

THE DANISH
INSTITUTE FOR
HUMAN RIGHTS

PUBLIC
PARTICIPATION
COMPLIANCE

PUBLIC PARTICIPATION COMPLIANCE

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ABBREVIATIONS

CRC	Convention on the Rights of the Child
DIHR	Danish Institute for Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICNL	International Centre for Not-for Profit Law
ISHR	International Service for Human Rights
NGO	Non-governmental organization
OSI	Open Society Institute
OSCE	Organization for Security and Cooperation in Europe
UDHR	Universal Declaration for Human Rights
UN	United Nations
UPR	Universal Periodic Review

CHAPTER 1

1. DEFINITION OF PUBLIC PARTICIPATION

” Public participation means processes in which individuals, groups, and organizations have the opportunity to participate and take part in the conduct of public affairs that affect them, or in which they have an interest¹

The adopted definition clarify that rights holders take active part in how public affairs are conducted by the duty bearers. As will be elaborated in further detail below our understanding of public participation implies that participation can be initiated by individuals, groups, organizations and other non-state actors as well as by invitation of public authorities and decision makers. In addition public participation can be exercised both in direct or indirect ways.

DIRECT PARTICIPATION	INDIRECT PARTICIPATION
TO STAND FOR ELECTION	FREELY CHOSEN REPRESENTATIVES
TO CAST A VOTE	
CITIZENS IN DIALOGUE WITH ELECTED REPRESENTATIVES & PUBLIC ADMINISTRATION	
THE RIGHT TO BE HEARD AND CONSULTATIONS	

The understanding of public participation traditionally drawn focus on election. The right to be elected and the right to vote are modes of *direct participation*.

To be represented through chosen representatives is on the other hand termed *indirect participation* since the elected individuals act as representatives of the voters and take over the responsibility of political decision making.

However, there are a variety of ways to enjoy *direct participation* which as the term indicate is a direct way to influence the exercise of political decisions including those reached by the legislative, executive and administrative powers.

¹ Definition made by the Canadian Population and Public Health Branch

Public participation is therefore enjoyed both during elections but is also on-going between periods of elections.

In order to provide the necessary conditions to be able to participate in the conduct of public affairs in a meaningful way, other civil and political rights are essential. This includes freedom of expression, freedom of assembly and freedom of association.

CHAPTER 2

2. PUBLIC PARTICIPATION AND THE INTERNATIONAL HUMAN RIGHTS STANDARDS

The international human rights standards are precise in formulating participation in the conduct of public affairs and the three composite civil and political rights enabling effective and genuine public participation. The Universal Declaration of Human Rights from 1948 include these four rights and they are again to be found in the legally binding International Covenant on Civil and Political Rights from 1966.

A large number of other rights contributing indirectly to create positive conditions to public participation but without being fundamental as the following core civil and political rights.

THE RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS

Article 25 in the International Covenant on Civil and Political Rights (1966) protect the right to participate in the conduct of public affairs:²

“ Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives.
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The Human Rights Committee has in General Comment 25 interpreted how to understand direct participation in article 25 in ICCPR:

“ The conduct of public affairs, is a broad concept which relates to the exercise of political power and in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public

² International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49

administration, and the formulation and implementation of policy at international, national, regional and local levels³.

The Committee goes on to outline how citizens can participate in direct manners:

” Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

To conclude the Committee quite clearly express that this right can be enjoyed directly or indirectly and the Committee also emphasize that this right cannot be fully realized unless freedom of expression (ICCPR article 19), freedom of assembly and association (ICCPR article 21 & 22) are also secured.

FREEDOM OF OPINION AND EXPRESSION & ACCESS TO INFORMATION

Freedom of opinion and expression is protected by ICCPR article 19:

” 1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other 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 reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.⁴

Freedom of opinion and freedom of expression are essential for any free society. These rights entail freedom to disseminate ideas in a variety of ways, such as through spoken,

³ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : 12-07-1996. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments)

⁴ International Covenant on Civil and Political Rights. General Assembly Resolution 2200A (XXI). 16 December 1966. Article 19

written and sign language, images and objects of arts, books, newspapers, pamphlets, posters, dress, audio visual, electronic or the Internet. Freedom of expression includes both the freedom to express and the freedom to receive information in political discourses, individual or public affairs, journalism, cultural and artistic media, teaching, religious discourses and commercial advertising. It also includes being able to request information from public authorities. A vital condition in enjoying freedom of expression is *the ability to seek, receive and impart information* and ideas of all kinds, regardless of the sources and particular viewpoints conveyed.

FREEDOM OF ASSEMBLY

Freedom of assembly is protected in article 21 of ICCPR and reads as follows:

” The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.⁵

Freedom of peaceful assembly allows for the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose. According to the Organization for Security and Cooperation in Europe (OSCE) definition, which includes static and moving assemblies in outdoor and indoor spaces,⁶ freedom of assembly should be enjoyed with as few regulations as possible.

FREEDOM OF ASSOCIATION

Freedom of association is protected by article 22 in ICCPR:

” 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful

⁵ Ibid. Article 21

⁶ Guidelines on Freedom of Peaceful Assembly. OSCE Office for Democratic Institutions and Human Rights (ODIHR) Poland 2007

restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.⁷

Freedom of association has a positive and a negative aspect. The positive is freedom to associate and the negative is freedom to refuse to associate. It follows that governments can deny this freedom in two ways. Either by prohibiting individuals from associating with those they would choose to associate, or by forcing individuals to associate with those they would otherwise choose not to associate. In the protection of this right, all individuals should also be able to associate informally. Civic organization laws should be written and administered so that it is quick, easy, and inexpensive to establish a civic organization as a legal person.

