important development in this area.

The European Court of Human Rights, for its part, had consistently refused to recognise a right of access as an aspect of the right to freedom of expression. Scarcely three weeks ago, however, on 14 April 2008, the Court reversed its earlier position on this in a very important case, *Társaság A Szabadságjogokért v. Hungary*, in which it held that a local human rights NGO had the right to access a complaint lodged by an MP before the Constitutional Court concerning recent amendments to the Criminal Code relating to drug offences. The European Court held that this was a matter of public interest, and that to fail to provide the information would inhibit open public debate. While not as forward-looking as the Inter-American decision, this is nevertheless clear affirmation of the right to access public information.

Taken together, I would say that this is a very impressive body of law and comment which signals the growing strength of the idea of access to information as a fundamental human right.

### **Other Bases for the Right to Information**

These general statements and holdings on the right to information find support in a number of more specific international rules in this area. In recent year, there has been increasing recognition that access to information on the environment, including environmental information held by public authorities, is key to sustainable development and effective public participation in environmental governance. The issue was first substantively addressed in the 1992 Rio Declaration on Environment and Development, in Principle 10:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Agenda 21, the “Blueprint for Sustainable Development”, the companion implementation document to the Rio Declaration, states:

[I]ndividuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information protection measures.

In 1998, as a follow-up to the Rio Declaration and Agenda 21, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the legally binding Convention on Access to Information, Public Participation in

Decision-Making and Access to Justice in Environmental Matters (known as the Aarhus Convention). The most important access to information provision is Article 4, which states, in part:

Each Party shall ensure that ... public authorities, in response to a request for environmental information, make such information available to the public ...

(a) Without an interest having to be stated.

41 of the 46 States, including the European Community, that participated in the convention which adopted Aarhus have ratified the Convention.

Anti-corruption is another area where significant openness obligations have been developed under international law and, in particular, under the UN Convention Against Corruption, which Morocco has ratified. Article 10 of the Convention is particularly relevant, calling on all States to take measures “to enhance transparency in its public administration” including by considering “Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration”, with due regard for overriding interests such as privacy. This is further bolstered by Article 13, on the participation of society, which, among other things, calls on States to enhance “the transparency of and promoting the contribution of the public to decision-making processes”.

### **Attributes of the Right to Information**

I would like to identify here five central elements of a system for the protection of access of information, along with a number of promotional measures.

First, an access to information law should establish a presumption in favour of disclosure. In most cases, this will reverse the pre-existing practice of secrecy which hitherto prevailed in the public sector. This presumption should apply to all public bodies, defined broadly, and should apply to all of the information they hold. As an example of the breadth of definition of information, a Swedish request for information related to the ‘cookies’ on the Swedish Prime Minister’s computer. The request was granted, and the information disclosed that there were in fact no cookies on his computer; in other words, at that time, the Swedish Prime Minister did not use the Internet. The point is simply that the right covers all sorts of information, regardless of how it is held.

Second, the law should place an obligation on public bodies to publish, on an automatic or proactive basis, a range of information of key public importance. Although the right to request and receive information is at the heart of an access to information law, automatic disclosure is also a very important means of ensuring that information is provided to the public. It helps ensure that all citizens can access at least a minimum platform of information about public bodies, including the vast majority of citizens who will never make an access to information request. Automatic disclosure has received ever greater attention in modern access to information laws, and many include very extensive proactive publication obligations for public bodies.

Third, the law should set out clear procedures for accessing information. Although this is rather mundane, it is at the same time fundamental to the successful functioning of an access to information regime. The law should, for example, make it easy to file a request (it should be possible to file one electronically or orally and, as necessary, requesters should be given assistance in filing their requests), strict timelines should be established for responding to requests, notice should be required to be given of any refusal to grant access to information and at least the outlines of the fee structure for successful requests should be provided.

Fourth, and very importantly, the law should establish clearly those cases in which access to information may be denied, the so-called regime of exceptions. On the one hand, it is obviously important that the law protect legitimate secrecy interests. On the other hand, this has proven to be the Achilles heel of many access to information laws. The UK Freedom of Information Act 2000, for example, is in many ways a very progressive piece of legislation. At the same time, it has a vastly overbroad regime of exceptions, which fundamentally undermines the whole access regime.

As with all restrictions on freedom of expression, exceptions to the right to access information must meet a strict three-part test. First, the law must set out clearly the legitimate interests which might override the right of access. These should specify interests rather than categories. For example, it should refer to privacy rather than personal records and national security rather than the armed forces. Second, access should be denied only where disclosure would pose a risk of harm to a legitimate interest. The harm should be as specific as possible. For example, rather than harm to internal decision-making, the law should refer to impeding the free and frank provision of advice. Finally, the law should provide for a public interest override in cases where the overall public interest would be served by disclosure, even though it might harm a legitimate interest. This might be the case, for example, where a document relating to national security disclosed evidence of corruption. In the long term, the benefit to society of disclosing this information would normally outweigh any short-term harm to national security.

The relationship of access to information legislation with secrecy legislation poses a special problem. If the access law contains a comprehensive statement of the exceptions to access, it should not be necessary to extend these exceptions with secrecy legislation. Given that secrecy laws are normally not drafted with open government in mind, and given the plethora of secrecy provisions that are often found scattered among various national laws, it is quite important that the access law should, in case of conflict, override secrecy legislation. Even more important is a rule specifying that administrative classification of documents cannot defeat the access law. In this context, it is worth noting that classification is often simply a label given by the bureaucrat who happens to have created a document, or his or her superior, and that this cannot possibly provide an adequate justification for overriding the right to information.

The fifth key element in an access to information regime is the right to appeal any refusal of access to an independent body. Ultimately, of course, one can normally appeal to the courts but experience has shown that an independent administrative body is essential to providing requesters with an accessible, rapid and low-cost appeal. The role of this body is particularly important in terms of interpreting exceptions to the right of access, given the complexity and sensitivity of this aspect of the system.

Public bodies should also be under an obligation to undertake a number of promotional measures to ensure full implementation in practice of the access regime. The precise measures will vary from country-to-country but they should include such things as training for public officials, public education about the access law, sanctions for officials who wilfully obstruct access, a system for reporting on measures taken to promote access, incorporating the provision of information into corporate incentive schemes and tracking information requests and how they have been dealt with within each public body.

### **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.