Freedom of Expression – A Flexible and Open Right

By Helen Darbishire

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A RESPONSE TO KAROL JAKUBOWICZ'S CALL FOR A RIGHT TO PUBLIC EXPRESSION

The central thesis of Karol Jakubowicz's paper "The Right to Public Expression: A Modest Proposal for an Important Human Right" is that the right to freedom of expression as currently established in international treaties may not suffice in the 21st century to support the complex communications structures of our modern, digitalised societies, that it is "incomplete" and not fit for purpose. To this end Jakubowicz proposes replacing this right with a new right, the right to public expression.

Without a doubt the biggest frustration with Jakubowicz's paper is that he fails to set out a concise definition of this new right which he asserts should replace "mere" freedom of expression. He gives indications here and there – the right to be "listened to" mentioned in the first paragraph, the right to "participate in the public discourse", the right of "universal access to the Internet and other digital media" – but it is never made clear if the new right when drafted would explicitly include these rights, and he fails to propose the redaction of a provision for this right which could be slotted into international human rights treaties, supposing that the opportunity to do so and the necessary political will existed.

This new right to public expression is, largely, an attempt to resuscitate the right to communicate, an equally ill-defined right first posited in the 1970s which had as its

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goal to democratise communication by providing everyone with equality of access to the media.[2] Jakubowicz considers that the right to communicate movement failed because "no-one could imagine how the State could make freedom of expression a positive right by providing everyone with the means necessary to join the public discourse." That has now changed, thanks to the digital revolution, which provides the justification for reconsidering the sufficiency of the right to freedom of expression.

Another striking feature of Jakubowicz's paper is that its comprehensive overview of the current status of the right to freedom of expression as enjoyed in the first decade of the new century demonstrates that there is nothing "mere" about it. The right to "free communication of ideas and of opinions" is, as the French Declaration of the Rights of Man and the Citizen[3] (1779) which forms part of France's Constitutional law to this day, asserted, "one of the most precious rights". Jakubowicz convincingly shows that under the umbrella of the relevant human rights texts – Article 19 of the Universal Declaration of Human Rights and related provisions in international treaties and national constitutions – a whole family of rights has developed, has been expanded on in soft law, and is supported by public policies and programmes. In doing so he undermines his own thesis by failing to show the need for the posited new right or what significant changes it would or could deliver. Furthermore, these rights are enjoyed in practice, not perfectly and by no means in all parts of the world, but by many people and in many places, and no evidence is put forward as to how the redrafted right would in and of itself positively impact on current levels of enjoyment of freedom of expression, nor how it would reduce violations of this right.

This response paper, therefore, attempts to identify what this new right to public expression might entail at the same time as assessing whether Jakubowicz makes a convincing case for it. It thereby aims to evaluate whether there is a need to revisit the right to freedom of expression in a way which would justify the inevitable risks entailed in opening up for redrafting Article 19 of the Universal Declaration of Human Rights.

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[2] The freedom of expression organisation Article 19 summarises the right to communicate as "the right of every individual or community to have its stories and views heard." See *Statement on the Right to Communicate* (2003), available at http://www.article19.org/pdfs/publications/right-to-communicate.pdf. Article 19 argues that the existing international human rights architecture already protects this right.

[3] The Declaration of the Rights of Man and the Citizen of 1979, Article 11. English translation at: http://www.diplomatie.gouv.fr/en/france_159/institutions-and-politics_6814/the-symbols-of-the-republic-and-bastille-day_2002/the-declaration-of-the-rights-of-man-and-the-citizen_1505.html

1. How can media freedom be a human right?

At the heart of Jakubowicz's arguments is a concern that "freedom of the press is the freedom of those who own it",[4] and hence that exercise of the right to freedom of expression can never be enjoyed equally as long as some have greater access to and influence over means of communication than others.

This is a valid concern, and it is certain that concentration of media ownership in the hands of economic and political elites directly damages the democratic system that freedom of expression is supposed to uphold (witness Berlusconi's Italy).