PROHIBITION OF DISCRIMINATION

These four rights as well as all other rights in the UDHR as well as in ICCPR should be granted *equally to everyone* without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. When it comes to the mentioned four civil and political rights vital to public participation, it is crucial that extra efforts be made to ensure that the participation environment includes minorities, vulnerable and marginalized groups. In article 2 in UDHR, the entitlement is formulated as follows:

” Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷ International Covenant on Civil and Political Rights. General Assembly Resolution 2200A (XXI). 16 December 1966. Article 22

OTHER LEGALLY BINDING INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND PUBLIC PARTICIPATION

Since the UDHR (1948) and ICCPR (1966) were adopted a number of other human rights instruments have elaborated on the principle of participation in relation to the specific focus of the instruments. Also UN treaty bodies, special procedures etc have during the recent decades paid attention to participation and the right to be heard. The following are selected examples illustrating this positive tendency.

1. Covenant on Economic, Social and Cultural Rights & the Declaration on the Right to Development

In the Covenant on Economic, Social and Cultural Rights adopted in 1966 the UN sub-committee has issued a number of general comments where the principle of participation continuously is flagged as a central and leading principle when it comes to development issues. In the interpretation of the Covenant the sub-committee point to broad and inclusive participation in planning and/or decision making in e.g. education, the right to adequate food, the right to water, the right to health, the right to work and the right to take part in cultural life.⁸

The rather strong emphasis on everyone's participation in developmental issues has an equally strong priority in the UN Declaration on the Right to Development from 1986.⁹ In this it is repeated throughout the text that development policies should be made on the basis of all individuals active, free and meaningful participation.

Neither the general comments nor the declaration are legally binding. However, in different they both ways carry authority and express aims, values and principles of importance which are instrumental and guiding for member states.

2. Convention on the Elimination of All Forms of Discrimination against Women

This convention adopted in 1979 by the UN General Assembly establish in part II in article 7 (a), (b) and (c) that women should have equal access to the participation in the conduct of public affairs at three different levels.¹⁰

⁸ Committee on Economic, Social and Cultural Rights - General Comments 1, 11, 12,13,14,15, 18 & 21.

<http://www2.ohchr.org/english/bodies/cescr/comments.htm>

⁹ Declaration on the Right to Development. Adopted by General Assembly resolution A/RES/41/128 of 4 December 1986

¹⁰ Convention on the Elimination of All Forms of Discrimination against Women. Adopted by General Assembly resolution 34/180 of 18 December 1979

” Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

This quite broad definition of women’s rights in the political and public life mirrors very much the earlier mentioned interpretation of public participation in General Comment 25 of ICCPR.

3. Convention on the Rights of the Child

This convention from 1989 affirms in article 12 (1) the right of the child to be heard in matters affecting the life of the child.¹¹

” Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

4. Convention on the Rights of Persons with Disabilities

This convention from 2006 applies a broad definition of participation by both embracing the right to be consulted and heard in matters concerning persons with disabilities

¹¹ Convention on the Rights of the Child. Adopted by General Assembly resolution 44/25 of 20 November 1989

(article 4 (3)) as well as the right to be involved on equal terms in activities relating to the conduct of public affairs (article 29 (b) and (i))¹²

” Article 4 – General obligations

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

Article 29

(b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

NON BINDING HUMAN RIGHTS INSTRUMENTS AND PUBLIC PARTICIPATION

Below are two examples of non-binding international human rights instruments where public participation is central. These examples illustrate the tendency of adopting participation as a guiding principles in the conduct of national as well as international affairs.

1. United Nations Principles for Older Persons

The General Assembly adopted in 1991 a resolution on United Nations Principles for Older Persons. In this participation is formulated as one out of five main principles which

¹² Convention on the Rights of Persons with Disabilities. Adopted by General Assembly resolution A/RES/61/106 of 13 December 2006

governments are encouraged to follow when developing national programming¹³. The principle on participation establish that older persons should participate in formulating policies affecting them. This is another example of the right to be heard in matters affecting the person although the declaration is not legally binding.

” Participation

7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

2. Universal Period Review

Within the framework of the UN Human Rights Council, the Universal Periodic Review (UPR) acts as a state reporting mechanism. According to guidelines to be applied the member states are encouraged to conduct hearing processes prior to the drafting of the national report.¹⁴ Although not compulsory experiences have shown that most states do in fact carry out such consultation processes.

¹³ United Nations Principles for Older Persons. Adopted by General Assembly resolution 46/91 of 16 December 1991
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>

¹⁴ 5/1. Institution-building of the United Nations Human Rights Council of 18 June 2007, section 15 (a)

CHAPTER 3

3. COMPLIANCE

By becoming a party to the United Nation's human rights treaties the individual state assume obligations and duties under international law to respect, to protect and to fulfil human rights.

The obligation *to respect* means that the state must refrain from interfering with or minimizing the enjoyment of human rights.

The obligation *to protect* requires the state to protect individuals and groups against human rights abuses.

The obligation *to fulfil* means that the state must take positive action to facilitate the enjoyment of basic human rights.

