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Freedom of Expression – role and powers of NHRIs and other national mechanisms

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Session 3- NHRIs and the COE- mutual engagement for the benefit of all

1/ Thank you for the invitation. Like coming home; Strasbourg my second home town, served for 9 years as a judge on the ECHR. Thank you for providing me with the opportunity to contribute to a topical discussion in our troubled times.

In addition it feels really good to be able to freely express my thoughts since I am no longer attached to the Swedish Parliament nor the COE!

My presentation will focus on the Swedish experience. First I will give you an overview of our system and then share some concerns about the future.

2/ No NHRI in Sweden yet, but a proposal from the Government (Oct 2016) to the Parliament to create one. (Elaborate if time allows.)

3/The parliamentary ombudsman as well as the chancellor of justice play a key role in the Swedish system, which is celebrating it's 250 year's anniversary December 1st 2016 together with the our neighbors in Finland. One part (of four) of our constitution concerning freedom of the press. For the purposes of our discussions today it suffices to say that the chancellor of justice is the sole prosecutor in cases concerning defamation and other alleged breaches of the freedom of the media legislation in a court proceeding where a jury decides the question of guilt. The parliamentary ombudsman has an extraordinary supervisory role and can be described as a watchdog guarding the principle of freedom of information.

Our long perspective gives us a unique possibility to contribute to this debate. 250 years. The principles of protection of sources, anonymity and the ban on investigating sources and the ban on punishing anyone who has given information to the media have been developed over time under the umbrella of the unique, strange and/or exquisite principle of sole responsibility of the editor. In addition we have developed a self regulatory system through PO (Pressens Ombudsman) and PON (Pressens opinionsnämnd, Press Council, 100 years old).

A very local model of minor interest to this international audience. Actually the man behind it all was a member of parliament from Finland, at the material time an integrated part of the Swedish Kingdom. Very radical ideas then, it took the rest of the world some 200 years to catch on, but now we can see the spreading of Freedom of Information laws in most parts of the world. Many of these pieces of legislation are better/more modern than the model I represent here. It can be

described as a passive one, everything the authorities are doing, every document they hold, receive or draft is accessible – with few well defined exceptions – but you have to ask for it. Several more recent laws show a more proactive approach, putting some burden of transparency on the authorities/civil servants. This is a welcome development.

4/ What do we learn from this? What can be the synergies of national institutions and the COE?

Regardless of the quality of the legislation it is of absolutely no use if there is not the culture and tradition to underpin it. One example: A journalist asked to get a copy of a document from the Swedish embassy in Brussels. The document concerned EU-legislation and was not controversial, at least not on the face of it. The civil servant first refused to give access and then, when the journalist insisted asked what the journalist wanted it for, and who he was. After which the civil servant explained that it would take a week or so to produce the document. According to our system you have a constitutional right not to explain why you are asking for a certain document or who you are and there is an obligation on the civil servant to give priority to the task, the document should in principle be produced immediately. As you understand there were many reasons to criticize the embassy and/or the civil servant for how this request was handled. (The example is made up by me but inspired by and a compilation of several real complaints made to the Parliamentary Ombudsman.)

My experience as Parliamentary Ombudsman has taught me that in many cases where things go wrong it is not caused by bad intent or negligence but rather by lack of education. Some civil servants are simply not aware of the legislation and how it is relevant to their daily work. This feature is particularly present on the municipal level where the civil servants often lack the basic knowledge about the constitutional rights of citizens even though they often handle and decide issues that are very important to citizens (childcare, support to persons incapable to sustain themselves, etc). In contrast with the central governmental agencies, including government office itself also subjected to the same rules, they seldom benefit from the support of a legal staff.

No one size fits all. What model you choose will depend on many factors such as legal system and tradition and the level of faith or trust the citizens have in their public institutions. This will in turn guide what will be the best practice when it comes to working together with COE and other international networks.

A particular feature of the system I am talking about is what is called the protection of sources, the right to be anonymous when leaking information/documents and the prohibition for the employer to investigate what civil servant provided the (classified) information. This can be difficult to understand if you come from a system where your loyalty to your employer carries more weight than the principle of access to information. I am not going to tell you that the one system is better than the other; it all depends. Benchmarking is fine but in the end the legislator has to make a choice and to remain vigilant and protective of the rights achieved.

Any system it can be abused. A complaint was filed with the Ombudsman by a person who was well known in many governmental agencies and by many civil servants (including the ombudsman's office itself) for frequent and voluminous requests for documents. A municipal agency got more or less flooded by these requests, employed a person only to keep up with the requests but when that was not enough took the case to the municipal council who decided that henceforth no request coming from this particular individual should lead to any action. This was communicated to the person who filed a complaint to the ombudsman. Not surprisingly the ombudsman found that what the municipality had done was in breach of the Constitution and pronounced severe criticism. The situation is currently being studied by the Government. Maybe we will see a proposal for amended legislation; limiting the number of documents you can ask for at one particular time (situation in Finland?) and/or asking the citizen to pay a nominal fee for the service rendered.

The Swedish/Finnish system is a sensitive one, well worth of protection. But it needs to be developed on a long-term basis. It can easily be demolished. This is why what is happening in Europe and elsewhere right now concerning the working conditions and security of journalists is deeply worrying.

Social media and the technical development poses real challenges to the system and there are voices in Sweden claiming that the principle of access to information has come to its end and has to be abandoned, specifically pointing at the growing problem with hate speech. Wrong! The principle should be retained, especially important in these times of fact resistance but it has to be adapted to modern life. The problem lies more with the (non)application of the legislation than with legislation itself. Attitude of police and prosecutors sometimes part of the problem.

The balancing of the interest of freedom of speech (Art 10) against the interest of personal integrity (Art 8) is a delicate exercise.

Ownership structure of media is another feature influencing what we are discussing right now but beyond the scope of this debate.

Let me finish by telling you something about was is cooking in Sweden right now and hopefully by doing so inspiring a discussion:

On 7 November 2016 the minister of culture and democracy received an official report concerning possible ways to reform the state support of media. Currently the receivers of financial support from the state are basically newspapers together with public service radio and TV. The Government has seen a need to review the support in order to make it more technique neutral, among other things, to allow what is sometimes referred to as new media to profit as well. There is a concern that local journalism has suffered from recent developments and that, as a result, quite a few municipalities are not covered at all. The investigation/report seeks to remedy this. This is hardly controversial but the proposal to introduce a democracy condition is. The current support does not

focus on content but the proposed one will and publishers publishing content not respecting “fundamental values” should not qualify for the support.
-How is this going to assessed?
The proposal is to install a kind of board of individuals representing different actors on the media market (ie no politicians) but this part of the proposal has been criticized as a potential threat to the freedom of expression.

Finally, let me wrap up as follows: Like all human rights freedom of Expression is never achieved once and for all, never a done deal. It is a constant battle, requiring from all of us that we all are vigilant, all the time.

Thank you.