

MEDIA AND DEMOCRACY

'PRESS FREEDOM' HAS LONG BEEN A RESOUNDING BATTLE CRY THROUGHOUT THE AFRICAN CONTINENT, IN THE MIDST OF SOME OF THE WORLD'S WORST MEDIA REPRESSION. BUT IN A HEALTHY SPATE OF SELF-SCRUTINY, MANY AFRICAN JOURNALISTS ARE CHALLENGING THEMSELVES AND EACH OTHER ON WIDESPREAD ABUSE OF THOSE FREEDOMS. IN MANY CASES, AFRICAN MEDIA ARE NO MORE DEMOCRATIC - AND NO CLOSER TO SERVING THE PUBLIC - THAN THE 'OPPRESSORS' THEY CRITICISE...



Photo: Howard Banant/Renasc-Africa

Denying access to information weakens the media and the state

cultures of **Secrecy**



Invoking Official Secrets Acts abusively and indiscriminately across Africa has had negative repercussions for journalists, governments and the public at large. **Tawana Kupe** argues that democracy and journalism itself would benefit if such Acts were replaced by Freedom of Information legislation...



Harare, Zimbabwe, February 1999. Journalists protesting the arrest and torture of fellow journalists allegedly threatening national security. Who's threatening whom?

While the link between a democratic dispensation and economic and social development has not been conclusively made, it is clear that societies where citizens' rights are severely curtailed do not enjoy the same rates and levels of development as societies where citizens enjoy their rights. The late 20th century and the 21st century have been labelled 'the Information Age' – it is therefore incongruous that African societies do not actively embrace mechanisms which promote access to and dissemination of information.

The media is a key institution in dissemination of information in a modern society – one of the major links between the governors and the governed. Lack of access to information for the media effectively means lack of communication between the two components of society. It effectively means that public institutions take on a life of their own and become self-serving. It follows that the media must have access to all kinds of information without undue hindrance.

If a society maintains a culture of secrecy instead of a culture of openness based on access to all kinds of information, the role of the media is curtailed. Further, it often means that powerful institutions in a society can operate outside the scrutiny of the media to the detriment of the citizenry. Lack of access hinders the free flow of information and promotes rumour-mongering among the citizenry and speculation within the press. The result is to promote tendencies towards sensationalism instead of in-depth reporting and analysis of issues and processes. Ultimately, therefore, lack of access to information sustains bad governance and hinders the democratisation process.

Denial of access promotes a lack of accountability from the powers-that-be; abuse of citizens' rights and corruption easily set in, and in fact characterise many

Access to information in Africa – for instance to the independent press – is denied in various ways. One way is to delay official comment until the publication has to run the story without comment or has to drop the story altogether to avoid publishing one-sided or unsubstantiated stories. Secretiveness also hinders the journalistic ethic of checking and double-checking sources and facts. Another tactic is to refer the media to the government information ministry which requires all questions in writing only to pass them on to the relevant ministry and department and then back again through the same route to the media. This tactic hits directly at the way media works, because a news story cannot wait forever. In cases where there are answers these are often either evasions, bare denials or simply a 'no comment'. In most cases there is just no response to the written questions. Journalists and the public have no institutionalised means to compel officials or institutions to answer questions or provide information.

On the other hand the government-owned and controlled media is rewarded for its loyalty by being given better (but still selective) access to public officials and public institutions. Ultimately, it is not just the media that suffers in the denial of access to information but the general public – which is entitled to information. One could argue that denial of access to information amounts to hindering democracy and – dare I say – one of the worst threats to national security.

THE DIRE CONSEQUENCES

Clearly, then, lack of access to information and the use of official secrets have a counter-productive effect on the media, public officials and institutions and the general public. Much of this counter-productiveness derives from this failure to draw the line between what information is legitimately

of the nation and what needs to be in the public domain as a matter of accountability of those empowered to carry out decisions using public funds and in the public interest.

Circumstances often arise where, on the information available to them, journalists believe that public officials in charge of state security appear to be acting in violation of the public trust and to be using secrecy and state security as a way of dodging accountability. In some cases there are rumours of war or foiled coup attempts. In the absence of a Freedom of Information Act or institutionalised forms of access to information, the decision to publish a story is then based on the journalist's belief that, firstly, their sources are credible. Secondly, it is based on their judgment that securing the public interest, informing the public and bringing officials to account is of paramount importance and an institutional responsibility.

The problem, however, is that in such a situation the possibility of checking and double-checking a story is greatly reduced. The danger of publishing information actually prejudicial to public security and safety is heightened. If journalists decide to publish, authorities might then act against the journalists or the media in a manner which also infringes on their editorial independence. Although prosecuting the media organisation in this case can be judged as a violation of press freedom and inimical to notions of open and democratic societies, journalists will have undeniably broken the law.

Further, for a journalist who publishes information which has security implications and which can actually be harmful, accusations of irresponsibility and conniving with enemies of the state, real or imagined, can appear credible to the general public. Such a situation also allows journalists who do not adhere to professional ethics or who tend to

for journalists to perform their expected watchdog role they must have access to information. Unfortunately, most African countries do not have a Freedom of Information Act written into their constitutions. Most have, rather, Official Secrets Acts so vaguely worded that they can be interpreted liberally by officials who wish to hide something or avoid scrutiny of their actions. Such Acts also prevent individuals or groups from verifying information held about them by powerful social institutions.