Through ratification of international human rights treaties the government undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties.

At domestic level, the constitution and the legislation must be harmonized with international human rights obligation and duties of the country including the civil and political rights essential to exercise public participation. The legislation must clearly reflect the international standards including their principles and values as well as measures to reach and support those or in case of violations which counter measures to take.

Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are respected, protected, implemented, and enforced at the national level.

The following focuses on public participation and compliance including what the state can do to respect, to protect and to fulfil the four core civil and political rights in domestic legislation and the implementation of this. The examples are not exhaustive

but serve as illustrations of possible initiatives and best practices for states wishing to carry out its international obligations.

THE RIGHT TO PARTICIPATE IN THE CONDUCT OF PUBLIC AFFAIRS

At the basic level public participation in politics entails the absence of force or intimidation and it requires states to show *respect* by refraining from putting up restrictions and limitations to the crucial freedom rights. Other important factors include that systems, institutions and procedures are put in place by the state which also make efforts to ensure that these rights and freedoms can be enjoyed by all to avoid unfair and unreasonable discrimination. Finally, it implies the availability of reliable and independent judicial procedures to appeal to if the basic requirements are not met.

Any limitations and restriction which applies to the exercise of the right protected by the ICCPR Article 25 in ICCPR should be based on *objective and reasonable criteria* such as age and mental incapacity. However, restrictions due to economic status, language, literacy and political affiliation are impermissible. Conditional restrictions based on residency may for example be permissible as long as these limitations do not exclude homeless persons.¹⁵

Given the many components making up this right and the many ways in which it can be *fulfilled* this implies that there are many obligations binding upon states.

This is especially the situation when it comes to *indirect participation* the following illustrate the complex set of structures/instruments, resources and other types of conditions which the state has to resolve in the legislation as well as in effective institution building and systems as well as procedures to implement the legislation resulting in free and fair election living up to the international standards. The election cycle can be divided into three main phases:¹⁶

PRE ELECTION

Legal framework: Constitution, legislation, electoral system and boundaries, electoral bodies and code of conduct

Planning & implementation: Budgeting, funding & financing, election calendar, recruitment & procurement and logistics & security

Training & education: Operational training for election officials, civic education and voter information

Voter registration: Voters registration, observers accreditation, domestic observers and parties & candidates

¹⁵ OHCHR GC No. 25, para. 11; Human Rights and Election p. 10 para 65

¹⁶ Electoral Process Programme. The International Institute for Democracy and Electoral Assistance

Electoral campaign: Campaign coordination, breeches & penalties, party financing, media access and code of conduct

ELECTION PERIOD

Voting operation and election day: Vote counting, voting and special & external voting

Verification of result: Official results, complaints and appeals and tabulations of results

POST ELECTION PERIOD

Post-election: Audits & evaluations, voter lists, update institutional strengthening & professional development, legal reform and archiving & research

Quite detailed indicators are developed to measure the quality of the structures/activities in all three steps in the cycle.¹⁷ The set of indicators in the referred example can be of assistance to help identifying weaknesses and corresponding recommendations needed to improve the election cycle. This is crucial in order to ensure that it is in fact freely chosen representatives that conduct the public affairs in a given country.

Between elections the question is how the elected representatives integrate public participation into the decision making process. When it concerns *direct participation* it is not just citizens but the possibility of everybody to engage at different levels of governance including planning and deciding priorities for development and public service provision.

In accordance with the United Nations main website a country's credibility and respect is very much judged by its ability to exercise good governance. UN understand this as follows: "*Good governance promote equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring.*"¹⁸

Following the same trend of thinking, the Council of Europe model below is an example of how to define the steps applied by governments and parliaments in the process of formulating, implementing and adjusting policies¹⁹:

¹⁷ One such an example is A Framework for the Systematic Study of Election Quality. Jørgen Elklit and Andrew Reynolds. November 2004 <http://aceproject.org/electoral-advice/archive/questions/replies/320596246/136841045/c-project-on-election-admin-quality-fdem106903-dvs-april-2005-art-i-democratization.pdf>

¹⁸ What is Good Governance? Governance. Global Issues. United Nations. <http://www.un.org/en/globalissues/governance/>

¹⁹ Code of Good Practice for Civil Participation in the Decision-Making Process. Adopted by the Conference of INGOs at its meeting on 1st October 2009. Conference of INGOs of the Concil of Europe. CONF/PLE(2009)CODE1

Agenda setting: Political agenda including new policy initiatives made by the parliament and government

Drafting: A policy is turned into draft regulations e.g. laws, motions or policy directive

Decision: Draft regulations are decided by public authority, parliament, referendum etc.

Monitoring: Outcome of Implemented policy is measured and accessed to determine degree of realization

Reformulation: Findings from monitoring of the policy implementation and evolving needs feed into reformulation of the policy

Direct public participation can be applied in some or all steps and in different ways. At the policy level a referendum is often taking place when a new constitution is to be adopted while in connection with the passing of the annual municipality budget the city council might present the draft budget on its website and allow for posted comments or call for an open budget meeting in the town. Non-governmental actors such as NGOs, human rights defenders, unions, media and oppositional politicians often influence agenda setting and create public debates addressing government policies, decisions or performance at all decision making levels. When bringing attention to complex issues in accessible manners such public debates can affect the policy makers whom sometimes become diligent monitors of the polls in order to accommodate the public opinion.

