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Strasbourg, 29 September 2000

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Opinion 130/2000

Restricted

CDL (2000) 74

English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**FREEDOM OF EXPRESSION AND
FREEDOM OF INFORMATION**

Bosnia and Herzegovina

Comments by
Mr P. van Dijk (Member, The Netherlands)

Freedom of Expression and Freedom of Information

provisional observations by P. van Dijk

1. It is important, in my opinion, to clearly state at the outset that a distinction has to be made between:

(a) Access to information without any hindrance by the authorities beyond the limits of the necessary and proportional restrictions as provided by law.

This right serves to promote free flow of information and to prevent monopolies of certain information streams. It is my feeling that this is the main link which the Johannesburg Principles intended to establish between freedom of expression and freedom of information.

It implies on the part of the authorities primarily the negative obligation to abstain from interference in the access to information and from favouring certain providers of information. Thus, the European Court of Human Rights held in the *Sunday Times* case that Article 10 ECHR guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed (Series A, No. 30, § 66).

It also implies a positive obligation on their part to promote pluralism to the extent necessary to enable access to full and objective information. See also the Declaration on Media in a Democratic Society, adopted at the 4th European Ministerial Conference on Mass Media Policy in Prague on 8 December 1994.

(b) Access to information held by the authorities themselves. For our report we are dealing with public access only, i.e. the entitlement of all members of the public at large to government information in order to further transparent administration and the citizen participation in the democratic process; to be distinguished from private access, i.e. the entitlement of a person to access to his or her personal information (on this, see the *Leander* judgment of 26 March 1987, A.116); and to be distinguished from official access, i.e. the entitlement of public authorities, including members of Parliament and courts, to access to government information in virtue of their official status.

Here the negative and the positive obligation seem for the larger part to merge. Taking away any hindrance beyond the limits of the necessary and proportional restrictions as provided by law will usually imply positive steps to make the information accessible and available.

2. That access to information as mentioned under (a) is implied in the internationally guaranteed right to freedom of expression, is in my opinion no longer seriously disputed. Even though Article 10 of the European Convention does not expressly mention the right of access to information, that right is included in the right to receive and impart information.

Access to information as mentioned under (b) creates greater problems.

- The Special Rapporteur of the United Nations has no authority to interpret the law.

- The Resolutions of the Commission on Human Rights of the United Nations are, as far as I know, not explicit on the right of access to information of the administration.

- The Human Rights Committee has adopted a general comment concerning Article 19 of the International Covenant on Civil and Political Rights in 1983, but I do not know what it says about the right of access to information.

- The European Court of Human Rights has taken a rather restrictive approach so far, while it has expressly rejected the position that Article 10 ECHR implies the obligation on the part of the administration to disseminate information of its own motion.

- The European Commission of Human Rights has held that the right of public access to government information is connected with the right of freedom of expression under Article 10 ECHR insofar as the information concerned is generally accessible under domestic law (Clavel case, 15 October 1987, Application No. 11854/85).

- The Parliamentary Assembly of the Council of Europe, in its Recommendation of 23 January 1973 on Mass Communication Media and Human Rights (Rec. 0582(1973)), proposed to extend Article 10 ECHR by expressly securing the freedom to seek information with a corresponding duty on public authorities to make information available on matters of public interest subject to appropriate limitations. The recommendation did not result in an amendment of Article 10. (See also Resolution 428(1970) of the Parliamentary Assembly of 30 January 1970).

- The Committee of Ministers of the Council of Europe, in a Declaration of 29 April 1982 on the freedom of Expression and Information, expressed the intention of the Member States to pursue an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters. Access to information is not referred to as a right included in Article 10 ECHR.

- I do not know whether there is any more recent relevant practice or case-law of the United Nations or the Council of Europe.

The conclusion may be that there is a strong tendency to accept that the right to receive information as element of the right of freedom of expression implies in principle the right of access to information of the administration, which information must be made public at a specific request and subject to the usual limitation grounds.

3. As far as the draft-report itself is concerned, I have the following observations:

Ad III.8: The report should not primarily examine the interpretation given by the Human Rights Commission but that by the Human Rights Committee, since the Committee has the authority, under the International Covenant, to interpret Article 19.

That is not to say that the Resolutions of the Commission of

Human Rights and the views of the Special rapporteur should not be mentioned, but their relative value as authoritative interpretations should be duly indicated.

Ad III.8.a): Instead of "major principle of international law on human rights" I would say: "basic human right recognized by international law".

Ad III.B.20: "has not been receptive" should read: "has not yet been receptive".

Ad III.25.end: delete "the implementation of" and add a reference to the interpretation of Article 19 of the Covenant.

Ad IV.b): This statement should be qualified a little. The word "forcibly" should be deleted.

14 August 2000

P. van Dijk