In making his case, Jakubowicz points out how strange it is that in treaties affirming individual human rights, the media are expressly protected, as if media organisations were also sentient beings. In fact, of course, the protection is for *communication through* any media, as Article 19 of the Universal Declaration of Human Rights makes clear:

> 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.

Furthermore, the drafters of the UDHR were farsighted enough not to limit the type of media through which people were free to communicate, endowing the right with tremendous flexibility as the technological and digital revolutions of the 20th century advanced. When drafting the Declaration in 1948, Eleanor Roosevelt and René Cassin could hardly have imagined a teenager in Ushuaia sending Tweets to a middle-aged Facebook-user in Vladivostok, and yet the provision serves to protect their expression and information rights.

It is true that there are other texts, some of them long-standing, which specifically mention the freedom of the press (such as the First Amendment of the United States Constitution, which forbade Congress to "restrict free speech or press freedom"), or Sweden's 1766 Freedom of Press Act, a Constitutional Law originally entitled "His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press",

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[4] Jakubowicz cites President Urho Kekkonen of Finland as having said this "many decades ago"; this author cannot find a reference to source this quote (though the American columnist A. J. Liebling is credited with having coined an almost identical axiom: "Freedom of the press is guaranteed only to those who own one". A. J. Liebling, The Wayward Press, "DO YOU BELONG IN JOURNALISM", *The New Yorker*, 14 May 1960, p. 109; copy on file with the author). According to the Official National Biography of Finland (available at http://www.kansallisbiografia.fi/english/?id=632), many analysts now take the view that during his five terms as President (1956–1982), Kerkkonen was an autocratic, "power-hungry", and "unscrupulous" ruler who presided over "an atmosphere of 'self-censorship' that plagued the public radio and television service, Yleisradio, in particular."

whose preamble establishes and justifies the right because of the societal benefits it delivers:

> ... the great advantages that flow to the public from a lawful freedom of writing and of the press, and whereas an unrestricted mutual enlightenment in various useful subjects not only promotes the development and dissemination of sciences and useful crafts but also offers greater opportunities to each of Our loyal subjects to gain improved knowledge and appreciation of a wisely ordered system of government; while this freedom should also be regarded as one of the best means of improving morality and promoting obedience to the laws, when abuses and illegalities are revealed to the public through the press;[5]

Apart from the "our loyal subjects" bit, the justifications for a robust right to freedom of expression have barely changed to this day, and many are repeated in Jakubowicz's paper.

Freedom of the press in the eighteenth century was perceived as "freedom of the printing press", in other words, the right to publish books, leaflets, pamphlets and the like.[6] Protecting freedom of "writing" in this way was akin to the call – supported by Jakubowicz in this paper – for protection of passive and active internet access rights today. There is nothing in this right that protects a particular kind of media – the term "freedom of the press" is often still applied to radio and television, and indeed to the internet.

Jakubowicz hints that a reformulation to introduce a "right to public expression" would see the word "media" removed from the international human rights treaties. Thus he picks on Article 13 of the American Convention on Human Rights (which provides everyone the right to "seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice") in order to complain that "*the distinction*

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[5] English Translation of the 1766 law to be found on the website of the Chydenius Foundation, named after one of its drafters, Anders Chydenius, also a Finn who was a member of the Swedish Diet. See http://www.chydenius.net/pdf/worlds_first_foia.pdf

[6] See "Thoughts on Civil Liberty" by Peter Forsskål, first published 1759, English translation, published by Atlantis Stockholm, 2009.

between oral expression and expression in print or through other (mass) media is indicative of an approach that conflates individual freedom of expression and freedom of the press."[7]

There are two problems with this line of argument. First, a close reading of the American Convention on Human Rights makes clear that Article 13 does not in fact establish a right to "freedom of the press". Nor, for that matter, does Article 10 of the European Convention on Human Rights. In spite of this, the extensive interpretation of this right by the European Court of Human Rights links protection of freedom of expression to protection of media freedom, although at the end of the day what is protected is expression through the media. It is highly likely that international human rights bodies and national courts would eventually interpret a new right to public expression in much the same way, reading into it a protection of media outlets from seizure, closure, arbitrary denial of access to air- and cable-waves and so forth. A change in wording would be unlikely to bring significant benefit from this perspective.

