



# FREEDOM OF EXPRESSION AND MEDIA REGULATION

*A media legislation manual*

By Hendrik Bussiek

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## Foreword

# MEDIA IN A DEMOCRATIC SOCIETY

At the most basic level the media perform the role of one of the oldest crafts in the world – that of the storyteller. In an ever-expanding and ever more connected world with more and more stories to tell, we can no longer rely on hearing them face to face from our neighbours and friends. We need someone to collect them for us, from far and wide, every day, and tell them - in words, sounds and pictures. That is what journalists do and why we have 'the media', operating as the link between individuals and the world around them, from the community right up to the global level.

This link between the individual and the wider community, especially fellow citizens in a national context, can and does work both ways: Readers/listeners/viewers are not just passive consumers of what the media offer them. They also make their own voices and opinions heard – on letters pages, in talk shows and other interactive programmes and a growing multitude of internet forums. All together, the media enable a society to talk to itself.

All in all, 'the media' are democracy in action. Just like in any successful democracy, the more voices that are heard, the better. And just like the purpose of law generally in a democratic society is to enable all citizens to live a full and dignified life and exercise their rights while not violating those of others in the process, the same principle applies in the case of any legislated regulation of the media. Limitations placed on freedom of expression and the media by law are justified only to prevent violations of other rights or the rights of others. Media law must be enabling, meant to make sure that the media paint as full a picture of life in all its facets as possible - that all stories worth telling do indeed get told.

Relations between those who tell the story and those who want to be told are mostly pretty straightforward: Listeners/readers/viewers need to be able to trust the media and rely on them to tell the truth or the full story. If not, there must be ways for them to complain about mistakes or omissions and demand corrective action. This is what journalistic ethics are all about. They spell out how the media are expected to go about their work and in what way they are accountable to their public. And compliance with the basic tenets of journalistic ethics is not just a worthy ideal to strive for but part of the bottom line, or, to put it more politely, a necessary condition for survival: If a media operation loses people's trust, it ceases to be an effective communicator and risks losing business or even going out of business altogether.

Things get a lot more complicated when a third group of people comes into play: those who do not want a story or fact to be told and known. This can be any private individual who fears embarrassment or loss of privacy. But more frequently it is those in authority. They may be trying to keep information to themselves simply because this increases their hold on power and allows them to govern more comfortably without too much close scrutiny of their actions by the media and, through the media, the public. They may also be seeking to hide uncomfortable facts, mismanagement or corruption from the citizens on whose behalf they are supposed to be working.

The rights and sometimes widely divergent interests of these three groups of players need to be balanced and accommodated. Naturally, there is bound to be friction and it will erupt from time to time. A common understanding of the rules of the game, and, if necessary, a few basic legal provisions and guidelines will help to keep the friction manageable.



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## ABOUT THE AUTHOR

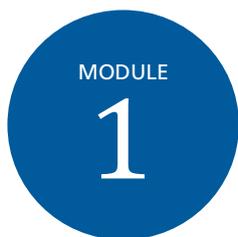
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### *Sophie Haikali*

Sophie Haikali is a producer, writer and researcher with education, training and over 10 years of project experience in media development, research and filmmaking. For a period of 6 years she coordinated projects in about 19 countries in Africa, for the media project of the Friedrich-Ebert-Stiftung, with an emphasis on conceptualizing, training, creating and editing materials, research and mapping media developments. She holds a BA in Media Studies from the University of Namibia and an MA in Media Culture from the University of Maastricht.



# THE MEDIA: FRIEND OR FOE - OR NEITHER?

## TOPICS

- MAIN FUNCTIONS OF THE MEDIA
- HOW MEDIA HOUSES WORK
- MEDIA AND POLITIC(S)IANS

### The role of the media

The media play different roles, according to their target audience, reach, focus and the medium used (print, broadcasting, internet). They have different approaches and styles, different criteria for selecting stories, different news angles, different stances on social or economic issues, and even different political persuasions. The different media do not fulfil all possible roles all the time or meet all of our needs – nor are they supposed to do so.

So what, essentially and ideally, is the role of the media?

They provide people with both information and entertainment. In so doing they not only enrich lives but also help people to reach their full potential, make informed decisions and play an active part in their communities.

### Main functions of media

The media perform two main functions:

1. They provide information and a platform for debate and participation where all views and concerns can be aired, both by ordinary people and by those in authority.
2. They act as a watchdog and hold those in positions of power accountable to the public.

### Watchdog of society

It is the watchdog function of the media in particular which is most likely to raise the ire of those who come under such (unwelcome) scrutiny, and which makes 'the media' the favourite villain of many public figures. Surely it is no coincidence that those who find themselves under the media's microscope – and are not happy with what is shown in minute detail – will be the first and loudest to claim that the media, summarily, 'need to be reined in'.

### Most common generalisations about 'the media':

1. 'The media' as a whole is criticised when only one or a few may have made a mistake or got a story wrong.
2. 'The media' are accused of pursuing a general tendency – say towards sensationalism or the routine bad-mouthing of politicians – even though this may only be practiced by some outlets.
3. 'The media' are often said to be wallowing in bad news, ignoring the fact that they will only report on

what is actually happening and what audiences want to know about. It is futile to blame the messenger for an unpalatable message.

### How media houses work

Whatever their outlook or primary purpose, in one sense all media – be they print, broadcast or internet - are in the same boat: they compete with each other for market share. They need to sell their product – both to buyers and to advertisers. Each of them seeks to attract as many readers/listeners/viewers/users as possible – not (just) to satisfy an ambition to remain or become an influential voice in society, but simply to survive in the marketplace and, hopefully, make a profit.

Most newspapers in Africa are sold on the streets and the main selling point on the street is the front page and the main headline. The first paper to come out with a good story will be the one that sells best – people won't waste money on buying old news. Therefore stories of public interest on corrupt public servants, for example, sell well and will continue to make the front page.

Of course, some newspapers may have an openly partisan agenda: pushing the line of a certain political party or force. Many have a certain political or social outlook – some are more inclined to support the government of the day and the status quo, others are more critical and probing. Some editors give more room to diversity of opinion and argument, others exercise tighter control over their preferred editorial line. What they certainly do not do is sit together with their competitors and conspire to hatch common strategies – they do not have the time for it and it would be contrary to their business and/or political interests.

With the media industry being the cut-throat, highly competitive business that it is, operators run a very tight ship with a pared-down number of staff. Sub-editors and senior editors have to make sure that stories really are accurate and balanced – if they fail to do so it will, most likely, be because of their workload rather than for any mischievous reasons. Newspaper editors, journalists and reporters produce an enormous amount of material every day in a rush, in some cases a whole book's worth five or six times each week.

## Media and politic(s)ians

The media – politicians’ friend or foe? Unless a media house is owned by political players, they do not set out to be either. The best way to find out how someone else ticks, as in all spheres of life, is to talk and try to understand each other’s ways of operation and challenges. In the case of media and politics, a good starting point is the realisation that the two spheres need each other.

### Why politicians need the media?

Politicians and parliamentarians depend on newspapers, magazines, radio, television and any other media to give them a fuller picture of people’s needs and views. They also need the media to inform citizens about their programmes and activities. If they present their case well this makes for an interesting read.

Of course journalists will not always write the story in the way politicians want it to be reflected. Editors might also not agree about the news value – and ignore the story altogether. That is their prerogative and up to their own professional judgement.

### How the media benefits from a good relationship?

For their part, the media also benefits from a good working relationship with, and easier access to, politicians, drawing on their professional judgement and grasp of the issues at hand. Journalists have to do stories on a range of subject matters and cannot be expected to be equally knowledgeable about all of them. If politicians make themselves easily available, answer questions readily and give feedback promptly, this will not only earn them respect and sympathy among the media fraternity, it will also enable journalists to produce more informative and in-depth material – and thus deliver a better service to the public. Again, this is in the interest of both politicians and the media.

The culture of secrecy and antagonism towards the media, on the other hand, which seems to have taken root in a number of African countries, creates a vacuum of authentic and credible news where rumour-mongering and half-truths are allowed to thrive. This can only lead to mistrust, disillusionment and unrest among the general population, and in the final analysis to a weakening of democratic structures which may put the whole system at risk. Nobody wants this to happen, least of all responsible politicians.

## IN A NUTSHELL

### Main Functions of the media:

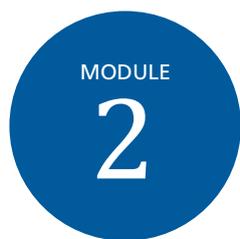
1. They provide information and a platform for debate and participation.
2. They act as a watchdog and hold those in power accountable.

### Keep in mind

Media houses are businesses with tight deadlines.

### Suggestion

Be pro-active: Seeing that the story will be written either ways, provide your side of the story, answer questions and give feedback in a timely manner.