In addition to Official Secrets Acts there exist provisions in other legislation like the Law and Order Maintenance Acts or Public Order Acts that can be used to deny the media access to information, arrest and detain journalists or search a media organisation's premises and confiscate material. Ironically, most of these Acts were inherited from colonial regimes but not repealed at independence.

Official Secrets Acts are often justified on grounds of state security – or the protection of information that has implications for state security. While it is legitimate for any government to protect national security – and governments even in Western democracies have such Acts – African governments (and others) often fail to distinguish between state secrets and information that has no implications for that security.

What has happened in many African countries is a meeting of **two cultures of secrecy**: one inherited from the **colonial regimes** and one from the **nationalist movements** which waged struggles for national liberation.

African societies. Corruption on a massive scale has seen the plunder of public resources by successive regimes from colonial times to the post-colonial era. Private corporations, including transnational corporations, have been able to operate in Africa in ways they would never get away with in societies where openness is the norm.

In essence what has happened in many African countries is a meeting of two cultures of secrecy: one inherited from the colonial regimes and one from the nationalist movements which waged struggles for national liberation. Because secrecy rather than openness is the norm, a culture of control of information has been allowed to develop. Public officials routinely deny information to the media, especially to the privately owned media that often has to play the watchdog role.

deemed 'classified' and which is not.

Official Secrets Acts, for instance, are frequently invoked when issues that the media wants to report are most pertinent. A major example is during war situations or in relation to the military and executive branch of government. Issues related to a country's defence and security are rightly recognised as sensitive because they affect the safety and security of the entire nation. If military secrets and strategies are made available to enemies or potential enemies, the harm to the nation can be immense.

However, issues of military spending and even preparedness should not be totally beyond scrutiny and in blanket fashion covered by an Official Secrets Act. A balance needs to be struck between what should remain secret for fear that other parties might use the information to the detriment

sensationalise for commercial gain to compromise the profession. Issues of national security have an emotional dimension which can resonate with the public and discredit journalists and the media.

It is therefore in the interests of journalists and the media that Freedom of Information Acts become law. Access to information will enable journalists to 'dig deeper' while remaining on the side of the law and not appearing to be above the law. Professionally, it will assist journalists to be able to better practice self-regulation. Institutionally, it will enable journalists to fulfil the best ideals of journalism, to pro-



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Secrecy

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duce accurate and balanced journalism for the benefit of the public.

A state which moves against journalists on allegations of breaching military secrets encourages the belief that there is something to hide, creating a credibility gap with the public and tensions with journalists and the media as an institution. As the Zimbabwean and Zambian governments learnt earlier this year, after arresting journalists on allegations of breach of military matters/secrets, such action brings about a torrent of international criticism which impacts on the international standing of the country. It also affects the country's ability to enjoy the confidence and levels of support that nations which respect human rights and observe the rule of law enjoy. Once action is taken using laws which are archaic and infringe on human rights, the question becomes not whether the government is correct in taking action against breaches of existing laws, but a broader issue of low standards of governance.

For the general public a confrontation between journalists and public officials can be confusing, contributing to lack of trust in public institutions. The ramifications for using Official Secrets Acts therefore far outweigh their efficacy, if any, in modern contexts. In short, in contexts where there is no Freedom of Information but Official Secrets Acts there is no winner.

Landscape

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On the civil side, the law of defamation continues to present a daunting challenge to the media in the region. Several newspapers have been forced to shut down after large libel awards were given against them. What is disturbing is the failure of our legal systems to recognise the distinction between private individuals and public figures when it comes to liability and damages in libel cases against the press. It is now widely recognised – since the 1964 U.S. Supreme Court decision of *New York Times vs. Sullivan* – that public figures should not be entitled to damages for libel in the absence of malice. The rationale is that it is not in the public interest for the threat of libel proceedings to discourage open debate on the conduct of public affairs. And yet the wisdom of *Sullivan* seems to have largely escaped the courts in the region, where offended public figures are awarded huge damages at the expense not only of individual newspapers, but of press freedom at large.

Zambian courts came close to recognising the importance of *Sullivan* in 1995 in *Sata vs. Post Newspapers Ltd.* & Another when the High Court held that public figures must be open to the most searching criticism of their official acts and must accept factual errors reasonably made in the course of such criticism. But then the court went on to say that only the public conduct of public figures was to be protected by the defence of fair comment, pointing out that it remained illegitimate to attack the private

A balance needs to be struck which will enhance the standing of public institutions and protect the interests of society. This balance necessitates the abolition of Official Secrets Acts in favour of Freedom of Information Acts. Freedom of Information Acts can have provisions which protect sensitive information from being placed in the public domain. However, such provisions must not deviate from the principle of openness. Mechanisms must be worked out so that it can be verified that particular information is sensitive, or which aspects of such information are sensitive. We must rectify the situation where information is declared secret and so unavailable to the local media because it allegedly endangers national security, yet it remains available to media from 'enemy' countries. Besides, in the modern context of global media such information becomes available locally anywhere.