Parliaments and governments operating in open and transparent manners provide easy access to information about policies, decisions, plans, draft laws, budgets, practices etc. as well as opportunities for consultation processes enabling direct public participation particularly by the civil society in all five levels. This is a top-down approach because the initiative is taken by the policy makers.

In countries with governments less committed to initiate direct public participation the top-down approach is typically incomplete or entirely absent but direct public participation is sometimes instead enjoyed as a result of bottom up initiatives. It is quite often the role of the organized civil society including the media, academics, the political opposition, unions, NGOs etc. to monitor the five areas of public decision making, to draw attention areas of concern and engage in monitoring, awareness raising and advocacy to create broad support and sufficient pressure on the policy makers.

Similarly in open governed countries the bottom up approach is important to enable citizens, groups, organizations etc to bring up issues of concern and viewpoints to influence the policy making at all levels. Although the government provide avenues for direct public participation these might be incomplete in terms of decisions taken as well as the degree of involvement or topics not decided upon.

To enable individuals to engage in direct participation in the conduct of public affairs domestic legislation should establish how state institutions provide avenues and mechanisms for everyone to participate directly in the subject areas of their mandates. In some countries it is for example stated in the constitution that there should be public access to parliament proceedings.

These are some types of legislation where avenues and procedures to exercise direct public participation should be prescribed:

- Legislation on planning legislation
- Legislation on public records
- Legislation on public administration
- Legislation on local government
- Legislation on election
- Legislation on information and communication
- Legislation on environment
- Legislation on health
- Legislation on equal treatment and right of minority groups

For example, when developing legislation or adoption of national action plans on these sectors or areas, the involvement of affected and concerned individuals and groups should be integrated into the policy level and in preparation of the legislation. There are good examples of legislation outlining how and when direct participation can take place.

Based on ratified international conventions on environmental protection the parliament of Zambia has as an example passed new legislation where direct public participation especially in national policy on the environment at the community level should actively involve local authorities and communities.²⁰ The legislation outline e.g. avenues of participation in the environmental impact assessments process prior to the initiative is started, before major decisions are reached and consultations during the implementation processes. According to the findings of the study there are, however, a number of challenges hindering an effective implementation of the legislation.

Direct participation in matters affecting certain individuals and groups such as persons with disability, children, minorities or ingenious people regulations, procedures etc should be established. To fulfil this obligations in a meaningful way for example for children, there are a number of conditions that have to be in place.

²⁰ Public Participation in Zambia. The case of Natural Resources Management. Nosiku Sipilanyambe Muniyinda & Lee Habasonda. 2012. The Danish Institute for Human Rights (not yet published)

To illustrate how a child can be heard in matters affecting his or her life as stated in article 12 of the Convention on the Rights of the Child (CRC), the Committee on CRC in general comment 12 interpret principles and conditions to be in place to provide this particular right and guiding principle. Article 12 establish that the child should be heard in judicial proceedings, in the family, in alternative care, in health care, in education and school, in play, recreation, sports and cultural activities, in situations of violence etc. The best interest of the child and the freedom of expression of the child are highlighted as cross cutting principles to guide adults when they in practice offer the right to be heard in their interaction with a child.²¹ An authoritative implementation handbook of CRC has been developed by UNICEF which offers further insights into the interpretation of all of the listed situations where a child should be heard as well as a checklist for state institutions responsible for implementing article 12 as well as all other articles in CRC.²²

A final example of direct public participation initiated by the government concerns the Universal Periodic Review (UPR) in Burkina Faso. The Ministry of Human Rights took lead in providing information about this instrument in 2008 when Burkina Faso was reviewed under this mechanism for the first time in the UN Human Rights Council. Efforts were made to form a cooperation based on active participation of the state, civil society and the independent National Human Rights Commission in this process. Consultations were conducted by the state to collect comments on the state report and to encourage the civil society to prepare their own alternative reports on the human rights situation in the country. After the UPR review in the Human Rights Council focus was on implementation of the adopted recommendations. The government established an inter-ministerial follow up committee to ensure broad participation in the implementation process. The civil society and the National Human Rights Commission were therefore represented in this committee.²³

²¹ General Comment no. 12 (2009). The right of the child to be heard. Convention on the Rights of the child. CRC/C/GC/12. 20 July 2009

²² Implementation Handbook for the Convention on the Rights of the Child. Rachel Hodgkin and Peter Newell. UNICEF. 1998

²³ NATIONAL REPORT SUBMITTED IN ACCORDANCE WITH PARAGRAPH 15 (A) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1. Burkina Faso. HUMAN RIGHTS COUNCIL. Working Group on the Universal Periodic Review. Third session. Geneva, 1-15 December 2008. A/HRC/WG.6/3/BFA/1 and National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21. Burkina Faso. Human Rights Council Working Group on the Universal Periodic Review. Sixteenth session. Geneva, 22 April–3 May 2013. A/HRC/WG.6/16/BFA/1

FREEDOM OF OPINION & EXPRESSION AND ACCESS TO INFORMATION

Freedom of opinion and freedom of expression are closely interrelated and inseparable. Furthermore, freedom of opinion and expression form a basis for the full enjoyment of a range of other human rights including freedom of assembly and association as well as the right to vote.²⁴