# PRINCIPLES OF FREEDOM OF EXPRESSION AND MEDIA FREEDOM

## TOPICS

- INTERNATIONAL STANDARDS
- AFRICAN STANDARDS
- FREEDOM OF EXPRESSION IN AFRICAN CONSTITUTIONS

### International standards

In its very first session in 1946 the United Nations (UN) General Assembly adopted Resolution 59 (I) which states:

*Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.*

Article 19 of the Universal Declaration of Human Rights (1948) says:

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*

The UN International Covenant on Civil and Political Rights (1966) in its Article 19 goes into more detail:

*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.*

The United Nations Human Rights Council, which is mandated to interpret this Covenant said in 2011<sup>1</sup> in regard to this Article:

*Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.*

*A free, uncensored and unhindered press or other media is essential in any society ... The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free*

*press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*

Other bodies and forums have confirmed these international principles. The Windhoek Declaration on Promoting an Independent and Pluralistic African Press, for example, was adopted by the General Assembly of the UN Educational, Scientific and Cultural Organisation (UNESCO) in 1991. It states in Article 9:

*(We) declare that:*

- *Consistent with Article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development.*
- *By an independent press, we mean a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.*
- *By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.*

### African Standards

The African Charter on Human and Peoples' Rights, adopted in 1981 and in force since 1986 after all African states had ratified the document, lists freedom of expression as one of the basic rights of all citizens. It states in Article 9:

1. *Every individual shall have the right to receive information.*
2. *Every individual shall have the right to express and disseminate his opinions within the law.*

In 2002, the African Commission on Human and Peoples' Rights of the African Union (ACHPR) adopted the Declaration of Principles on Freedom of Expression

<sup>1</sup> United Nations, Human Rights Committee, General Comment No. 34 - Article 19: Freedoms of opinion and expression, adopted on 21 July 2011

in Africa. This provides member states with a detailed interpretation of the rights to freedom of expression outlined in the African Charter. Clause I of the Declaration states:

1. *Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.*
2. *Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.*

And in clause II it states:

1. *No one shall be subject to arbitrary interference with his or her freedom of expression.*
2. *Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.*

In 2007, the African Union re-affirmed this principle in its legally binding African Charter on Democracy, Elections and Governance<sup>2</sup>. Article 27 says:

*In order to advance political, economic and social governance, State Parties shall commit themselves to: ...8. Promoting freedom of expression, in particular freedom of the press and fostering a professional media; ...*

In 2001, heads of state of the Southern African Development Community (SADC) countries signed the binding SADC Protocol on Culture, Information and Sport (2001)<sup>3</sup>. Section 17 (a) of this Protocol commits member states to the promotion, establishment and growth of independent media, as well as free flow of information.

In West Africa, the Economic Community of West African States expressly says in its 2001 Protocol on Democracy and Good Governance (in force since 2005):

*The freedom of the press shall be guaranteed.*

Angola, Burundi, the Central African Republic, Congo (Republic of), Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia are members of the International Conference in the Great Lakes Region. Their heads of states agreed in 2006 on a Protocol on Management of Information and Communication<sup>4</sup> which enjoins member states, among others, to

1. *Promote freedom of opinion and expression and the free exchange of ideas in the Great Lakes Region;*
2. *Promote freedom of the media to receive and to impart information and ideas in the Great Lakes Region ...*

Countries are bound by such international and regional conventions that they have signed or are party to – whether these originate from the UN, the African Union or regional bodies. It is important therefore that the provisions they contain be recognised and adhered to in any new laws or policies to be drafted. Where necessary, amendments must be made to existing laws in line with these mutually agreed provisions. They should also be used as a reference in interpreting legislation and in court rulings.

Some countries have written the need to abide by such agreements into their national legislation.

For example, in Mozambique, the Constitution states in Article 18:

*Validly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and they are binding on the Mozambican State.*

The preamble of Cameroon's 1996 Constitution "affirm[s]" the country's

*attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and the African Charter on Human and Peoples' Rights and all duly ratified international conventions relating thereto ...*

And Article 45 of the Constitution says:

*All duly approved or ratified treaties and international agreements shall following their publication override national laws, provided the other party implements the said treaty or agreement.*

## Freedom of expression in African constitutions

Freedom of expression is protected in literally all African constitutions. Here are some examples:

The 1996 Constitution of South Africa in its Article 16 guarantees "the right to freedom of expression" which specifically includes "freedom of the press and other media" and continues by saying that this right does not extend to

- (a) *propaganda for war;*
- (b) *incitement of imminent violence; or*
- (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm"*

2 The Charter came into force in February 2012 after the instruments of ratification had been deposited by the minimum required number of 15 African states.

3 The Protocol came into force in 2006 after SADC member states had ratified it.

4 This Protocol did not need specific ratification by member states and came into force automatically.

The 2010 Constitution of Kenya in its Article 34 also guarantees the “independence of electronic, print and all other types of media” (with similar limitations as in South Africa). In the same Article this basic law goes further by stressing:

The State shall not

- (a) *exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or*
- (b) *penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.*

Malawi’s Constitution states:

*The press shall have the right to report and publish freely, within Malawi and abroad ... (Article 36).*

The Constitution of Mozambique expressly protects:

*The right to expression and to freedom of the press as well as the right to information ... The exercise of freedom of expression ... shall not be restricted by censorship ...” (Article 48).*

Article 21 (1) (a) of the Namibian Constitution says:

*All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.*

Nigeria’s Constitution similarly protects the “right to freedom of expression and the press” in its section 39 and specifies further:

*... every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.*

Chapter II of the Nigerian basic law deals with “Fundamental Objectives and Directive Principles of State Policy” which range from the overarching goal “to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity”, to ensuring that

*...all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.*

Interestingly, section 22 then refers specifically to the role of the media as a watchdog in regard to these objectives:

*The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the Government to the people.*

## IN A NUTSHELL

- Countries are bound by international and regional conventions that they have signed or are party to as well as by their constitutions.
- Provisions and principles contained in these documents must be adhered to when new policies and laws are drafted.
- Existing laws must be amended if they contradict the provisions and principles contained in international instruments (and national constitutions)

### Suggestion

Familiarize yourself with international and regional instruments and apply the relevant conventions and standards.



## BALANCING ACT: FREEDOM OF EXPRESSION VS OTHER RIGHTS

### TOPICS

- LEGITIMATE RESTRICTIONS ON FREEDOM OF EXPRESSION
- FREQUENTLY QUOTED REASONS FOR EXEMPTIONS
  1. STATE OR NATIONAL SECURITY
  2. DEFAMATION
  3. 'FALSE NEWS'
  4. HATE SPEECH

### Legitimate restrictions on freedom of expression

The right to freedom of expression, unlike the right to life, for example, cannot be unconditional because it might jeopardise the rights and basic freedoms of others.

Article 19 of the International Covenant on Civil and Political Rights (1966), which guarantees the right to freedom of expression in its paragraph 2 also has a clause on limitations in the following paragraph 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 (ordres public), or of public health or morals.

The Human Rights Committee of the United Nations in its 2011 commentary points out that such restrictions are justifiable only under certain strictly limited conditions:

*Paragraph 3 [of Art 19] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstances, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with Article 19.*

In any case, the Committee goes on to say,

*... restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected ...*

### The three-part test

The Declaration of Principles on Freedom of Expression in Africa in chapter II (2) provides a useful tool for testing the legitimacy of laws that might infringe on freedom of expression:

*Any restrictions on freedom of expression shall be provided for by law, serve a legitimate interest and be necessary in a democratic society.*

This “three-part test” is internationally recognised as a yardstick to decide whether such restrictions are justifiable. To pass this test:

- limits on freedom of expression must be based on a law enacted by parliament and cannot be imposed by a presidential decree or in a similarly undemocratic fashion;
- they must protect a legitimate interest, for example the right to privacy; and
- restrictions on freedom of expression must be necessary in a democracy society, i.e. essential to address a pressing social need; the restriction must be proportionate to the aim, and the reasons given to justify the restriction must be relevant and sufficient.

The Kenyan Constitution includes the essential components of this test in its Article 24:

*A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

- (e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Most countries in Africa still have legislation in place, which was originally meant to protect the colonial masters against their subjects and which does not comply with these democratic principles and provisions. After independence, some of these laws remained on the statute books, intentionally or unintentionally.

Therefore, the Declaration of Principles on Freedom of Expression in Africa demands in its clause XIII:

*States shall review all criminal restrictions on content [of media] to ensure that they serve a legitimate interest in a democratic society.*

## Frequently quoted reasons for exemptions

### 1. State or national security

Government officials and state authorities often claim, quite broadly, that the interests of state or national security constitute a valid justification for restrictions on freedom of expression.