Public officials and agencies must prove that information needs to be kept out of the public domain and not the other way round. The principle must always be one that recognises that openness and access to information is a right not only for the media but for the public at large. Only in extraordinary situations should the principle of open access be curtailed, and even then the parameters, processes and duration for doing so must be protected from abuse.

A system which adjudicates access to information needs to be easily accessible itself and must work expeditiously so that decisions are not reached when the matter has become academic. Media work on dead-

behaviour of public officials. In practice, that distinction is not always easy to make.

The South African Supreme Court has also recently loosened the noose around the media in defamation cases when, in *National Media Ltd & Others vs. Bogoshi*, it rejected the traditional doctrine of strict liability for media defendants and introduced the availability of a defence of absence of fault. But the Zambian and South African cases are exceptions to an otherwise hostile regime of defamation laws throughout the region which are in urgent need of reform.

NEW FORMS OF CENSORSHIP

A relatively new threat to media freedom comes in the pervasive attempts by governments to muzzle the press by introducing media council legislation which seeks to register journalists, set up government-appointed media councils and establish harsh disciplinary measures against journalists who fall foul of such laws. In the last two years there have been attempts to introduce such legislation in Uganda, Kenya, Tanzania, Zambia, Botswana and Swaziland. The Ugandan law is already in the statute book despite being blatantly unconstitutional. The media and civil society in Tanzania, Botswana and Zambia have successfully fought off this threat to media freedom, while the jury is still out in Kenya and Swaziland where such laws have been published but not promulgated.

AN ENABLING ENVIRONMENT: ACCESS TO INFORMATION

The attempt by governments to establish compulsory registration of journalists and set up media councils has been done in the

lines because of the perishability of news, so access to information for journalists wishing to publish breaking news needs to recognise news routines and processes. Secondly, in relation to ordinary citizens or groups the mechanism for adjudicating disputes over access to information must not be so cumbersome and expensive that it acts as a deterrent. If access to information is a right, it must be a right that can actually be exercised and enjoyed.

Once such a system is in place journalists – in the interests of responsible, informative journalism – must adhere to the system or face the legal and professional consequences of publishing information that is legally protected. Because of ongoing social change and technological developments, any mechanism which limits access to information for specific reasons in a given context and for a specified duration needs constant review. If enacted without excluding key institutions like the executive branch of Cabinet and without bowing to claims from corporate organisations about the need to keep secrets for commercial reasons, South Africa's Open Democracy Act could be a place to start – a model to help set standards of freedom of information and access to information that the continent so urgently needs to adopt.

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name of maintaining high journalistic standards. However, it is ironic that the governments so intent on standards are also the slowest in creating an enabling environment for such standards to flourish. In this regard, the need for access to information legislation is obvious and common to all countries in the region. South Africa is the most advanced in this regard, with its Open Democracy Bill in the final stages of enactment. Although not perfect, the bill nonetheless offers a good model for the rest of the continent. What remains to be seen is how other countries, which have for so long been governed under a cloak of official secrecy, will find the political will to promulgate access to information legislation. The media and civil society have a crucial role to play in creating the necessary impetus through sustained advocacy.

The landscape for media freedom in the region, then, is uneven, but largely fraught with the dangers of yesteryear. The relative opening up of political space has not been accompanied by systematic reform of repressive legislation inherited from the one-party and apartheid eras, and governments have continued to use these laws to suppress press freedom and undermine the tenets of democracy. There is urgent need for an overhaul of repressive laws to further expand the boundaries of free expression and create political space for the entrenchment of democracy.

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ing government, has no equal in any other Muslim or Arab country. The governments of the countries of the Maghreb have labelled Algeria's independent press 'subversive' to the point of forbidding its dissemination in their territories. One cannot cross the Moroccan or Tunisian borders with Algerian newspapers.

TELEVISION: AN OUTMODED MONOPOLY

If the press is largely free and diversified the situation with broadcast media is something else. The one television network, as well as both national and regional radio stations, are under state control. In spite of demands and a law which provides for the setting up of independent radio and T.V. stations, the authorities to this day have not delivered the necessary administrative approval.

But this should not be further delayed. It is necessary to emphasise, however, that these state broadcast institutions have strongly competed with the foreign networks broadcast via satellite. Compared with countries with a similar population count, Algeria has among the highest number of satellite dishes in the world. Algerians have the choice between dozens of foreign networks, notably those broadcasting in Arabic and French.

The Algerian media, particularly the independent press, has become in a relatively short time a true opposition, a real and precious open space where one enacts every day an apprenticeship in democracy and in free citizenship. This achievement didn't fall from the sky. It is the fruit of struggles diverse and strenuous against the monopolies and censors who impaired journalists with imprisonment, judicial harassment, suspended publication and many other setbacks. But above all, in the struggle against fundamentalist terrorism, a negation of all liberties – the profession has paid the highest price: 90 journalists and media workers assassinated in five years.

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