

Freedom of Information and Expression Advocacy and Litigation Strategies for Latin America

*Report of a Meeting held in Buenos Aires,
Argentina, March 18-19, 2004.*

May 2004



OPEN SOCIETY JUSTICE INITIATIVE

Open Society Justice Initiative Freedom of Information and Expression

www.justiceinitiative.org/activities/foifoe

Advocacy and Litigation Strategies for Latin American

Report of a Meeting held in Buenos Aires, Argentina, March 18-19, 2004

On March 18-19, 2004, the Justice Initiative brought together lawyers and activists from across the Americas to develop litigation and advocacy strategies, and strengthen intra-regional networks for promoting freedom of information and expression. The meeting resulted in some common approaches to (i) Freedom of Information (FOI) advocacy strategies, (ii) FOI litigation strategies, and (iii) priority areas for litigation in the area of freedom of expression.

1. FOI Advocacy Strategies

Many countries in Latin America and the Caribbean have still to follow the lead of Mexico, Peru, Panama and Jamaica, four countries which have adopted and implemented FOI laws. Participants discussed starting points for advocacy strategies.

i) FOI as an anticorruption measure

Freedom of information laws provide a powerful weapon for exposing corruption. This is an attractive platform for promoting FOI laws in countries where corruption is a concern—particularly where governments have committed to introducing anti-corruption measures. The anticorruption potential of FOI laws appeals to wide sectors of society, and campaigning on this issue highlights the importance of transparency both in promoting accountability and engendering public participation.

ii) Building public trust

For governments, one motivation for increasing transparency is to improve public confidence, which has suffered, in many countries, after long years of human rights violations and corruption. Across Latin America, administrative reforms currently underway, such as decentralizing government and promoting citizen participation in decision-making, are responses to this erosion of public trust. The Governor of Sinaloa State, Mexico, for example, promotes transparency as a way of increasing public trust in government with the explicit aim of combating non-payment of taxes.

iii) Access to truth

FOI laws can sometimes be used to access information about the actions of governments of the past. A change of regime can also result in a broad opening of archives, as happened in Mexico in November 2001 when President Fox decreed that hundreds of thousands of documents should be made public, including those about Tlatelolco massacre. Periods of transition are clearly opportune moments to promote transparency.

At the same time, FOI laws are not the best guarantor of access to truth because much information on past violations may not be held in regular government files. Even Truth and Reconciliation Commissions have difficulty accessing information, and in some cases need to guarantee confidentiality to secure testimonies (as happened in Peru). Conference participants noted that where a transition is incomplete, those implicated in past crimes may be resistant to FOI laws if they are perceived to be all about the past, while the wider public may prefer to be forward-looking and focus on the potential of FOI laws to help guard against future abuses.

iv) Media, Civil Society and Business as allies

Journalists and other media groups are natural allies in promoting freedom of information, but participants from Peru and Mexico warned about focusing too heavily on the media in promoting FOI laws. Narrowly focused media-driven campaigns in those countries left much to be done after laws were passed. Civil society FOI groups in Mexico and Peru now have to educate other sectors of civil society on the laws' applications. They noted the experience of Central and Eastern European activists, that broad-based FOI campaigns were preferable because they (i) increase the likelihood of passing FOI laws and (ii) create a demand for information which will help drive implementation once the law is adopted. Another group interested in transparency is the business community. Corruption behind closed doors often leads to unfair awarding of government contracts. In Mexico, business groups have now joined the campaign to adopt FOI laws in a number of states.

2. FOI Litigation Strategies

Civil society groups use a variety of methods to promote FOI laws—these include advocating reform, raising public awareness, and providing technical assistance and training to government officials and civil society groups. Litigation is another available, and sometimes necessary, tool to enforce the right.

Although the Inter-American Court has not yet recognized a general right to access government-held information, it has relied on Article 13 of the American Convention on Human Rights to support the fundamental importance of freedom of information in a democratic society.¹ The Court has also explicitly recognized a right to information when this is related to the exercise of other Convention rights. Thus, in the *Barrios Altos* case, the Court argued that a state's obligation to investigate and punish serious human rights violations included an obligation to shed light on the truth. This obligation corresponded to the victims and their families' "right to truth."² It is important to build on the existing jurisprudence in order to expand the scope of the Convention right to information, with a view to obtaining recognition of a general right to access government information.

¹ In a 1985 Advisory Opinion on Article 13 of the American Convention on Human Rights, the Court noted that "[f]or the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion," concluding that "a society that is not well-informed is not a society that is truly free." *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 32, 70.

² *Barrios Altos* Case (Peru), Judgment of March 14, 2001, (Ser. C) No. 75 (2001).

In countries with FOI legislation in place, litigation is a possible strategy in a range of situations.