The assumption seems to be that there is an inherent, almost self-evident contradiction between state security – however loosely defined - and freedom of expression, media freedom in particular, and that, where the two collide, the safeguarding of state security is automatically the higher good. This line of argument needs to be looked at very closely.

#### a. Seditious Libel

There are still clauses on seditious libel as an offence against the state in a number of penal codes.

It is a crime to publish material that advocates or calls for political change by unconstitutional means such as violence, insurrection or rebellion against the state, leading to a breach of peace. This limitation on freedom of expression is, of course, legitimate. But a closer look at the detailed provisions in some of these clauses often raises serious questions.

The Criminal Code in Nigeria, for example, defines seditious intention as the intention “to excite disaffection against the government”. But that, surely, is normal practice in a democracy: opposition parties are always touting themselves as the better alternative and thus trying to create “disaffection against the government”, exposing its blunders and shortcomings. The latter also goes for the media.

This is what the UN Human Rights Council has to say on the issue:

*The penalisation of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.*

The Nigerian Court of Appeal ruled in a sedition case that provisions such as those in section 51 of the Criminal Code are inconsistent with the country's Constitution, which guarantees freedom of expression:

*We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. ... To retain Section 51 of the Criminal Code in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our constitution, will be a deadly weapon and to be used at will by a corrupt government or tyrant ... let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose. The decision of the founding fathers of this present constitution which guarantees freedom of speech which must include freedom to criticize should be praised and any attempt to derogate from it except as provided by the constitution must be resisted. Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds, there should be a resort to the law of libel where the plaintiff must of necessity put his character and reputation in issue. Criticism is indispensable in a free society.*

#### b. Security Legislation

On many statute books there is security legislation to protect the state against espionage by agents in the pay of foreign or enemy countries.

The desire to prevent this by way of a law is legitimate, of course.

The snag is that often such legislation is being used to harass journalists who have ferreted out unpalatable truths - say about the real state of preparedness of a country's defence force, or the unfitness of an important minister for office - and are exposing these for the benefit of the general public.

This does not mean to say that the issue of national security should be taken lightly or shrugged off completely in the name of freedom of expression. It is an important, possibly vital, social value – if national security was indeed seriously undermined the state might cease to be in a position to protect the rights of its citizens altogether.

It is universally accepted, therefore, that certain restrictions on freedom of expression are warranted to protect national security interests.

However, the meaning of what the term is supposed to imply needs to be clearly - and narrowly – specified.

The UN Human Rights Council says:

*Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.*

The “Johannesburg Principles: National Security, Freedom of Expression and Access to Information” (1995) could serve as a useful tool in this regard. These principles were developed by 36 leading experts from all over the world at the invitation of the international lobby organisation, ARTICLE 19, and have since been increasingly referred to in court rulings and policy formulation.

Principle 6, for example, provides a key test for restrictions on freedom of expression in the name of national security, which prohibits restrictions unless a government can demonstrate that:

- (a) *the expression is intended to incite imminent violence;*
- (b) *it is likely to incite such violence; and*
- (c) *there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.*

An expression “intended to incite imminent violence” is clearly and understandably unlawful. An expression – say a comment or an article or a remark in a public rally – may also have unforeseen but very real consequences that need to be borne in mind. In that case, however, there needs to be a direct link established between what was written or said and the likelihood or actual perpetration of such harm or violence before a restriction can be justified.

All of these qualifications serve to make the point that the expression of an opinion or a belief in itself does not breach national security.

In the words of Clause XIII of the Declaration of Principles on Freedom of Expression in Africa:

*Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.*

In this context the UN Human Rights Council<sup>5</sup> also cautions against the indiscriminate use of another term to justify limitations on free speech:

*Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression.*

## 2. Defamation

A person defames another person when he or she publicly makes untrue and insulting remarks about him or her designed to smear his/her reputation. Such defamation is an offence – be it perpetrated by a journalist or any other individual – in most (if not all) countries in the world, and for good reason. The right to freedom of expression must not be misused to wilfully violate the privacy and honour of another human being.

### How to protect against defamation without unduly restricting freedom of expression?

In some countries defamation (or libel) is a criminal offence. Section 197 of the Zambian Penal Code, for example, generally defines criminal libel as defamatory matter not published in good faith. Publication is deemed to have been made in bad faith if the matter was false and the person who published it believed it to be false; or if the matter was published to injure the person defamed; or – and this is the grey area of particular concern for the media – if the matter was untrue and published “without having taken reasonable care to ascertain whether it was true or false”.

### Problem with criminal defamation: its effect on the use of freedom of expression

Bearing in mind the three-part test, is it really necessary and appropriate to prosecute and imprison persons for causing harm to the reputation of another person?

Generally, jail sentences serve the purpose of protecting society from further harm caused by the offender, to rehabilitate the offender so that he/she does not repeat the offence, to deter others from committing the same crime and to show society that “justice has been done”. Defamation once proven, it can be argued, is not a readily repeatable offence – a person who has been shown to defame another will not easily be believed the next time.

This argument becomes particularly pertinent in the context of the media: To a journalist or publishing house the resultant loss of credibility could be lethal.

And while a jail sentence might discourage others from perpetrating the same offence, such a harsh penalty carries a very high price. It will have what in legal circles is often described as a “chilling effect” on people’s readiness in general to use their right of expression.

There is increasing consensus nowadays that defamation should be decriminalised to ensure that citizens can exercise their right to freedom of expression without state interference. Criminal defamation has been struck down by courts in a number of countries as being incompatible with democratic practice.

<sup>5</sup> United Nations, Human Rights Committee, General Comment No. 34 – Article 19: Freedoms of opinion and expression, adopted on 21 July 2011

The UN Human Rights Council also recommends that

State parties should consider the decriminalisation of defamation.

### What constitutes defamation?

Assessing what might or might not constitute defamation becomes particularly tricky and contentious when the statement in question was made about a public figure. According to some national legislations this still warrants special sanctions.

Section 69 of the Zambian Penal Code, for example, deals with defamation of the president specifically and provides that without the option of a fine

any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter – is guilty of an offence and is liable on conviction to imprisonment for up to three years.

In Mozambique, this special protection by law can also be extended to ministers, parliamentarians, magistrates, foreign heads of state, or diplomats.

Such provisions are completely out of step with international and African norms and standards. The UN Human Rights Council<sup>6</sup> says:

... the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit, public figures benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. ... States parties should not prohibit criticism of institutions, such as the army or the administration.

Defamation laws must be crafted with care to ensure that they comply with paragraph 3 [of Article 19 of the Covenant which allows for certain limitations to freedom of expression], and that they do not serve, in practice, to stifle freedom of expression. ... a public interest in the subject matter of the criticism should be recognised as a defence.

And Clause XII of the Declaration of Principles on Freedom of Expression in Africa stipulates that:

1. *States should ensure that their laws relating to defamation conform to the following standards*
  - *no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;*
  - *public figures shall be required to tolerate*

- *a greater degree of criticism; and*
- *sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.*

2. *Privacy laws shall not inhibit the dissemination of information of public interest.*

Having regard for all of these considerations, it is still legitimate for the state to protect the privacy and reputation of its citizens - all citizens and a person who was seriously harmed by defamatory statements must have the (civil) right to seek redress and/or compensation.<sup>7</sup>

### Guidelines for drafting regulations on defamation:

- Civil defamation legislation must be applicable to all persons and organisations and not the media alone. Media practitioners are citizens like all others and must be treated equally.
- Liability for defamation should come into play only if the accused person knows that the statement expressed was false or if he or she acted in reckless disregard of its veracity. There should thus be no liability for defamation if the statement is an opinion, or substantially true. This is confirmed by ARTICLE 19<sup>5</sup> in its Principles on Freedom of Expression and Protection of Reputation :
- No one should be liable under defamation law for the expression of an opinion. An opinion is defined as a statement which either does not contain a factual connotation which could be proved to be false; or cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).
- Defamation should be defined as one person defaming another. It follows logically that public authorities cannot then bring defamation claims.

Again in the words of ARTICLE 19's Principles:

*Defamation laws cannot be justified if their purpose or effect is to:*

- *prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption;*
- *protect the 'reputation' of objects, such as State or religious symbols, flags or national insignia;*
- *protect the 'reputation' of the State or nation, as such ..."*

<sup>6</sup> United Nations, Human Rights Committee, General Comment No. 34 - Article 19: Freedoms of opinion and expression, adopted on 21 July 2011

<sup>7</sup> Taking its name from article 19 of the Universal Declaration of Human Rights, ARTICLE 19 works as a global campaign for freedom of expression.

Public officials may bring defamation claims only in their personal capacity and “under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status” (ARTICLE 19)<sup>8</sup>.

When a claim of defamation is made to the courts, the first step in the proceedings should be to examine whether the statement in contention was indeed defamatory. While it may have been extremely harmful to the aggrieved person’s reputation, it could still very well be true.