The second problem is that Jakubowicz's argument is not logical: even if the media had been given a special "human" rights status in the Universal Declaration of Human Rights (which they were not), such a move would not *per se* deny or eliminate the importance of the individual's right to freedom of expression. It is long established that the right to hold and express opinions and ideas and to communicate information to other human beings is not a right that is exclusively contingent on the existence of (mass) media but applies also to many other fora, including expression in small groups or directly to an audience. Hence the right to "public" expression – in terms of a right to enter directly into a real-life public discourse – is already protected by the UDHR.

2. Freedom of expression as a negative, neo-liberal right

According to Jakubowicz, the right to freedom of expression is a uniquely negative right, in other words, one that does not place positive obligations on governments to protect and promote the right. Instead of sustaining this argument, however, he compiles a body of references which demonstrate the extensive obligations on governments to ensure that all members of society enjoy freedom of expression, including – though not exclusively – through mass media, to protect plurality of the media, and to protect from harm those who exercise their opinion and expression rights.

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[7] Article 10 of the European Convention on Human Rights does not come in for the same criticism, perhaps because it makes no express mention of the media through which the expression shall be exercised, except indirectly in the provision permitting licensing of the media: *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

It is hard to see how some semantic tinkering with the language of international human rights treaties (taking out the words "freedom of" and replacing them with "public" to achieve the "right to public expression") would result in any substantive change to the interpretation of this right.

A more effective strategy for a believer in the right of all individuals to communicate in the public space might be to emphasise the positive obligations that freedom of expression imposes, and to call for these to be fully developed using all the means at the disposal of modern public administrations.

Jakubowicz is similarly successful in undermining his own arguments against the existing freedom of expression right on the grounds that it is predicated on neo-liberal free market ideologies. He establishes that this is not the case by enumerating the significant efforts that have been made by intergovernmental bodies and national governments, particularly but not exclusively in Europe, to promote and protect public service media.

Although the instability of the media world in these times of rapid technological change and financial crisis reveals the fragility of public service media and of the plurality of the media landscape in general, it is evident that the interpretation by human rights bodies such as the Council of Europe, whose texts Jakubowicz references extensively, instruct national policy makers and legislators to do all they can to promote media diversity. And while the Norwegian Constitution may be particularly explicit in placing an obligation on the authorities "to create conditions that facilitate open and enlightened public discourse", Norway is by no means the only country where the responsibility is taken seriously at the national level, as the recent global expansion of legislation providing for community broadcasters amply demonstrates.[8]

3. Strategies for developing new rights

An ongoing lament throughout the paper is that the right to freedom of expression has failed to serve the movement of the 1970s and early 1980s in favour of a "right to communicate". This movement aimed to address the problem of small numbers of media outlets run in a top-down manner by governments operating in the days before direct citizen participation in decision-making had developed and by unaccountable businesses (see also above). It strove to find mechanisms to involve larger numbers of people in the decision-making structures that governed by advocating for "the right to participate in public communication." It aimed to balance the allocutory (one-way)

[8] The community radio movement has perhaps been the most successful at putting the ideas behind the right to communicate (considered further in Section 3) into practice. The World Association of Community Radio Broadcasters (AMARC) brings together a network of more than 4,000 community radios, Federations and community media stakeholders in more than 115 countries. See www.amarc.org.

and "repressive" communication that was deemed by some to prevail in mass media at the time.

The right to communicate movement became linked with the debate within UNESCO on the New World Information and Communication Order, which aimed to rebalance the global flow of news in favour of the disadvantaged South. Doomed to flounder on cold war controversies over whether this was in fact a hidden agenda for subverting freedom of expression for authoritarian goals, the movement came a generation too early, petering out before what Jakubowicz rightly refers to as the "great democratic triumph" brought by the internet.