In General Comment no. 34 the Human Rights Committee elaborate the interpretation of article 19 in ICCPR which protect these freedoms. The Committee perceive freedom of opinion as unique as it requires full protection without interference. It is an absolute right in other words. All forms of opinions are protected in article 19 such as opinions relating to politics, science, history, moral or religion. Finally, any form of forcing the holding or not holding of any opinions is prohibited and freedom to express an opinion or freedom not to express as well as the right to change opinion is covered by article 19.²⁵

The first Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression understand “freedom” as dual. One aspect covers freedom of access to the state which refers to the participation of the individual or groups in matters of the state. Following the Special Rapporteur this connotes obligations of the state to guarantee the right with positive measures. In General Comment 34 the Human Rights Committee elaborate that the obligation of the state are binding on every state party as a whole including the executive, legislative and judiciary and other public or governmental authorities at all level such as national regional or local. The Committee furthermore determine that article 19 (2) concerning access to information include records held by public bodies regardless of the form in which the information is stored , its source and the date of production. This include the media having access to information on public affairs as well as a right of the general public to receive media output. In addition every individual should be able to obtain personal stored data from public authorities as well as from private individuals or bodies controlling such files. State parties should make every effort to ensure easy, prompt, effective and practical access to such information and state parties should enact the necessary procedures to gain access to information, such as by adoption of freedom of information legislation.²⁶

²⁴ General comment no. 34. Article 19: Freedom of opinion and expression. Human Rights Committee. 201nd session. Geneva, 11-29 July 2011. CCPR/C/GC/34. 12 September 2011

²⁵ Ibid. Page 2-3

²⁶ Ibid. Page 2-5

The other understanding of freedom of expression refers to freedom from the state. Privacy should be guaranteed to the individual by providing protection from any undue external interference by the state or by third parties. Following this the state is in principle not obligated to guarantee the right with positive measures.²⁷

In reference to the European Court of Human Rights the Special Rapporteur point out that freedom of expression is both applicable when information and ideas are regarded as favourable, inoffensive or with indifference as well as those offending, shocking or disturbing the state or the population. Consequently, article 19 (2) imply that every communicable type of idea, information, opinion, news, advertising, art, critical political commentary etc falls within the scope of protection.²⁸ Both the Special Rapporteur and the Human Rights Committee draw special attention to the role of the media as being crucial in securing the enjoyment of freedom of opinion and expression as well as all other rights in ICCPR. The press should be freed, uncensored and unhindered and state parties should ensure that the public broadcasting services operate independently.

As mentioned above freedom of opinion is to be perceived as absolute while freedom of expression can be subject to restriction by law or any other power. This is stated in article 19 (3) where two types of restrictions are permitted. Restrictions can be applied either when relating to the respect of the rights or reputations of others or to the protection of national security, public order, public health or morals.²⁹

The national legislation should establish how it is lawful to make restriction and at the same time stay within the boundaries of the international human rights standards. The Special Rapporteurs on freedom of opinion and expression have provided quite extensive and helpful interpretations on article 19 (3) concerning permissible limitations on freedom of expression and access to information. This include interpretations of the terminology in paragraph 3 such as national security, public order, public health, public morals and state of emergency .³⁰ The following is a shortening of the guiding principles proposed to states when formulating possible restrictions:³¹

- ✓ The restriction must not undermine or jeopardize the essence of the right of freedom of expression
- ✓ The relationship between the right and the limitation must not be reversed

²⁷ Promotion and protection of the right to freedom of opinion and expression. Report of the Special Rapporteur, Mr. Abid Hussein, pursuant to Commission on Human Rights resolution 1993/45. Commission on Human Rights. Fifty-first session. Item 10 of the provisional agenda. E/CN.4/1995/32. 14 December 1994. Page6-7

²⁸ Ibid. Page 8-9

²⁹ Ibid. page 5

³⁰ For a list of all accessible documents go to the website of the Office of the High Commissioner for Human Rights: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Issues.aspx>

³¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue. Human Rights Council. Fourteenth session. A/HRC/14/23. 20 April 2010. Paragraph 79

- ✓ All restrictions must be provided for by pre-existing statutory laws
- ✓ Laws imposing restrictions must be accessible, concrete, clear and unambiguous so that they can be understood by everyone
- ✓ Laws imposing a restriction must set out the remedy for challenging the illegal application of the restriction
- ✓ Laws imposing restrictions must not be arbitrary and must not be used as a means of political censorship
- ✓ Any restrictions imposed on the exercise of a right must be “necessary” and i) be based on grounds recognized by ICCPR, ii) address a pressing need, iii) pursue a legitimate aim and iv) be proportionate to that aim
- ✓ Certain specific limitations are legitimate if they are necessary in order for the State to fulfil an obligation to prohibit certain expressions that cause serious injury to the human rights of other
- ✓ Restrictions already established must be reviewed
- ✓ In state of emergency States are permitted to temporarily suspend certain rights
- ✓ Any restrictions must be consistent with other rights recognized in ICCPR and other international human rights instruments
- ✓ All restrictions shall be interpreted in the context of the particular right concerned

FREEDOM OF ASSEMBLY

Following the Special Rapporteur on the rights to freedom of peaceful assembly and of association, an assembly is an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in. Assemblies play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events, and importantly, influencing States’ public policy.³²

The Special Rapporteur draws attention to that freedom of peaceful assembly is not an absolute right but can be subject to certain restrictions. He further emphasize that the

³² Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Human Rights Council Twentieth session. Agenda item 3. A/HRC/20/27. 21 May 2012

freedom is to be considered the rule and its restrictions the exception. He continues that restrictions must not impair the essence of the right.³³

National legislation and practices leading to enjoyment of freedom of peaceful assembly (and the right to freedom of association) ought to adopt to the norms and principles established in ICCPR in articles 21 and 22 (2):

” No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

In order to implement freedom of peaceful assembly it is crucial that the state does not impose impermissible restrictions in legislation or in the regulating body and procedures. Other crucial responsibilities of the state is to provide protection and exercise respect in case of lawful assemblies being disrupted either by law enforcement agencies or other individuals, groups etc.