Section 197 of the Kenyan Penal Code, for example, provides for a public interest defence by saying that defamation is not unlawful if “the matter is true and it was for the public benefit that it should be published”.

Where a statement is proven to have been untrue, the first aim of the court should be to seek an amicable settlement between the parties – basically in the form of a public apology by the offender. This should be provided for by law.

If compensation is granted, its sole purpose should be to redress the harm caused to the reputation of the injured person. It must also be proportional to the harm caused. The amount of damages awarded should not be likely to result in severe financial distress or bankruptcy on the part of the offender or the closure of a publication.

### 3. “False news”

Arrests of editors and journalists - sometimes even printers and vendors – who “publish[es] any false statement, rumour or report which is likely to cause fear and alarm to the public” (Penal Code of Kenya) are frequent in Africa, in particular when media are critical of government.

Zimbabwe’s Public Order and Security Act (2002) makes it a criminal offence to publish or communicate “false statements prejudicial to the state”. A person may be fined or imprisoned for up to five years for publishing a false statement likely to incite public disorder, affect the defence and economic interests of the country, or undermine public confidence in the police, armed forces or prison officers.

#### Problem with “false news”

Why, one could ask, should the publication of false stories not be punishable, if indeed they do cause “public fear and alarm”? - Because, as the Supreme Court of Uganda found in a remarkable judgement in February 2004, there is a greater good to be protected<sup>9</sup>:

*A democratic society respects and promotes the citizens’ individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. In order to maintain that benefit, a democratic society chooses to tolerate the exercise of the freedom*

<sup>8</sup> ARTICLE 19 is defends freedom of expression and freedom of information

<sup>9</sup> 2004 Ugandan Supreme Court ruling on Constitutional Appeal No. 2 of 2002 lodged by journalists Charles Onyango-Obbo and Andrew Mwenda

*even in respect of ‘demonstrably untrue and alarming statements’, rather than to suppress it.*

The court pronounced unconstitutional a law that banned the reporting of “false” news likely to cause “fear and alarm” (introduced in 1954 by the British colonial administration) and struck it from the statute books:

*[T]he right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information ... [A] person’s expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant ... Indeed, the protection is most relevant and required where a person’s views are opposed or objected to by society or any part thereof, as ‘false’ or ‘wrong’.*

In making their decision, the judges specifically referred to the difficult choices to be made daily by journalists and editors:

*In practical terms, the broadness [of the provision] can lead to grave consequences especially affecting the media. Because the section is capable of very wide application, it is bound to frequently place news publishers in doubt as to what is safe to publish and what is not. Some journalists will boldly take the plunge and publish...at the risk of suffering prosecution, and possible imprisonment. Inevitably, however, there will be the more cautious who, in order to avoid possible prosecution and imprisonment, will abstain from publishing. Needless to say, both the prosecution of those who dare, and the abstaining by those who are cautious, are gravely injurious to the freedom of expression and consequently to democracy.*

### 4. Hate speech

The issue of speech which might incite hatred against individuals or groups - hate speech for short - is extremely controversial and, unfortunately, quite topical in many countries the world over. The case of Rwanda in 1994, where some media actively engaged in incitement to murder and genocide, was one of the most horrifying recent examples and has given rise to renewed calls for a ban on such perversions of the idea of free speech.

Pros

- Proponents of limitations on hate speech argue that repeated hate speech is likely to promote and result in fear, intimidation, harassment of, or serious physical harm done to, individuals or entire groups. They refer not only to Rwanda but also to the rhetoric of the Nazis in Germany which led to attacks on the Jewish community and prepared the way for the Holocaust.

Cons

- Some who argue against legal restrictions state that hate speech laws are not an effective tool to prevent such speech.
- Some argue that hate speech does not necessarily lead to actions, and where actions are carried out, the speaker or writer of the message cannot be held responsible for the actions of others.
- Others agree that hate speech may certainly be dangerous and should not exist, but that it cannot be wished away or simply suppressed by law. Instead it needs to be actively tackled and fought through open debate.

**Reasonable restrictions regarding hate speech**

Article 20 of the International Covenant on Civil and Political Rights narrows down the scope of acceptable legal limitation and states:

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

South Africa refined this provision further in its 1996 Constitution. Section 16 (2) restricts the right to freedom of expression in cases of

- (a) *propaganda for war;*
- (b) *incitement of imminent violence; or*
- (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

The qualifications in this provision are essential. There must be incitement of imminent violence – in other words: a call to weapons here and now is not allowed, but theoretical considerations on revolutionary means are legal. Hate speech must constitute incitement to cause harm - the mere use of swear words, for example, is covered by freedom of expression. Calls to attack or in other ways do harm to a certain group of people defined perhaps by the colour of their skin, fall outside the scope of what a democratic society must tolerate and may invite prosecution.

**IN A NUTSHELL:**

Criminalising the expression of opinion that is critical of the government cannot be considered reasonable ground for restricting freedom of speech or media freedom (or constitute a breach of national security) in a democratic society. All restrictions must be clearly defined and according to the Declaration of Principles on Freedom of Expression in Africa in chapter II any restrictions on freedom of expression:

1. shall be provided for by law,
2. serve a legitimate interest and
3. be necessary in a democratic society.

**Suggestion**

Legislation that restricts freedom of expression or freedom of the media should be reviewed using this yardstick.

## SELF-REGULATION VS. STATUTORY REGULATION OF THE MEDIA

### TOPICS

- PROFESSIONAL STANDARDS
- IMPLEMENTING THE STANDARDS: STATUTORY VS. SELF-REGULATORY SYSTEMS
- LICENSING PUBLICATIONS AND JOURNALISTS

The Declaration of Principles on Freedom of Expression in Africa of the (ACHPR) says in its Clause IX:

1. A public complaints system for print or broadcasting should be available in accordance with the following principles:
  - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and
  - the complaints system shall be widely accessible.
2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
3. Effective self-regulation is the best system for promoting high standards in the media.

### Professional standards

It is generally recognised that there should be a set of recognised standards for journalists, and a means to complain about and correct mistakes for example factual inaccuracies. Therefore journalists worldwide, including in most countries of Africa, have formulated and adopted codes of professional standards or codes of ethics/practice and self-regulatory bodies have been set up to enforce them.

The South African Press Code was thoroughly reviewed and may be used as a template for comparing existing codes or developing new ones in other countries (see: <http://www.presscouncil.org.za/>).

In most countries there are separate codes for print and broadcast media and therefore separate enforcement mechanisms. Broadcasting is dealt with in module 7 and 8; here we concentrate on print media.

### Implementing standards – statutory or self-regulatory?

As with all kinds of control mechanisms, there must be a way to monitor compliance and sanction non-compliance. This is where arguments and options on statutory or self-regulation of the media need to be considered.

#### Self-regulation: media councils/ombudsmen

A study published in 2007<sup>10</sup> showed that 87 countries in the world have set up voluntary self-regulatory mechanisms in the form of media councils or press commissions; in Africa these are most commonly known as press or media councils. They may vary in mission and structure, but have a largely similar overall pattern. All of them seek to perform three major functions:

1. to show that the media are accountable to the public;
2. to assure sources that journalists will act responsibly towards them;
3. to protect the professional integrity of journalists against outside interference, as well as the status and unity of the profession as a whole.

The primary objective of media councils is to act as a complaints body. Any member of the public who feels aggrieved by a published story or thinks that the responsible journalist did not comply with the requirements of the code of ethics can take his or her complaint to the council rather than going the costly and lengthy route of court action. Such complaints are usually dealt with by committees set up by the press council.

There are two different approaches in setting up such councils.

1. One is to appoint representatives of journalists and publishers only – self-regulation in the narrow sense.
2. The other is to have members of the general public actively involved in order to increase the mechanism's credibility and acceptance. This is called co-regulation.

<sup>10</sup> Barker I and Evans L, 'Review of the New Zealand Press Council, November 2007, accessed from [www.presscouncil.org.nz](http://www.presscouncil.org.nz)

### Statutory and voluntary regulation

Some governments in Africa introduced regulation of the media by legislating for the setting up of press councils (statutory regulation). In some countries statutory and voluntary media councils exist side-by-side.

In Ghana, for example, the 1992 Constitution provides for the establishment of a National Media Commission (NMC) with the mandate to “promote and ensure the freedom and independence of the media for mass-communication or information” (Article 167). The Commission’s main tasks are to “ensure the establishment and maintenance of the highest journalistic standards in the mass media” and to “insulate the state-owned media from government control”. The NMC is mandated to deal with complaints against the media from the public and to appoint the board members of state-owned media. It is, however, not allowed to “exercise any control or direction over the professional functions of a person engaged in the production of newspapers or other means of communication” (Article 173). Its 15 members are representatives from ten civil society groups as well as two persons appointed by the state president and three by parliament.