It seems obvious now that the right to communicate was misguided in its strategy, however laudable its aims: the solution has come not from reform of the international human rights architecture but from technological developments which succeeded in doing what the "May 1968 generation" had called for by opening up the media space and creating opportunities for everyone – at least many in the developed world – to be owners of their own little "printing press".

At the same time, the mere fact that technology has evolved, does not necessitate rewriting the human rights treaties (if it did, we'd be redrafting them every few months to keep up with the current pace of change!). The existence of ICTs does not, as Jakubowicz asserts, in and of itself justify a new right. Rather it argues for redefining policies and investing in the infrastructure of communication to ensure that all benefit from any new development, tailoring the norms to new contexts while holding firm to the values that underpin them.

Pushing for a brand new right didn't work for the right to communicate, and probably won't work for the right to public expression, particularly not while it remains ill-defined and lacking a broad base of support.

Jakubowicz notes that there are three ways in which new rights come about. A reaction to oppression is one, although this usually occurs after a catastrophic phase. The post-World War II human rights treaties came in response to a systematic and large-scale betrayal of Enlightenment values around the world. This was in many ways a one-off event in the history of the development of human rights, although rights have continued to evolve since as a result of shake-ups in political systems, crises, and scandals.[9]

The other two mechanisms are top-down from benign leaders or bottom-up as part of a civil movement to claim the new right. By far the most prevalent modern mechanism

[9] For example, the 1998 Rome Statute establishing the International Criminal Court to prosecute those accused of crimes against humanity was a direct result of the genocides in the former Yugoslavia and Rwanda, each of which had their own special tribunals demonstrating the need for a stronger mechanism to ensure justice for victims and, it is intended, to deter such crimes in the future.

for evolution of human rights is when these rights are enjoyed on the ground as societies evolve, and gradually become enshrined in law, developed in jurisprudence and recognised at the international level. In recent decades, advances in human rights have rarely if ever resulted exclusively from a top-down approach by politicians or other enlightened thinkers and legal experts. Rather, the most prevalent mechanism is the bottom-up push from a well organised civil society movement which uses all the advocacy and legal tools at its disposal to secure change.

Freedom of expression as a right has benefited from such movements, evolving into a complex and multifaceted right – as evidenced by Jakubowicz's paper. And sometimes a "new" right *is* recognised: an example of how progress can be made, reading new rights into existing rights, is supplied by the successful global movement for the right of access to information, which indicates how flexible the international human rights system is and how it is capable of adapting to reflect the evolution of human rights. (The achievements of this movement are summarised in the Case Study at Annex I.)

4. The family of communication rights

Jakubowicz bemoans the shortcomings of freedom of expression and enumerates a cluster of "communication rights" to bolster his argument that there is a need to introduce a new human right to public expression.

A careful analysis of this family of rights demonstrates that many of these "rights" are already expressly recognised and others are on the road to recognition.

The rights listed below have been extracted from the table in Jakubowicz's paper entitled "Four Pillars of Communication Rights". The presentation has been restructured to identify which rights are already secured in international law and which are still in development.

4.1 Freedom of Expression family rights already secured (UDHR article)

This group includes rights recognised under Article 19 as well as rights which have a communication dimension, interacting at least in some way with the right to freedom of expression:

- Freedom of expression (Article 19)
- Freedom of the press and media (Article 19)
- Access to, and ready availability of, public and government information (Article 19)
- Diversity and plurality of media and content (Article 19)
- Right to honour and reputation (Article 12)

- Information privacy and data protection (Article 12)
- Privacy of communication (Article 12)
- [Right to be free from] Communication surveillance in public and workplace (Article 12)
- [Right to] Participation in the cultural life of one's community including right to benefit from scientific and technical advances (Article 27)
- [Right to] Communication in one's mother tongue. (Article 2 guarantees enjoyment of other rights without discrimination on grounds of language)

In some cases the assertion of privacy rights may clash directly with the right to freedom of expression, which is not absolute and which in some cases may be limited to protect privacy or to counter defamatory expression. This delicate balance has been worked out in national and international law and jurisprudence and whilst there is a tension which is constantly being revisited (for example in campaigns to abolish criminal defamation provisions), there is nothing to indicate that reframing freedom of expression as public expression will significantly affect the state of play.

