Press freedom's changing legal regime

still a dangerous landscape

Many African countries have gone through political transformation, with the advent of multi-party democracies across the continent. But the course their media must navigate remains a minefield, writes **Njonjo Mue**...

The right to freedom of expression, including media freedom, in Africa has always been the first victim of dictatorship. It first fell victim during the colonial era when foreign powers imposed strict limits on expression in the name of national security. It then suffered during the succeeding one-party regimes which, shortly after independence, quickly consolidated their power by continuing the clampdown on expression in the name of national unity.

But the winds of change that Harold Macmillan spoke of in Cape Town in the sixties would finally seem to be upon the African continent. In the nine years since 1990, all the countries of southern Africa have undergone far-reaching political transformation, replacing former one-party and apartheid minority regimes with multi-party democracies. With this 'second liberation' of the nineties, in which open political competition returned to many countries, freedom of expression seems to have obtained a new lease on life – or has it?

While it cannot be denied that many countries in the region have undergone a political metamorphosis with the introduction of party political competition, the landscape where the media operates in most of these countries remains treacherous and hostile, the course they navigate full of legal landmines and booby-traps.

The main reason for this is that Africa's so-called 'second liberation', with the notable exception of South Africa and Namibia, saw the establishment of nominal democracies through superficial constitutional amendments which allowed a form of political competition while denying its substance. In particular, those celebrated constitutional amendments did not establish structures that supported democracy – such as an independent judiciary – to enforce fundamental rights and a free and independent press.

At a media lawyers' conference in 1998 it was noted that many of Africa's transitional democracies were characterised by a dominant ruling party which held a majority in Parliament and continued to preside over a monolithic hegemony akin to the one-party days. Such ruling parties were able to keep in place most of the restrictive legislation inherited from the days of dictatorship.

Constitutional protection?

The constitutions of all the countries in the region guarantee the right to freedom of expression, with a number – namely South Africa, Namibia and Mozambique – expressly guaranteeing the right to freedom of the press. But these same constitutions permit a wide scope for limitations on this fundamental right. This, coupled with the absence of truly independent judiciaries, has made the bill of rights virtually unenforceable in most countries in the region.

The exceptions are South Africa and Namibia, where the courts have declared several laws unconstitutional for violating the freedom of expression clause. Zimbabwe also has a fiercely independent judiciary. However, the efficacy of the Supreme Court's power of constitutional review has greatly been undermined by the alacrity with which the government has introduced constitutional amendments –

The constitutions of all the countries in the region guarantee the right to freedom of expression ... But these same constitutions permit a wide scope for limitations on this fundamental right.

easily passed into law by the ruling party's huge Parliamentary majority – after the court has made an adverse judgment. There have been no fewer than 14 constitutional amendments in Zimbabwe since 1980, many of which have whittled away at the bill of rights and the power of the courts to enforce it.

Enforceability of the bill of rights is also a contentious issue in Zambia. Each successive government in that country has left behind its own set of laws detrimental to freedom of expression. Most recently, the entire editorial staff of the independent *Post* newspaper were arrested and charged with espionage. This followed the publication of a front-page article questioning Zambia's military capacity to withstand an incursion from neighbouring Angola, which had threatened to retaliate following Zambia's alleged involvement in its civil war on the side of the rebel UNITA movement (see story on p. 10).

The task of cleaning up the statute books has been left to the judiciary, who have to discharge it under the watchful eye of a powerful executive. What's more, the judiciary cannot change the law of its own accord and has to wait until a provision is challenged for unconstitutionality. Most Zambians are impoverished and too busy with bread and butter issues to spearhead law reform through constitutional challenges. This is the reality not just in Zambia but throughout the region.

Troublesome laws

The most problematic laws for working journalists come under the rubric of national security legislation. This includes the offences of sedition; publishing false news likely to cause fear, alarm or despondency among the public; possession of secret documents and so on. With much of the region still engulfed in conflict, governments have been quick to resort to these archaic provisions to muzzle the press and discourage it from publishing unsavoury stories.

Recently, journalists in Zimbabwe and Uganda have fallen foul of false news provisions; several journalists have been detained or jailed in the Democratic Republic of Congo for rubbing the authorities in that war-torn country the wrong way. In Angola, a private radio station was recently shut down and several of its journalists arrested for re-broadcasting an interview with rebel leader Jonas Savimbi. It was not clear what law they had violated. Even in South Africa, by far the safest country for journalists in the region, Swiss journalist Jean-Philip Ceppi was arrested for allegedly being in possession of a secret document. He was subsequently released.

Ceppi's arrest demonstrates the danger presented by allowing repressive laws to lie fallow rather than repealing them soon after the advent of a new dispensation. Such laws are easily revived to muzzle the press whenever the government feels cornered. What is more, even when they are not actively applied, such laws cause a chilling effect on the media by causing insidious self-censorship among journalists fearing reprisals. ARTICLE 19's policy is therefore to call for a comprehensive legal audit in all transitional democracies to ensure that their laws are in line with constitutional guarantees and international human rights standards.

One such audit was done in Malawi at the end of 1997 by the Malawi Law Commission with the help of ARTICLE 19 and the Civil Liberties Committee of Malawi. A 200-page document was produced outlining laws that abridged the freedom of expression guarantees in the Malawi Constitution. The document was then discussed by representatives of civil society who produced a report to be tabled by Cabinet and from there sent to Parliament. It was a laudable effort, but the recommendations that came out of the process are still making their way through the pipeline and it is not yet known how many of them will see the light of day.