The Special Rapporteur draws attention to the Organization for Security and Cooperation in Europe (OSCE) guideline on freedom of peaceful assembly. The OSCE guidelines aim at guiding especially legislators by taking point of departure in UDHR, ICCPR but also the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁴ The 7 guiding principles in the regulation include:

- ✓ Any kind of peaceful assembly not expressly forbidden by law should be presumed permissible
- ✓ The state has a positive obligation to facilitate and protect peaceful assembly
- ✓ Any imposed restriction must have a formal basis in the law and should be in conformity with international law
- ✓ Restricting measures should be proportionate to the pursuance of legitimate aims
- ✓ Freedom of assembly should be enjoyed equally by all and the regulating authorities must not discriminate
- ✓ The public should be informed and have easy access to the regulating body governing freedom of assembly and the regulating process should be fair and objective. Any restrictions and reasons for this should be communicated

³³ Ibid.

³⁴ Guidelines on Freedom of Peaceful Assembly. OSCE/ODIHR. Warsaw. 2007

- promptly to the organizers and appeal to an independent court should be allowed as early as possible
- ✓ The regulating body must comply with the legal obligations and should be held accountable for any failure

The OSCE guidelines furthermore provide guidance on legitimate grounds for restrictions and procedural issues as well as policing public assemblies, responsibilities of the organizer and monitoring of peaceful assembly.

FREEDOM OF ASSOCIATION

Freedom of associations include registered political parties as well as NGOs, media organizations, student groups, local community networks and coops, charities, indigenous self-governing bodies, labour and trade unions, lobbyist groups, religious organizations, academic institutions, online associations, sports clubs, and other independent and organized groups. Membership in associations may be inclusive and heterogeneous or exclusive and homogenous.

Again the Special Rapporteur on the rights to freedom of peaceful assembly and of association has contributed to a useful and concise definition:

” An “association” refers to any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.³⁵

Freedom of association has a positive and a negative dimension since it include both the free and voluntary right to associate but also the right not to associate with others. Compulsory membership of for example a political party, union or religious group is not considered permissible.

The state furthermore has a negative obligation not obstruct in the exercise of the right to associate. Obstructions of the right to associate carried out by states can be done in a multitude of impermissible ways. As outlined above articles 21 and 22 in ICCPR establish that both the rights to associate and assemble can be limited only i) in the interests of national security or public safety, ii) for the prevention of disorder or crime, iii) for the protection of health or morals or iv) for the protection of the rights or freedoms of

³⁵ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Human Rights Council Twentieth session. Agenda item 3. A/HRC/20/27. 21 May 2012

others. These restrictions can only be imposed “in conformity with the law” and when strictly “necessary in a democratic society.”

International Centre for Not-for Profit Law (ICNL) and Open Society Institute (OSI) have prepared an extensive set of guidelines of how to legislate on civic organizations. Along the line of positive obligations the ICNL/OSI guidelines emphasize the importance of domestic legislation reflecting principles such as:³⁶

- ✓ There should be a single, national registry of all civic organizations that is accessible to the public
- ✓ Civic organization laws should be written and administered so that it is quick, easy and inexpensive to establish a civic organization as a legal person
- ✓ The establishment of a civic organization should require filing only a small number of clearly defined documents
- ✓ Basic rights, limits and powers of civic organizations should be defined by law. In addition, certain minimum provisions necessary for the operation and governance of a civic organization should be required in an organization’s governing documents
- ✓ Formal civic organizations should generally be permitted to engage in any legitimate fundraising activity, including door-to-door, telephone, direct mail, television, campaigns, lotteries, raffles, and other fundraising events
- ✓ Any civic organization receiving more than minimal benefits from the state or engaging in a significant amount of public fundraising should be required at least annually to file appropriate reports on its finances and operations with the state agency that is responsible for general supervision of civic organizations
- ✓ All acts or decisions affecting formal civic organizations should be subject to appropriate administrative and judicial review.

The guidelines provide further detailed recommendations concerning legislating on regulating civil society organizations including the establishing and registration, public registry, structure and governance of organizations, prohibition on direct or indirect private benefit, activities, fundraising, reporting/supervision/ enforcement, taxing, foreign organizations and foreign sources of funds.

As indicated in the first two principles listed above the ICNL/OSI guidelines refer to a transparent public registry. The guidelines propose that there is a need for creating a registry of all formal civic organizations which the public has access to. Such registered organizations hold status as legal persons. However, the guidelines do not touch upon the question of non-registered organizations.