4.2 Other Rights – not directly relevant

- Right to equality before the law (Article 10) – Although it is not made clear why this right in particular has been selected, it is important to note that in some documents relating to the right to communicate,[10] it seems that this right may be used to constrain expression, as it is often alleged that the media "violate the right to presumption of innocence". This author would make a distinction between the role of the courts in upholding the principles of fair trial and presumption of innocence and the legitimate limits on freedom of expression to protect against defamation. The right to equality before the law does nevertheless have some relevance: it is an essential right for anyone needing to defend his or her right to freedom of expression.

4.3 Rights identified but still in development / needing reinforcement

- [Right of] Access to corporate information (Article 19) – Many national access to information laws place obligations on private bodies where they perform public functions or operate with public funds; many other international instruments require some transparency of businesses, such as the Aarhus Convention, the UN Convention Against Corruption, much law and practice,

[10] See Article 19's analysis the 2003 Draft Declaration on the Right to Communicate, at http://www.article19.org/pdfs/analysis/hamelink-declaration-the-right-to-communicate.pdf

and a host of financial regulation instruments. It is likely that, following on from the European Court of Human Rights' definition of "information monopolies",[11] this right will expand in the next decade.

- Right of access to publicly funded knowledge (Article 19) – The right of access to information already provides much access to information created with public funds. There are however significant areas of human knowledge (such as vast swathes of scientific research) which is out of reach of those who cannot pay for access. The intellectual property rights of those who create this information conflict with the right of access to public sector information and so with the rights to freedom of opinion and expression and the free flow of ideas. This is an area where considerably more work needs to be done to define the precise scope of the right of access to such documents. It is, however, clear that the rationale that knowledge created with public funds should be part of the global commons, and therefore accessible to all, is gaining ground.

- Right to participate in governance nationally/transnationally (Article 21) – This is a rewording of "Effective participation by civil society in governance nationally/transnationally" from the transversal section "F". Civil society has been omitted because, like media enterprises, organisations do not have rights. More on the modern understanding of the right to participate is considered in Section 6 below.

- The obligation on governments to provide education on how to use media and ICTs (a rewording of "Widespread skills and capacities to use media, especially ICTs") (Article 19, positive obligation combined with Article 26 on right to education) - The special rapporteurs on freedom of expression from the United Nations, the Organisation for Security and Cooperation in Europe, the Organisation of American States and the African Commission on Human and Peoples' Rights have asserted that "Broad public education and other efforts should be undertaken to promote media literacy and to ensure that all members of society can understand and take advantage of new technologies with a view to

[11] *Társaság a Szabadságjogokért v. Hungary* (App no 37374/05), ECHR, 14 April 2009, paragraph 36. Available at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=849278&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

bridging the digital divide."[12] This is soft law but reflects thinking, law and practice in the area of media literacy.

4.4 Rights not yet widely recognised but in development

- [Right of] Access to the Internet / Universal access to relevant media (Article 19?) – As Jakubowicz notes, a number of countries have now recognised that access to information is, like access to a telephone line or electricity supply, a universal service which should be delivered to all on an "affordable and equitable" basis.
- [Right to] participation in communication governance (Article 19?) – There are many mechanisms by which members of the public and representatives of diverse interest groups participate in governance of the communication infrastructure. These are continuously expanding in line with the tremendous shift in concepts of the right to participate in public decision-making (see also Section 4 below). Although not per se framed as a right, the obligation of governments to establish mechanisms that ensure broad participation in communication governance is clearly established in law and practice, and is a sine qua non of a democratic media environment. A distinction should be made, however, between, on the one hand, the positive obligation to ensure that members of the society have input into broadcasting policy and processes such as the allocation of airwaves, and, on the other hand, a direct right of any individual to participate in the governance of any media outlet, which is clearly not practicable.