The Ghana Journalists Association (GJA) has a Code of Professional Ethics for media houses which is enforced by an Ethics and Disciplinary Council that deals with complaints from the public. The Ghana Independent Broadcasters Association (GIBA) also has its own Code of Ethics which is used in conjunction with the GJA’s Code of Conduct. In cases of serious breaches of these Codes, the offending radio station can be expelled from the Association.

The African Media Barometer (AMB)<sup>11</sup>, a self-assessment exercise based on African standards, conducted by a local panel of experts in 2011, said:

*The general assessment is that the self-regulatory mechanisms – with all their flaws – are working more efficiently than the statutory NMC because they serve as “courts of honour” and their “name-and-shame” sanctions seem to be the strongest weapon against unethical practices.*

In some African countries efforts to introduce statutory regulation for the media failed – mainly for constitutional reasons.

In Zambia, for example, an attempt to pass legislation meant to oblige journalists to become members of a Media Association and to register with a statutory Media Council was judged unconstitutional by the country’s High Court in 1997:

*I do not in my view consider the decision to constitute the Media Council of Zambia to be in furtherance of the general objectives and purposes of the Constitutional powers, among them, to promote democracy and related democratic ideals such as*

*freedom of assembly and association, freedom of expression, and press freedom in particular ... The decision to create the Media Council of Zambia is no doubt going to have an impact ... on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the Council would entail losing his status as a journalist, and with it the denial of the opportunity to express and communicate his ideas through the media. In the light of the above it cannot be seriously argued that the creation of the Media Association or any other regulatory body by the Government would be in furtherance of the ideal embodied in the Constitution, vis-à-vis freedom of expression and association. Consequently, I find that the decision to create the Media Association is not in furtherance of the objectives or purposes embodied in the Constitution in particular those protected in Articles 20 and 21” [which guarantees freedom of expression and association].*

In July 2010, the Federal High Court in Nigeria declared unconstitutional a press law which included the establishment of a statutory Press Council. The judge said:

*I must hold that the total effect of the Nigerian Press Council Act ... constitutes a bulwark against the free expression of opinion, idea and view whether by individual journalist or by the press and this, in my view, constitutes a gross violation of the rights guaranteed under Section 39 of the constitution [which guarantees freedom of expression] ... The act has ... created an illicit ombudsman in the council, which will certainly be used to define and tailor the additional directions and policies of the media. This is not the dream of our constitution makers. The dream is for a free speech country where views and opinions are shared openly freely through any medium ... without threat ... Therefore, I find the act oppressive, overbearing and grossly incompatible with a standard of a [democratic] society.*

Generally, where self-regulatory mechanisms exist, there will be no need for a statutory media council. It is only when media organisations do not agree to be bound by a self-regulatory body that a statutory regulatory body should be considered. In such instances, measures must be put in place to ensure that the regulatory body is truly independent. Measures must be taken to ensure that such a body will act in the public interest – and not be biased towards any particular sector of society or interests.

The Declaration of Principles on Freedom of Expression in Africa states in Clause IX (2):

*Any regulatory body, including media councils, established to hear complaints about media content, shall be protected against political, economic or any other undue interference ... Effective self-regulation is the best system for promoting high standards in the media.*

<sup>11</sup> In 2005, the AMB was jointly developed by the Media Institute of Southern Africa (MISA) and the media project of the Friedrich-Ebert-Stiftung (FES), fesmedia Africa

## Licensing publications or journalists

Statutory regulation often seeks to go further than establishing a media complaints body only, but also introduces licensing of publications, registration of journalists and establishing minimum professional qualifications. The argument made in favour of such regulatory requirements is that journalists and media houses have special influence and therefore must have special responsibilities.

### Licensing publications?

Like all enterprises, publications are usually registered under a Companies Act. Going far beyond this, some states impose licensing requirements on all media (treating the print media the same as broadcasters). While the reason for licensing broadcasters is to ensure efficient use of the airwaves, there is little justification for the licensing of print media – other than the wish to exert some kind of control over them. The requirement for compulsory licensing prior to publication implies the possibility that a publication may be refused registration. This clashes with constitutional stipulations that guarantee freedom of the media and freedom of expression.

In light of these considerations the 1999 Constitution of Nigeria in its Section 39 (2) stipulates clearly that:

*... every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions.*

And the 2004 Constitution of Mozambique says in Article 48 (3):

*Freedom of the press shall include, in particular, ... the right to establish newspapers, publications and other means of dissemination.*

### Registering journalists?

The easiest and seemingly most innocuous way of keeping a check on specific professional groups is to compile a list of its bona fide members that is then made available to the public.

### Frequently quoted arguments for registration

There are lists of recognised plumbers, estate agents, medical doctors and a host of other professionals, for each interested person to know who they are dealing with. Only those who make the grade make it on to the list; if they under-perform or act unprofessionally, they are struck off. This keeps imposters out and serves to increase the individual accredited member's status and public recognition.

### Arguments against registration & minimum qualifications

- The problems starts with who determines who a journalists is and what kind of criteria make sense. Some great journalists have no qualifications from any schools of journalism or any other degrees.
- There are fundamental differences between journalists and, for example, lawyers or medical

doctors, who work within set parameters in a strictly regulated environment and according to agreed standards, and who therefore have to show clear proof of competency before they can be allowed to do so. And while lawyers and medical doctors are protected by the constitutionally guaranteed freedom of profession, there is no constitutional right to be a lawyer or a doctor. The work of journalists, on the other hand, is the exercise of their right to freedom of expression, a right which is guaranteed to all citizens in most constitutions.

- Journalists do this for the benefit of their fellow citizens. Without people who collect reports on events and views on issues, and who distribute these to the community as a whole every day (in other words: without a medium or the media) there would not be mass freedom of expression in a society.
- If indeed the constitutional right to exercise freedom of expression, and thus to be a journalist, is to be taken seriously, nobody can be excluded from exercising that right by any attempt to regulate who may or may not 'officially' qualify as a journalist.

Speaking in practical terms, journalists come in all shapes and forms – reporters out in the field, sub-editors and editors in their offices who actually compile the paper or final broadcast product, film makers, columnists, bloggers, full-time employees and freelancers.

All of these arguments against registration do not, of course, preclude the practice of issuing journalists with press cards to facilitate their interaction with members of the public. Such press cards should be issued by unions, associations or employers and be accepted as proof of identification by all organisations, including state authorities.

The UN Human Rights Council in its comment on the International Covenant on Civil and Political Rights clearly states:

*Journalism is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3 [of article 19 of the Covenant which allows for certain limitations to freedom of expression].*

The media have very different formats and levels of sophistication, and hence different personnel requirements. Given the above-mentioned all-encompassing nature of journalistic work, which covers all areas of human life and endeavour, there can be no one set body of required qualifications.

To make it in the profession you need to be able to think clearly, to collect information, to assess and weigh up facts, to make sound judgements and construct a convincing, logical argument. And you need to be able to put it all into

words - to “write”. Nobody has yet been able to make an objective finding on what constitutes good writing. Styles differ, and so do tastes. Experience shows that many of the best - and best-loved - journalists in the world, including in Africa, never had any formal journalistic training at all.

Journalists can perhaps best be compared to politicians who also have to be able to address the totality of peoples concerns (with no obligation either to first obtain training or a licence to do their job or to register with a professional body). This does not mean that all of them will be all-rounders, equally familiar with every topic under the sun - even though some (in both camps) may think they are. Specialisation usually happens on the job.

### **Qualifications vs. Training**

Basic training for journalists is certainly desirable and often acquired beforehand at colleges or universities by those wishing to enter the field. It can also be actively encouraged by employers in the form of intensive on-the-job or in-house training or extended leave given for degree courses or other forms of further study. Either way, media houses are free to define their own employment requirements. However, to make such formal journalistic training a legal condition for entry into the profession would limit access and thus, again, be in breach of the right to freedom of expression.

It is up to media owners and editors to choose the right person to work in a particular position for their particular organisation or to accept (or reject) contributions from certain analysts or columnists.

### **IN A NUTSHELL:**

- Freedom of expression is a constitutionally protected human right. Journalists exercise that right by practicing journalism!
- According to the Declaration of Principles on Freedom of Expression in Africa effective self-regulation is the best system for promoting high standards in the media.
- If there is no self-regulatory mechanism any statutory regulatory body needs to be truly independent.



## PRINT MEDIA LEGISLATION

### TOPICS

- BASICS OF A PRESS LAW

With constitutional guarantees of press freedom in place and successful self-regulation of the media through established professional bodies and procedures, there is no real need for additional media-specific legislation. However, many countries enact some legislation, with the main aim of affirming the independence of the press.