Protection of journalistic sources

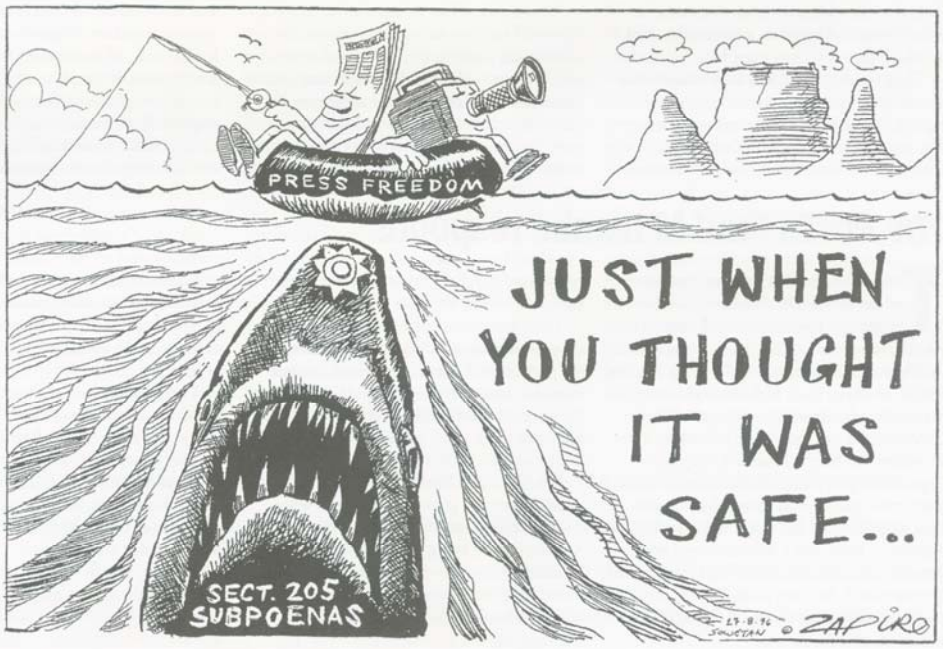
Another thorn in the side of the media in the region is the lack of recognition of the importance of journalist confidentiality. An extreme example of this is the arrest, detention and torture by military authorities of Zimbabwean journalists Mark Chavunduka and Ray Choto in January. Although eventually charged with publishing false news, what caused the furore was the illegal arrest and detention by military authorities who sought to know the source of the story carried by *The Standard* newspaper alleging that there was a coup plot in the offing against President Robert Mugabe. Mugabe himself publicly supported the military's illegal action against the press. He subsequently refused to assent to a new Public Order and Security Bill because, he claimed, it did not go far enough in checking the activities of the press.

In South Africa, section 205 of the Criminal Procedures Act provides for compelling any person who is likely to have material or relevant information of an alleged offence to give evidence of such offence in a court of law. No exception is made of journalists who obtain information or material in the course of their work. Security forces frequently abused this provision during the apartheid era to force journalists to reveal the sources of sensitive stories.

More recently, section 205 was invoked to compel journalists to hand over photographic material taken during the killing of gang leader Rashaad Staggie in Cape Town in 1996, which was captured on T.V. and by still cameras and made headlines worldwide. The journalists refused to do so and the ensuing dispute between the state and the media continues in the courts.

ARTICLE 19's position is that while all citizens have a duty to ensure that law and order is maintained, forcing journalists to reveal their sources is inimical to press freedom as it exposes individual journalists to potential danger once they are labelled police informers. It also causes crucial sources to dry up once they know that their confidentiality cannot be guaranteed. This interferes with the free flow of information, press freedom and free expression.

ARTICLE 19's policy is to call for a comprehensive legal audit in all transitional democracies to ensure that their laws are in line with constitutional guarantees and international human rights standards.



The right balance between freedom of the press and free expression on the one hand and maintaining law and order on the other needs to be identified without compromising either of the two societal interests. In South Africa, a step was taken in that direction in early 1999 when a memorandum of understanding was signed between, on the one hand, the South African National Editors' Forum and, on the other, the Ministers of Justice and of Safety and Security and the National Director of Public Prosecutions, laying guidelines for how, if at all, section 205 was to be applied to the media. This recognition of the special role played by the media is a first step, but it needs to be enshrined in law sooner rather than later.

to page 61 ▶

Forcing journalists to reveal their sources is inimical to press freedom as it exposes individual journalists to potential danger once they are labelled police informers.

Secrecy

◀ from page 7

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, contributiing 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.

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 deadlines 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.

TAWANA KUPE is a Lecturer in media studies in the Department of Journalism and Media Studies at Rhodes University.

Landscape

◀ from page 9

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 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 name of maintaining high journalistic standards. However, it is ironical 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.

NJONJO MUE is the Legal Adviser to ARTICLE 19 – The International Centre Against Censorship, and Head of ARTICLE 19's regional office for east and southern Africa

Prix

◀ from page 21

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.

A journalist for more than 20 years, LAZHARI LABTER has worked for a variety of Algerian and foreign newspapers. He is currently Coordinator of the International Federation of Journalists in Algiers. A writer and poet, he is the author of several books.

This article was translated from the French version by Melissa Baumann.