It should be noted that a couple of other rights in the table were omitted. Specifically, these were the references to "a balanced knowledge-sharing regime, with practical support measures" and "availability of relevant knowledge for all communities", which seem to be results or outcomes rather than rights.

[12] JOINT DECLARATION ON DIVERSITY IN BROADCASTING The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information, December 2007. Available at
http://www.article19.org/pdfs/igo-documents/mandates-broadcasting.pdf

TABLE A

Freedom of Expression family rights already secured (UDHR)	Rights not yet fully developed but in existence in law and practice
Freedom of expression (Article 19) Freedom of the press and media (Article 19) Access to, and ready availability of, public and government information. (Article 19) Diversity and plurality of media and content. (Article 19) Right to honour and reputation (Article 12) Information privacy and data protection (Article 12) Privacy of communication (Article 12) [Right to be free from] Communication surveillance in public and workplace (Article 12) [Right to] Participation in the cultural life of one's community (Article 27) [Right to] Communication in one's mother tongue. (Article 2 guarantees enjoyment of other rights without discrimination on grounds of language)	[Right of] Access to corporate information (Article 19) Right of access to publicly funded knowledge (Article 19) Right to participate in governance nationally/transnationally (Article 21) The obligation on governments to provide education on how to use media and ICTs (Article 19)
Other Rights (not directly relevant but enshrined UDHR)	**Rights not yet recognised / not clearly defined / not yet developed**
Right to equality before the law (Article 10)	[Right of] Access to the Internet / Universal access to relevant media / affordable and equitable access (Article 19?) [Right to] participation in communication governance (Article 19?)

5. The right to be heard and the right to participate

At several junctures, Jakubowicz mentions the right to be "heard" or "listened to", although he anticipates his critics by noting that no one can be forced to listen, however ardent someone else's desire to communicate. It seems that this right to be heard is somehow linked to the right to "join the public discourse in a personal capacity".

It could, however, be argued that we have a right to be heard in that there is an obligation on public bodies to open up channels for consultations with members of the public. The right to participate directly in government can be realised in many forms, from direct democracy exercises such as referenda in Switzerland to participatory

budgeting in the towns and villages of Peru, the only country in the world to have a national law requiring participatory budgeting.[13]

Jakubowicz cites data from the US which shows relatively low levels of engagement in social and political issues (14 per cent of adults). At the same time, there is a wealth of examples from around the world of how policy and law are being shaped following public consultations carried out with a variety of mechanisms, some direct, others mediated by use of ICTs. The exercise of freedom of opinion and expression combined with the right of access to information and the right to participate is functioning effectively to underpin an ongoing revolution in the way public bodies take decisions.

In this context, to limit the right to participate to participation in a generalised public discourse – the right to add our voices to the existing and growing babel – would narrow it. The right to participate requires a range of additional mechanisms, not all of which fit comfortably under the rubric of protection of expression and information.

The right to participate is a developing right which deserves attention and support. It is a key right in modern democratic structures, in the same way that the right of access to information, with its twin obligations to publish information proactively and to respond to requests from the public, is changing the way that individuals interact with governance structures. These are rights which merit much more attention and support, but it does not seem likely that such support would be delivered by reframing freedom of expression as a right to public expression.

6. Is freedom of expression under threat?

Another occasional argument which appears in the paper, possibly in support of the new right to public expression, is that freedom of expression is under threat and even possibly on the retreat, hounded in the western world at least by a combination of big business, the financial crisis, and the new censorship justified by the war on terror.

These are legitimate concerns. They indicate that perhaps now is not the time to start pulling out the foundation stones of our communication infrastructure by opening up for revision the right to freedom of expression, thereby casting aside all the accumulated body of soft law, jurisprudence and national law and policy from the past 60 years.