### Basics of a press law

#### 3 basic rules:

1. No press law is the best law, as is the case in South Africa.
2. If, however, a country deems it necessary to have such a law, it should be affirmative rather than restrictive.
3. All stakeholders in society, including the media, should be consulted and involved in the processes of drafting the law.

What kind of provisions would an acceptable press law contain? It would start out by reaffirming the obvious:

1. The press (media) are free.

To flesh out the principle of media freedom further, a second section could read like this:

2. Special measures of whatever kind which adversely affect media freedom are forbidden.

To forestall any temptation to introduce special registration requirements for print media, another sentence could be added:

3. Media activities, including the establishment of a publishing enterprise or any other firm in the media business, may not be rendered dependent upon any form of special licensing. Broadcasting is regulated under a special Act.

This, of course, will not preclude the need for publishing houses - like all other enterprises - to register under the Companies Act.

It will be useful for the general public to know who is responsible for what appears on the printed page and who to contact over any queries they might have. The law, therefore, could stipulate that all publications "publish in each issue names and business addresses of the publisher, editor-in-chief and editors of the various sections".

The law could go on to describe the role of the media by saying:

4. The media fulfil a public function by procuring news and disseminating it, by voicing opinions and criticism, or participating in the process of opinion-forming in other ways.

There could also be a clause which clarifies that the media are subject to any general legal provisions regarding instances of libel and defamation, violation of privacy etc., and that there is thus no need for "special" laws in this regard that would apply only to the media. A press law could put it like this:

5. The culpability for criminal offences perpetrated by means of published material is determined by the terms of general criminal law.

It could furthermore be useful to have a provision in the press law on the right to reply. Such legislation presently exists in Mozambique, but hardly anywhere else in Africa. An institutionalised right of reply could help to avoid court cases for damages or even criminal libel:

6. Right of reply

The right of reply obliges an editor or publisher to publish a reply from a person who claims a story affecting him or her was factually incorrect. It is important to underline here that such a reply or counter-version must address the facts only, not the expression of an opinion. An editor may refuse to publish such a reply if it is demanded more than three months after the original publication, if it is inappropriately long or if it goes beyond the correction of facts. The aggrieved person can then seek a court order for the editor to publish the counter-version.

7. Protection of sources

One of the most hotly debated issues between lawmakers and media practitioners is the protection of sources. To put it more simply: Should journalists be allowed to conceal the identity of their informants?

The Declaration of Principles on Freedom of Expression in Africa has this to say in its Clause XV:

*Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:*

- (e) *the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;*
- (f) *the information or similar information leading to the same result cannot be obtained elsewhere;*
- (g) *the public interest in disclosure outweighs the harm to freedom of expression;*
- and
- (h) *disclosure has been ordered by a court, after a full hearing.*

Mozambique is one of the few countries to have developed specific legislation on the issue. Its Constitution states in Article 48 (3):

*Freedom of the press shall include, in particular, the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications.*

And the country's Press Law makes the point even more clearly (Article 30):

*Journalists shall enjoy the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment.*

Why should journalists have this right? The 2000 Report of the UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression gives the following answer:

*The Special Rapporteur considers the protection of journalists' confidential sources indispensable for maintaining a free flow of information to journalists and therefore safeguarding the public's right to know ... A journalist should not be used as a source for investigating authorities to obtain evidence from. In addition, undertakings of confidentiality have to be absolute, since otherwise the information would never have reached the public domain. It should also not be forgotten that the safety of journalists and their sources could also be compromised if the identity of sources were to be revealed.*

In 1982, the High Court of Nigeria ruled that it would be incompatible with the right to freedom of expression if journalists were compelled to disclose their sources:

*... the newspapers are agents so to speak of the public to collect information which it is in the public interest to make known, and to feed the public of it. In support of this constitutional right of press freedom the newspaper cannot be required to disclose its sources of information except in grave or exceptional circumstances, neither by means of discovery before trial nor by questions or cross-examination at the trial. Nor by means of subpoenas from courts or summons by a legislative investigating body. The reason is because if newsmen were compelled to disclose their sources of information which it is not in the public interest*

*to make known, charlatans would not be exposed, unfairness would go unremedied. Misdeeds and serious faults in the corridors of power and elsewhere would never be made known to the public.*

### IN A NUTSHELL:

If a press law is deemed necessary, it should derive from meaningful consultations with all stakeholders in society and include the following 7 components:

1. State that the media are free.
2. Prevent unreasonable restrictions: special measures of whatever kind which adversely affect media freedom are forbidden.
3. Pre-empt registration attempts: media activities, including the establishment of a publishing enterprise or any other firm in the media business, may not be rendered dependent upon any form of special registration or admission. Broadcasting is regulated under a special Act.
4. Define the role of the media as fulfilling a public function by procuring news and disseminating it, by voicing opinions and criticism, or participating in the process of opinion-forming in other ways.
5. Clarify that the media are subject to any general legal provisions: the culpability for criminal offences perpetrated by means of published material is determined by the terms of general criminal law.
6. Include the right of reply.
7. Include the protection of sources.



## THE RIGHT TO ACCESS TO INFORMATION

### TOPICS

- PRINCIPLES OF ACCESS TO INFORMATION
- MOST FREQUENTLY LISTED REASONS AND CONDITIONS FOR EXEMPTIONS
- GENERAL RULE FOR LIMITATIONS OF ACCESS TO INFORMATION
- OBLIGATORY DISCLOSURE IN THE PUBLIC INTEREST
- ORGANIZATIONAL PROCEDURES TO ACCESS INFORMATION
- PROTECTION OF WHISTLEBLOWERS

### Principles of access to information

The right of access to information has come to be widely acknowledged as a basic democratic and human right, a right to be enjoyed by every individual and not just by any specific group or by the media.

Typically such information is held by governments and public bodies, gathered in the course of, and for the purpose of, their work on behalf of the people.

However, people all over the world are familiar with the tendency of those in authority to keep the information at their disposal to themselves and Africa is certainly no exception when it comes to this international culture of secrecy.

From the early nineties of the last century, more and more governments around the world have conceded that citizens do have the right to access state-held information and that mechanisms and legal provisions should be put in place to allow them to exercise this right. This is in accordance with what the Special Rapporteur of the United Nations on Freedom of Opinion and Expression wrote in 1995:

*Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked.*

The UN Human Rights Council in its 2011 comments refers to Article 19, paragraph 2 of the International Covenant on Civil and Political Rights which says:

*Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.*

The Committee concludes that this provision

*embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.*

The Declaration of Principles on Freedom of Expression in Africa gives a clear guideline on the issue in its Clause IV:

1. *Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.*
2. *The right to information shall be guaranteed by law in accordance with the following principles:*
  - *everyone has the right to access information held by public bodies;*
  - *everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;*
  - *any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;*
  - *public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;*
  - *no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and*
  - *secrecy laws shall be amended as necessary to comply with freedom of information principles.*
3. *Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.*

The 2011 African Platform on Access to Information (APAI)<sup>12</sup> reiterates those principles:

*Access to information is a fundamental human right, in accordance with Article 9 of the African Charter on Human and Peoples' Rights [which says that 'every individual shall have the right to receive information']. It is open to everyone, and no one should be privileged or prejudiced in the exercise of this right on account of belonging to a class or group howsoever defined, and whether in terms of gender, class, race, political association, occupation, sexual orientation, age, nationality, HIV status, and other bases as cited in many African constitutions.*

The right of access to information has become a constitutionally guaranteed right in several countries in Africa. The Kenyan Constitution, for example, says in Article 35 (1):

*Every citizen has the right of access to—*  
*(a) information held by the State; and*  
*(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

The South African Constitution of 1996 provides for the right of access to information in its Section 32:

*(1) Everyone has the right of access to –*  
*(a) any information held by the state, and*  
*(b) any information that is held by another person and that is required for the exercise or protection of any rights.*  
*(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

Most access to information legislation refers to “public bodies” or “public authorities”; intentionally broad terms that encompass any part of government: parliament (the legislature), ministries/departments (the executive) and courts of law (the judiciary) at all levels (national, regional and local). The terms also include institutions that are owned, controlled or substantially financed through funds provided by the state (public corporations or parastatals), or that carry out a public function on behalf of a public authority (such as maintaining roads or operating railway lines). All these public bodies are obliged by law to proactively disclose information on request by a member of the public.