- Systematic failure by government institutions to comply with the law. Experience from Peru has shown that initiating a lawsuit can lead to rapid release of information and may even encourage requests from government departments for technical assistance in implementing the law.
- Misapplication or restrictive application of the law, including through overbroad interpretation of exemptions, and/or secondary regulations on issues ranging from state secrets to costs for receiving information.
- Discriminatory application of the law and discriminatory provision of information.
- Certain flaws in the law, for example ambiguities regarding the range of government and parastatal institutions covered by the law, or the lack of a “harm” or “public interest test” for evaluating exemptions. In countries where the right of access to information enjoys constitutional recognition, litigation to address flawed legislation can be brought to the highest level.

In countries lacking FOI legislation, litigation should aim at specific results.

- To employ relevant existing constitutional or administrative provisions to entrench any ad hoc access to information mechanisms that already exist.
- To promote the right of access to information through cases chosen to underscore the need for an appropriate and functioning FOI regime.

At the Inter-American level, cases should be carefully selected both for their chances of success and for their potential to yield beneficial jurisprudence supporting the fundamental right of access to government-held information.

- Where victims have suffered clear harm as a result of the denial of information, cases are more likely to succeed.
- Cases which touch upon other basic rights, such as health or environmental protection or human rights violations, may prove more compelling for the Court (a similar approach proved successful before the European Court of Human Rights).³
- Information access should ideally be the central issue at stake, in order to establish access to information as a fundamental right.
- Cases from countries which have FOI legislation might be preferred, as the steps needed to fulfill the procedural requirement of “exhaustion of domestic remedies” are more evident. Furthermore, the existence of an FOI law provides a basis for arguing that the state has recognized the right of access to information.
- Where countries lack FOI legislation, cases at the Inter-American level can exert pressure for their adoption.

Many national governments and judicial systems are resistant to international jurisprudence, but participants at the Buenos Aires meeting did not view this as an obstacle, citing cases where reform had occurred despite professed rejection of international oversight. A recent example is the Inter-American Court’s decision against Chile in “*The Last Temptation of Christ*” case in which a

³ The European Court in a number of cases (*Leander, Gaskin, Guerra, McGinley and Egan*) has ruled that the positive obligation imposed on States by Article 8 (private and family life) includes the obligation to provide information.

challenge was brought to Chile's film censorship laws. The Court's ruling forced Chile to change the relevant constitutional and statutory provisions, replacing the prior censorship regime with a movie rating system.

Tactical considerations

Participants discussed tactical approaches to selecting cases at the national level, and identified the following considerations:

- All litigation, both national or international, should be compelling enough to generate widespread public support and provide advocacy platforms for law reform.
- Not all cases of interest to FOI professionals will attract public support. Challenges to arcane national security exemptions, for example, may have little advocacy value.
- Politically controversial cases are not always ideal for establishing clear precedents, particularly in national courts. Carefully chosen cases on obvious, if mundane, issues might be preferable. Some more cutting-edge cases might, however, be selected to challenge the perception that certain secretive institutions (like the army or the police) are immune to legitimate demands for information.

3. Priority Issues For Freedom of Expression Litigation

The meeting devoted a morning session to the discussion of key threats to freedom of expression in the region that can be addressed through strategic litigation and accompanying research and advocacy. Participants noted that litigation as a means of furthering free expression continues to be underused both at the domestic and Inter-American level.

The debate identified a number of cross-cutting priorities:

- *Promoting decriminalization of defamation and insult laws and the application of the "actual malice" principle for civil defamation laws.* Criminal defamation and insult/desacato laws remain on the books and are regularly enforced in most countries. Their chilling effects on media freedom and political debate in particular continue to be significant.
- *Challenging concentration of media ownership and promoting transparency of ownership structures.* Media ownership throughout Latin America is increasingly concentrated in the hands of small groups of multi-national corporations or local media barons. The problem is compounded by lack of transparency about who owns what and, in some countries, unreasonable judicial interpretations of property rights.
- *Challenging abusive and discriminatory allocations of government advertising.* Advertising, subsidies and other forms of indirect leverage are used by many governments to exert financial pressure and discriminate against critical media. It was noted that Chilean activists have taken Chile to the Inter-American Commission over the case of a small community radio that had its power cut by the local mayor.

- *Defending journalists and others against forced disclosure of confidential sources.* The laws and practices of many Latin American countries fail to provide adequate protection of journalists' right not to reveal confidential sources. Media professionals are often pressured to disclose their sources in the course of police or judicial proceedings brought against them (e.g., for libel or disclosure of state secrets) or in cases involving sensitive information published in the media.
- *In the broadcasting area, participants identified the need to promote:* independent and transparent regulatory authorities; fair access to and conditions for using frequencies; and reform of state-owned broadcasters, particularly aiming at fairer, unbiased broadcasting. Systemic harassment and discrimination against community broadcasters in certain countries (Brazil, Mexico, Paraguay, Venezuela) is a major concern.