³⁶ Guidelines for Laws Affecting Civic Organizations. Second Edition. Open Society Institute & International Centre for Not-for-Profit Law. Open Society Institute, New York. 2004

The mentioned Special Rapporteur on the rights to freedom of peaceful assembly and of association goes into the question of registration by arguing for a “notification procedure” rather than a “prior authorization procedure” as this “...comply with the international human rights law”³⁷

International Service for Human Rights (ISHR) places itself in a third position by arguing for associations to freely choose the legal form that best suits its members. This being either the registered form as a legal person or the more relaxed, not registered form, the de facto group. ISHR argues that ICCPR or other international instruments does not specify the form which an association may take and that it is in fact the intentional spirit of ICCPR to adopt a broad interpretation.³⁸

Special attention is now paid to human rights associations and activists as they are especially at risk of persecution due to the sometimes critical role they have to the government. In 1998 the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms was adopted by the UN General Assembly. In 2000 another step was taken by establishing a Special Rapporteur on the situation of human rights defenders. The present Special Rapporteur, Margaret Sekaggya, prepared in 2011 a commentary on the Declaration on human rights defenders.³⁹ In this she emphasizes the importance of not imposing undue restrictions on the civil and political rights and freedoms as they are fundamental for human rights defenders and others in pursuing their activities. The Special Rapporteur furthermore express concern about the tendency of a large number of countries enacting laws where the rights to associate, express, assemble etc are subject to limitations that in many cases are incompatible to the national constitution and the international human rights obligation of the country.⁴⁰

A legal analysis made in 2012 by International Centre for Not-for Profit Law and World Movement for Democracy Secretariat mirror the concerns expressed by the Special Rapporteur. In their analysis they draw attention to that it is especially domestic legislation in the areas of registration, operational activity,

³⁷ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai. Human Rights Council Twentieth session. Agenda item 3. A/HRC/20/27. 21 May 2012, page 15

³⁸ The right to Freedom of Association. Human Rights Defenders Briefing Papers Series. April 2009, page 6

³⁹ Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. UN Special Rapporteur on the situation of human rights defenders. July 2011

⁴⁰ Ibid. Page 5

speech & advocacy, contact & communication, assembly and resources that civil society organizations are facing barriers.⁴¹

⁴¹ Defending Civil Society. Report. Second edition. International Centre for Not-for-Profit law (ICNL) & World Movement for Democracy Secretariat at the National Endowment for Democracy (NED). June 2012

CHAPTER 4

4. NON-GOVERNMENTAL INITIATIVES PROMOTING DIRECT PUBLIC PARTICIPATION

PARLIAMENT AND STATE INSTITUTIONS

The state occupy a key position in ensuring that public participation can be enjoyed by all. Through ratification of the international human rights treaties the government takes on the responsibility to put into place domestic measures to comply with the treaty obligations and duties. This entails to respect, to protect and to fulfil human rights. How the government can take on this role in promoting especially direct public participation is described in chapter 3.

From chapter 3 it is clear that the parliament holds quite a central position to ensure ratification of the international human rights instruments and that they are implemented into the domestic legislation. However, it is not sufficient that human rights are established by law, the parliaments is furthermore obliged to ensure that state institutions are mandated and provided with the necessary resources including educated staff, budgets etc to be able to meet and carry out the concrete human rights responsibilities they have been entrusted.

Decisions regarding institutions, structures, procedures, resources etc contributing towards complying to the international human rights obligations and in this case public participation should be reflected in the domestic legislation and elaborated further in orders, guidelines etc. Obligations concerning participation in the conduct of public affairs embrace for example a free and fair election system and procedures, an independent electoral commission, election budget, training of staff, civil education and similar positive measures and it is the role of the parliament to adopt legislation and allocate resources for these.

It is recommended that modes of engaging public participation in relation to decisions reached by the parliament and public institutions is also outlined in legislation. One of the important conditions leading to meaningful participation is that the public is able to gain easy access to information from those bodies.

The civil and political rights supporting the right to participate in the conduct of public affairs call for specific types of public institutions in some cases as well as existing state institutions in other cases. Examples of these institutions is registration body for voluntary associations, law enforcement agencies regulating and providing protection of peaceful assemblies, bodies regulating the media (press, electronic and social media, newspapers, publications, TV, radio etc. It is the responsibility of the parliament to also ensure these are established, are allocated sufficient resources etc.

The parliament should establish other institutions or bodies of importance to supervise and monitor. Independent state institutions of various kinds occupy an important kind of position in their capacities of inspecting, monitoring, receiving individual complaints and for some institution to reach judicial decisions or provide recommendations if public institutions have committed violations. Some of the independent institutions are further entrusted the responsibility to carry out human rights research, information and training. Such types of independent institutions include ombudsman institutions, national human rights institutions or national commissions overseeing women, children, equality or similar topics.

Yet other state institutions are established to act as control or disciplinary mechanisms in cases of violations committed by civil servants in the judiciary, law enforcement or penitentiary.

The judiciary is a unique type of independent state institution as it holds the power to interpret and apply the law on behalf of the state. Following this litigation can be initiated against the state in cases of violations of specific human rights. This include cases of unlawful restrictions of public participation and the related civil and political rights.

NATIONAL HUMAN RIGHTS INSTITUTIONS

Independent national human rights institutions are mandated to take on a variety of roles functions when it comes to promoting human rights. Through research, monitoring, complaint handling and inspection activities these institutions oversee whether the state respect, protect and fulfil it's international human rights obligations. National institutions often provide the UN treaty bodies and Universal Periodic Review with independent reporting to be considered along with the state reporting. In some instances the monitoring and reporting draw attention to neglected human rights violations.