In Liberia, the Freedom of Information Act of 2010, in its Section 1 (6) defines these bodies as follows:

*All public authorities and bodies at all branches and levels of the Government, including but not limited to ministries, bureau, departments, autonomous agencies, public corporations, commissions, committees,*

*sub-committees, boards, military and paramilitary institutions, and any other related bodies supported in whole or in part by public resources;*

The African Commission's Declaration of Principles on Freedom of Expression, some African constitutions (e.g. those in Kenya and South Africa cited above) and laws as well as the African Platform on Access to Information go even a step further. In addition to requiring public bodies to disclose the information they hold, they also demand or grant a right to access in the case of information held by “private bodies” if that information is “necessary for the exercise or protection of any right” (Declaration). The Platform defines such private bodies in more detail as bodies that are:

*... owned or controlled by the government, utilise public funds, perform functions or provide services on behalf of public institutions, or have exclusive contracts to exploit natural resources (with regards to said funds, functions, services or resources), or which are in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to the exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.*

The definition in the Nigerian Freedom of Information Act of 2011 in Section 3 (7) is shorter:

*... private companies utilizing public funds, providing public services or performing public functions.*

#### **Right to personal data**

All persons are entitled to know what data on their individual circumstances the authorities have on file. More than that: if they find that these data are not correct, they have the right to demand that they be corrected. In Kenya this right is even guaranteed in the Constitution (Article 35 [2]):

*Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

The UN Human Rights Council in its 2011 comment refers to Article 17 of the International Covenant on Civil and Political Rights which says:

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

The Committee concludes:

*... regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed*

<sup>12</sup> The APAI Declaration was drafted by a constitutional working group representing nine African organisations and adopted in September 2011.

*contrary to the provisions of the law, every individual should have the right to have his or her records rectified.*

The Declaration of Principles on Freedom of Expression in Africa says in Clause IV (3):

*Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.*

The African Platform on Access to Information also acknowledges the right to personal data:

*All persons have a right to access and correct their personal data held by third parties.*

## Most frequently listed reasons for exemptions

1. *Protection of privacy*
2. *Protection of commercial interests*
3. *Protection of economic interests of the state*
4. *Defence and security*
5. *Protection of international relations*
6. *Law enforcement and legal proceedings*
7. *Protection of deliberative processes*

### 1. Protection of privacy

All governments collect heaps of personal information on their citizens. This is kept in tax files, police files, records in the possession of the education department, the traffic department and so on.

When responding to requests for disclosure, the right to privacy of individuals needs to be protected.

Such records are a matter between the individual citizen and the authorities and do not concern any third party.

Therefore the first exemption is usually that the disclosure of information requested must be refused if it would involve the unreasonable disclosure of personal information about a third party.

The Nigerian Freedom of Information Act lists such personal information in Section 15:

- (i) *files and personal information maintained with respect to clients, patients, residents, students, or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from public institutions;*
- (ii) *personnel files and personal information maintained with respect to employees, appointees or elected officials of any public institution or applicants for such positions;*
- (iii) *files and personal information maintained with*

*respect to any applicant, registrant or licensee by any government and/or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline;*

(iv) *information required of any tax payer in connection with the assessment or collection of any tax unless disclosure is otherwise requested by statute; and*

(v) *information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.*

### Protection of Privacy as grounds for non-disclosure?

Protection of privacy must not simply serve – or be abused – as a blanket ground for non-disclosure. Most access to information laws, therefore, contain a crucial exemption: If the information requested is not about a private individual but about a person who is an official of a public authority and if the information relates to the position or functions of that person, access cannot be refused.

The Nigerian Freedom of Information Act says in Section 15:

*Where disclosure of any information referred to in this section would be in the public interest, and if the public interest in the disclosure of such information clearly outweighs the protection of the privacy of the individual to whom such information relates, the public institution to whom a request for disclosure is made shall disclose such information ...*

### 2. Protection of commercial interests

Government departments have in their possession a lot of information on businesses and their products or services, collected for example during tendering processes. Obviously, such information should not be allowed to fall into the wrong hands, in particular those of competitors.

The South African Promotion of Access to Information Act of 2000 says in Section 36:

*... the information officer of a public body must refuse a request for access to a record of the body if the record contains—*

- (a) *trade secrets of a third party;*
- (b) *financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or*
- (c) *information supplied in confidence by a third party the disclosure of which could reasonably be expected—*
  - (i) *to put that third party at a disadvantage in contractual or other negotiations; or*
  - (ii) *to prejudice that third party in commercial competition.*

### Limits of the protection of commercial confidentiality

The South African Act stipulates one important exemption. The claim to commercial confidentiality must not be used to conceal potential dangers or risks from the public. Citizens must retain the right of access to any information or records of that nature:

A record may not be refused ... insofar as it consists of information ... about the results of any product or environmental testing or other investigation supplied by, carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.

The Nigerian Freedom of Information law similarly provides that such information be disclosed in the public interest:

*A public institution shall disclose any information ... if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in the disclosure clearly outweighs in importance any financial loss or gain to, or prejudice to the competitive position of or interference with contractual or other negotiation of a third party.*

### 3. Protection of economic interests of the state

As in the case of private businesses, the economic interests of a state also deserve protection and provisions in this regard are similar to those on the protection of private commercial interests. Such legitimately protected economic interests usually relate to the determination of currency or exchange rates, interest rates or customs or excise duties.

### 4. Defence and security

The security of the state, in other words, the security of all its citizens, is a valid concern.

People rely on the authorities to provide that protection and thus need to accept that this will entail some limitations to their right of access to information.

For this reason information relating to defence and security of a country is usually not disclosed.

However, the nature of such legitimately protected information needs to be very clearly defined: it will include only information relating to military and security tactics or strategy, or information held for the purpose of intelligence relating to defence.

#### Clearly defined exemptions

The South African law is very detailed in this regard. Section 41 (2) of the Promotion of Access to Information Act lists records which are deemed to be exempted from disclosure as those:

- (a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities;
- (b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of—
- (c) weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or

- (d) anything being designed, developed, produced or considered for use as weapons or such other equipment;
- (e) relating to the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of—
- (f) any military force, unit or personnel; or
- (g) anybody or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities;
- (h) held for the purpose of intelligence relating to—
- (i) the defence of the Republic;
- (j) the detection, prevention, suppression or curtailment of subversive or hostile activities; or
- (k) another state or an international organisation used by or on behalf of the Republic in the process of deliberation and consultation in the conduct of international affairs;
- (l) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d);
- (m) on the identity of a confidential source and any other source of information referred to in paragraph (d);
- (n) on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or
- (o) that constitutes diplomatic correspondence exchanged with another state or an international organisation or official correspondence exchanged with diplomatic missions or consular posts of the Republic.

A key and recurrent phrase in this section is “subversive or hostile activities”. What exactly such kinds of activities are understood to be is set out in the chapter on definitions:

- (a) aggression against the Republic;
- (b) sabotage or terrorism aimed at the people of the Republic or a strategic asset of the Republic, whether inside or outside the Republic;
- (c) an activity aimed at changing the constitutional order of the Republic by the use of force or violence; or
- (d) a foreign or hostile intelligence operation.

The definition is so narrow because, even in the sensitive area of defence, the people - who are also taxpayers - are entitled to obtain information, for example, on a major arms deal, the various tenders and their relative merits, and what exactly their tax money is being spent on. The authorities must not be allowed to evade the perhaps uncomfortable scrutiny of their decisions by summarily refusing disclosure “in the interest of national security”.

### 5. Protection of international relations

There are some parallels here with the accepted need for protection of personal information exchanged between two parties against unwanted or unauthorised disclosure to a third party.

- International relations are conducted on the basis of mutual trust.
- The understanding is that the content of verbal or written communication between state officials is not generally a matter for public consumption (unless otherwise agreed), and that each side will respect the other's sensitivities and concerns in this regard and honour the principle of confidentiality.
- This international consensus is reflected in most laws. Article 41 of the South African Act, for example, exempts from disclosure information on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or that constitutes diplomatic correspondence exchanged with another state or an international organisation, or official correspondence exchanged with diplomatic missions or consular posts of the Republic.

## 6. Protection of law enforcement and legal proceedings

The right of access to information does not override the need for the police and the judiciary to get on with the job of law enforcement – in order to protect the safety of all citizens and in accordance with the law and their regulations.

It is understood that these agencies will not disclose certain information: the names of minors in custody or under investigation, for example; details of planned arrests of suspects; of on-going criminal investigations or the strategy of the prosecution in an upcoming court case.

## 7. Protection of deliberative processes

Policy development is a consultative process carried out by way of communication; that is, the accumulation and exchange of information and opinion. There will be brainstorming sessions that are minuted, a first written draft to be discussed further, reviewed, amended, rephrased or thrown out altogether in favour of a fresh attempt. The whole exercise will only succeed and lead to a satisfactory outcome if there is an honest exchange of ideas and views, even the half-baked and unpopular ones.

The public at large cannot reasonably expect to be given access to such deliberative processes - not until a final draft is completed, which must then, of course, be open to public debate.