In sum, Jakubowicz fails to demonstrate the necessity for the "Copernican Revolution" to which he refers. His article lacks sufficient evidence of the need for a paradigm shift, even a small one from "freedom of expression" to "public expression". Indeed, the

[13] A scanned copy of the law can be found, in Spanish, on the website of the Peruvian congress: http://www.congreso.gob.pe/ntley/Imagenes/Leyes/28056.pdf and a machine readable copy can be found at http://www.transparencia.org.pe/documentos/ley_marco_del_presupuesto_participativo_28056.pdf.

material he assembles makes a rather compelling case against a new right and in favour of bolstering and maintaining the flexibility of the existing right to freedom of expression.

ANNEX

Case Study: From freedom of expression to access to information

The right of access to information from public bodies appears nowhere in the original conception of the right to freedom of expression. The protection of the right *"to seek, receive and impart information and ideas through any media"* did not encompass a right to ask public bodies for information and to get an answer; nor did it impose a positive obligation to publish information even without an information request.

In 1948 there was just one access to information law in the world (the Swedish Freedom of the Press Act of 1766 also conferred a right of access to documents held by government). There are now over 80 such laws. The Interamerican Court of Human Rights and more recently the European Court of Human Rights have found that Article 13 and Article 10 respectively protect the right of access to information, meaning the right to get answers to information requests.

The decision of the Interamerican Court of Human Rights in a case brought against Chile where a government body had simply not answered an information request was unequivocal:

> ... the Court finds that, by expressly stipulating the right to "seek" and "receive" "information," 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, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.[14]

The Court also made clear that this right forms part of the right to freedom of expression, which is impossible without information:

> The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the

[14] Case of Claude Reyes and others v. Chile, see http://www.corteidh.or.cr/casos.cfm?idCaso=245 (Spanish original) and http://www.corteidh.or.cr/casos.cfm?idCaso=245&CFID=525202&CFTOKEN=97319768 (English).

> right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.

The Court ordered the Chilean state to take various measures to ensure that individuals could exercise this right, including training public officials. Chile amended its Constitution and adopted an access to information law which came into force on 1 April 2009.

The European Court of Human Rights has also confirmed the existence of the right of access to information, albeit in rather more hesitant language. In considering a case in which a human rights organisation (the Hungarian Civil Liberties Union) had requested from the Constitutional Court a petition from a Member of Parliament, which the Court had ruled to be the private opinion of the MP, the Court stated that it would be "*fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights*", and that such arguments could not be invoked to justify the restriction on access to information and consequent interference with freedom of expression as protected by Article 10 of the European Convention on Human Rights.[15]

The Court argued that when a public body holds information which is essential either for the media to play their role as "public watchdogs" or for civil society to play a "social watchdog" function, then withholding that information is an interference with freedom of expression. The judges achieved this paradigm shift by arguing that when a public body holds information and refuses to release it, it is exercising the "censorial power of an information monopoly" and hence should have supplied the information to those requesting it.

The existence of the right to information protected by Article 10 of the Convention was confirmed on 26 May 2009 by a second ruling of the European Court of Human Rights, again in a case against Hungary. This case was brought by a historian, János Kenedi, who had applied for access to historical documents about the functioning of the Hungarian State Security Service, had been granted access by the Courts, but not provided with the documents by the Ministry of Interior.

In its ruling, the European Court noted that the Government accepted that there had been an interference with the applicant's Article 10 rights and confirmed that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression."[16]

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[15] *Társaság a Szabadságjogokért v. Hungary* (App no 37374/05), ECHR, 14 April 2009, paragraph 36, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=849278&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[16] *Kenedi v. Hungary* (Appl. no. 31475/05)

One of the reasons that the international human rights courts have been able to assert the existence of these new rights is the significant body of work carried out in the past 20 years by civil society organisations to secure recognition of the right of access to information at the national level. There was discussion in the movement lobbying for a new right to information, but no one seriously thought international treaties would be redrafted. Alternative strategies were therefore pursued (including making the most of the minimum-standard Convention on Access to Official Documents developed by the Council of Europe), while undertaking litigation to claim recognition of the right under Article 13 and Article 10 respectively.