Speakers and Participants

Néstor Baragli
*Oficina Anticorrupción
Ministerio de Justicia, Seguridad y Derechos
Humanos
Argentina
nbaragli@jus.gov.ar*

Mariela Belski
*Asociación por los Derechos Civiles
mbelski@adc.org.ar*

Jaime Cardenas
*Lima
jaime.cardenas@limac.org.mx*

Javier Casas
*IPYS Lima
jcasas@ipys.org*

Paula Castello
*AMARC Argentina
castello@paula.net.ar*

Ciro Colombara
*Colombara & Olmedo
ccolombara@cyo.cl*

Jorge Contesse
*Diego Portales Law School
jorge.contesse@udp.cl*

Helen Darbshire
*Open Society Justice Initiative
helend@sorosny.org*

Issa Luna Pla
*Lima
issa.luna@limac.org.mx*

Andrés Mejía
*IPYS Bogotá
amejia@ipys.org*

Alán García
*Lima
alan.garcia@limac.org.mx*

Gustavo Gómez
*AMARC Uruguay
gusgomez@chasque.apc.org*

Bethan Grillo
*Article 19
bethan@article19.org*

Hernán Gullco
*Asociación por los Derechos Civiles
hgullco@adc.org.ar*

Martha Farmelo
*Asociación por los Derechos Civiles
mfarmelo@adc.org.ar*

Lucía Fernández
*IPYS Lima
luciaf@ipys.org*

Eszter Filippinyi
*Open Society Justice Initiative
filippinyi@osi.hu*

Silvana Lauzán
*Participa
slauzan@participa.cl*

Fabiana Liut
*Transparent Markets
fliut@mercadostransparentes*

Nicolás Raigorodsky
*Oficina Anticorrupción
Ministerio de Justicia, Seguridad y Derechos
Humanos
Argentina
nraigoro@jus.gov.ar*

Laura Neuman
Carter Center
lneuman@emory.edu

Juan Pablo Olmedo
Colombara & Olmedo
jpolmedo@cyo.cl

Carlos Osorio
National Security Archive
cosorio@gwu.edu

Darian Pavli
Open Society Justice Initiative
dpavli@sorosny.org

Andrea Pochak
CEJIL/CELS
apochak@cels.org.ar

Luis Quinteros
Limac
luis.quinteros@limac.org.mx

Mario Rejtman Farah
Poder Ciudadano
rejtmanfarah@fibertel.com.ar

Guido Rodríguez
Defensoría del Pueblo de Panamá
grodriguez@defensoriadelpueblo.gob.pa

Roberto Saba
Asociación por los Derechos Civiles
rsaba@adc.org.ar

Rodrigo Santisteban
Limac
rodrigo.santisteban@limac.org.mx

George Vickers
Open Society Justice Initiative
gvickers@osi-dc.org

OPEN SOCIETY

JUSTICE INITIATIVE

The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.

The Justice Initiative is governed by a Board composed of the following members: Aryeh Neier (Chair), Chaloka Beyani, Maja Daruwala, J. 'Kayode Fayemi, Anthony Lester QC, Juan E. Méndez, Diane Orentlicher, Wiktor Osiatyński, András Sajó, Herman Schwartz and Christopher E. Stone.

The staff includes James A. Goldston, executive director; Zaza Namoradze, Budapest office director; Kelly Askin, senior legal officer, international justice; Mariana Berbec, junior legal officer, equality and citizenship; Helen Darbshire, senior program manager, freedom of information and expression; Indira Goris, program coordinator, equality and citizenship; Eszter Filippinyi, program coordinator, freedom of information and expression; Julia Harrington, senior legal officer, equality and citizenship; Nadejda Hriptievschi, junior legal officer, national criminal justice reform; Stephen Humphreys, senior officer, publications and communications; Katy Mainelli, administrative manager; Chidi Odinkalu, senior legal officer, Africa; Darian Pavli, legal officer, freedom of information and expression; and Martin Schönteich, senior legal officer, national criminal justice.

E-mail: info@justiceinitiative.org

New York

400 West 59th Street
New York, NY 10019 USA
Phone: +1 212-548-0157
Fax: +1 212-548-4662

Budapest

Oktober 6. u. 12
H-1051 Budapest, Hungary
Tel: +36 1 327-3100
Fax: +36 1 327-3103

Abuja

Plot 1266/No.11, Amazon Street
Maitama, Abuja, Nigeria
Phone: +234 9 413-3771
Fax: +234 9 413-3772

www.justiceinitiative.org