When mutual interest and motivation in the state agencies and the national institution exist the parties might engage in cooperation. The expertise of the national institution

can become a driving force in enabling the state to address violations or to enhance the enjoyment of specific human rights.

The national institutions enjoying full independency are well situated to act as a bridge between the state and civil society and pave the way for new avenues of public participation through own initiatives or by being instrumental in establishing institutionalized and structured modes of public participation.

Other types of positive measures contributing towards raised level of public participation include information and education as means to raise the public's awareness of their individual human rights and knowledge about how to claim their rights. An important part of such initiatives is to make sure that they include minorities and marginalized groups.

CIVIL SOCIETY AND OTHER NON-STATE ACTORS

Civil society should be understood in the broad sense as it include a variety of organized structures. A common characteristic is that they are independent, voluntary and non-state. However, the diversity of civil society can be seen in the plurality of action, purpose and value. As an attempt to systematize the types of civil society, it can be divided into four main categories although a mixture of several types often takes place:⁴²

Contained organizations are engaged in leisure, social, cultural, sport etc activities and the purpose is to serve interests and aspirations only of the members.

Service organizations provide concrete relief or assistance to a defined group of beneficiaries. This can include victims of domestic violence, orphans, prisoners, pupils, patients or other vulnerable and needy groups.

Independent organizations conduct monitoring and advocacy for well defined causes serving to advance altruistic causes such as advancement of women, environmental protect or world peace. They are non-party political and do not advance specific groups.

Reform organizations can be political groups, employers associations, labour unions, consumers or religious groups and they engage in monitoring and advocacy initiatives with a different purpose as they intend to influence the decisions-makers to adopt certain policies, legislation etc which meet the interest of the groups, organizations, societies they represent.

⁴² Alan Fowler. Strengthening Civil Society in Transition Economies – from Concept to Strategy: Mapping an Exit in a Maze of Mirror in *NGOs, civil society and the state: building democracy in transitional societies* ed by Andrew Clayton (Oxford, INTRAC NGO management series no 5, 1996)

4. NON-GOVERNMENTAL INITIATIVES PROMOTING DIRECT PUBLIC PARTICIPATION

Civil society organizations working in the field of human rights are the types engaged in service, independent and reform.

Traditionally human rights organisations carry out documentation and monitoring of areas of concern to assess and review the identified problems and to provide validated facts when drawing attention to these. The documentation will reveal weaknesses, shortage, malfunctioning etc. in legislation and practice and this knowledge will in addition point towards needed actions to improve and solve the problems.

Drawing on their documentation and experiences the human rights organizations engage in awareness raising and advocacy activities by producing reports, easy reading materials, engage in campaigns, conducting seminars, open meetings and engage the media to draw attention to the areas of concern – with the purpose that the public or selected target groups become informed and aware of the problems and suggested solutions. Often the advocacy activities target certain policy makers in order to pressurize them or if possible through dialogue to effect the proposed changes and reforms.

If the relation to the state including the government and parliament is not antagonized the civil society can organize conferences, public meetings, TV debates etc. with state officials or leaders to debate the human rights concerns and solutions and on friendly terms and through dialogue seek to influence them. Sometimes this leads to cooperation where a state agency and one or several human rights organizations jointly address an area of concern.

In the promotion of human rights in the national setting the civil society can make use of the UN human rights system. Independent parallel documentation can be submitted to the UN treaty bodies and Universal Periodic Review of the country to enable the UN system assessing the situation in the country and raising areas of concern to the government. The Human Rights Council and Special procedures are other possible instruments where adoption of resolutions, country visits by Special Rapporteurs, follow up on individual complaints etc can be initiated as other ways to react to the situation in the concerned country.

Positive human rights obligations rests with the state but civil society, national institutions and other independent actors often complement these. Human rights and other civil society organizations typically engage in providing services to women, children, minorities and others in need by offering shelter, housing, education, vocational training, health services, meals and blankets for prisoners etc. Services can also include offering legal aid and defence, library access and other more specific kinds of initiatives.

Human rights organizations contribute to the vast area of providing knowledge and information to rights holders about their right and avenues to claim them as well as providing training for civil servants and other types of personnel in state and independent institutions on how to ensure that their respective work functions accommodate relevant types of rights to the rights holders.

Civil society act as a venue for individuals to engage actively in public participation. At the same time civil society is often also concerned about the conditions and possible limitations to exercise public participation and are often in the forefront of addressing restrictive NGO legislation or practices, criticising censorship or police violence during demonstrations. When parliaments are adopting bill it is also often the civil society demanding access to the draft bill, avenues to comment on it and opportunities to discuss it with the parliamentarians.

Such initiatives taken by civil society organizations are supplemented by independent and articulated individuals and groups e.g. writers, artists, actors, politicians, academics, religious leaders or others who flag and defend their personal convictions and viewpoints and at times gain a national status which symbolize freedom and justice through their critic of the government. At times individual human rights defenders obtain the same status through their voiced opposition.

Due to the nature of their professional position journalists and lawyers draw attention to questionable state action. In cases of government controlled media journalists might insist in providing independent media coverage revealing negative state behaviour in spite of potential risk of facing persecution. Through litigation lawyers can bring cases to the courts which concerns individual cases of state violations and persecution.

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