The South African Act says in its section 44 that access to information may be refused

- (a) if the record contains—
- (b) an opinion, advice, report or recommendation obtained or prepared; or
- (c) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(d) if—

(e) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—

(aa) communication of an opinion, advice, report or recommendation; or

(f) conduct of a consultation, discussion or deliberation; or

(g) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

In order to exclude any abuse of provisions regarding exemptions of this kind, many other laws clearly distinguish between opinions (which are protected) and facts contained in a document (which should be accessible to the public).

## General rule for limitations of access to information

Good access to information legislation will specify clearly and comprehensively what information cannot be made available (and why) in order to ensure the protection of other rights and legitimate interests.

The point of departure or over-arching principle is that there should be “maximum disclosure” and this will be set out clearly in the law. The African Platform on Access to Information says:

*The presumption is that all information held by public bodies is public and as such should be subject to disclosure. Only in limited circumstances set out in these principles below may disclosure be denied.*

The document then goes on to outline what these limited circumstances will be:

*The right of access to information shall only be limited by provisions expressly provided for in the law. Those exemptions should be strictly defined and the withholding of information should only be allowed if the body can demonstrate that there would be a significant harm if the information is released and that the public interest in withholding the information is clearly shown to be greater than the public interest in disclosure. Information can only be withheld for the period that the harm would occur. No information relating to human rights abuses or imminent dangers to public health, environment, or safety may be withheld.*

As with all lawful restrictions placed on rights and freedoms, the general rule is that the limitation – in this case the exemption of any information from disclosure - must be necessary, justifiable and proportionate in a democratic society (applying the three-part test as explained in module 1).

## The public interest override

If the right of the people to be fully informed about the actions of public bodies on their behalf is really taken seriously, the obligation for these bodies to disclose all information which is in the public interest might appear almost like a matter of course.

However, to avoid misunderstandings or possible abuse, a good law should clearly spell out that in the case of potential harm to the public interest being caused by the withholding of information, this obligation takes precedence over any other considerations. In legal terms this is known as the “public interest override”.

The objective of this provision is to ensure that no exemption, however plausible, will be used by the authorities to hide evidence of wrongdoing of officials or potential dangers. In such cases, the public interest and the public’s right to know will override any other concern or confidentiality argument. The Freedom of Information Act in Liberia in its Section 4 (8) contains very clear provisions to this effect:

*A public authority or private entity may not refuse access to or disclosure of information simply by claiming it as “confidential or secret”. In order to qualify to be exempted from disclosure, it must be clearly demonstrated that:*

- a) *the information or record falls within or under one or more of the exemptions established in this Act;*
- b) *the disclosure of the information will cause or [is] likely to cause injury or substantial harm to the interest protected by one or more of the exemptions established in this Act; and*
- c) *the harm to be caused by the disclosure is greater than the public interest in having the information disclosed.*

## Organisational procedures for access to information

If every person has the right to gain access to information held by public and certain private bodies, the procedure to follow must be simple, even for those not used to dealing with bureaucracies. The UN Human Rights Council says:

*States parties should make every effort to ensure easy, prompt, effective and practical access to such information.*

An essential pre-condition for such access is that the bodies, public or private, have their house in order. In the words of the African Platform on Access to Information:

*Public and relevant private bodies have a duty to collect information on their operations and activities on behalf of their citizens. They also have a duty to respect minimum standards in relation to the management of this information to ensure that it may easily be made accessible to citizens.*

The Platform further demands a “clear and unambiguous process”:

*The law shall include procedures for the exercise of the right. The process to obtain information should be simple and fast and take advantage of new information and communication technologies where possible. Bodies falling under the scope of the access to information law should provide assistance to requesters in order to ensure that they receive the information they need. The information provided should be provided in a form understandable to the requestor. Information should be disclosed within a clear and reasonable deadline provided for by law. It should be available at low or no cost.*

Most access to information laws stipulate that public and private bodies have designated staff, or information officers, to facilitate the process. The Freedom of Information Act in Liberia says in its Article 3 (6):

*Every public authority and private entity to which this Act applies shall appoint, maintain and duly support at least one designated personnel/staff whose overall responsibility shall be to receive requests for information held by the authority or entity and coordinate the response(s) of the authority or entity to all such requests. The designated personnel/staff shall serve as the primary contact of the authority or agency with the public relative to request[s] for and provision of information, and his responsibilities shall include promoting best practices in record maintenance, storage, and management, and assisting members of the public, especially illiterate and other physically challenged persons, to file requests for information.*

There may be exemptions regarding the kind of information to be released, but the right of access as such is unconditional and, like all basic rights, cannot be denied. Making it dependent on personal “good reasons” would make such denial a matter of subjective interpretation - in effect it would mean opening the door for all kinds of feeble excuses.

The South African Act, for example, says explicitly that:

*...a requester’s right of access ... is ... not affected by any reasons the requester gives for requesting access.*

The Liberian Act clearly states:

*The right to request information is independent of personal interest in the information, and no one shall be asked or required to provide a justification or reason for requesting any information.*

The authority or institution in question has the duty to respond quickly to such requests. Many Acts set deadlines for processing at between 8 and 14 days, and the Liberian law sets a maximum period for responding of 30 calendar days. 60 days, the period allowed in South Africa, is regarded as far too long, especially in the case of requests from the media.

It may happen, of course, that a citizen addresses the wrong authority with his/her request.

In that case:

*such authority or entity shall, with notice to the requester, automatically transfer the request to the public authority or private entity known or believed to hold the requested information ... no later than fifteen (15) days after receipt of the request and with prompt notice served the requester (Liberian Act).*

In accordance with the UN Human Rights Council, which says that “fees for requests for information should not be such as to constitute an unreasonable impediment to access to information”, the Liberian Act states:

*The search for and provision of requested information shall be done free of charge to the requester, but a public entity may charge such amount as is necessary to cover actual cost of photocopying, transcribing, scanning or other forms of reproduction.*

### Refusal to information

If an authority decides to deny access to the requested information it “should provide reasons” (UN Human Rights Council). The Liberian act says:

*A request for information, including to inspect, review or reproduce the information, may be lawfully denied only if it is within one of the exemptions provided in ... this Act. A denial of a request and the reason thereof shall be in writing and served the requester no later than 30 calendar days as of the receipt of the request.*

If a request is refused there must be a mechanism for appealing against such a decision. The UN Human Rights Council says:

*Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failures to respond to requests.*

The first and obvious port of call for appeals is a court of law - the option chosen in South Africa. This, however, is a very costly and time-consuming route to go. Other countries have designated the Ombudsman - where such an institution exists - to act as an appeals body, or, alternatively, the national Human Rights Commission. Some countries have established Public Information Commissions, appointed by parliament for this purpose.

The Platform on Access to Information suggests a three-step process for the right to appeal:

*Everyone has a right to appeal administratively any action that hinders or denies access to information or any failure to proactively disclose information. They have a right to further appeal to an independent body and to finally seek judicial review of all limits of their right of access to information.*

The Liberian Act provides for such a staggered procedure. Section 6 (2) entitles requesters to an internal review of the decision which shall be:

*... conducted by a senior official or an internal information request review body to be established by each authority or agency.*

The review has to be concluded within 30 working days. If the applicant is not satisfied with the outcome he/she can appeal to an Independent Information Commissioner, established by chapter 5 of the Act and

*to be appointed by the President with the advice and consent of the Liberian Senate [the upper house of parliament]:The Independent Information Commissioner shall be a Liberian of high moral character and generally acceptable to many stakeholders. The Independent Information Commissioner shall serve full-time, and receive compensation at least equal to that received by a Circuit Judge. The work of the Information Commissioner and the Technical Secretariat to support his or her work shall be funded by the Government through the National budget. The Information Commissioner shall enjoy operational, investigative and regulatory autonomy, and general independence in the exercise of his or her work.*

In both stages of the process – the internal review and the appeal to the Commissioner - it is, according to Section 6 (4) of the act, up to

*...the public authority or private entity to show that it acted consistent with its obligations and in accordance with this Act (burden of proof).*

If an appeal is successful, the Commission has the right to:

*...order any public body or private body concerned to release requested information should it find that the information or record is not one that is exempted by this Act.*

In cases where requesters are not successful with their appeal, the Act also allows them to have the decision reviewed by a court of law.

The Information Commissioner also serves as an oversight body to:

*...investigate, monitor, and promote compliance with this Act.*

To this end he/she has the duty:

- *To train and build the capacity of personnel of public bodies and private entities concerned to ensure (1) proper interpretation and application of this Act and (2) that the handling of information requests is consistent across all government bodies.*
- *To consult with and provide support to Information Officers and other relevant officials of public bodies and private entities covered under this Act.*

- To develop access guidelines and procedures.
- To develop public awareness strategies and information dissemination campaigns to educate the public about their rights under the Act, and promoting necessary compliance with this Act.
- To evaluate existing laws and regulations relating to access to information, and to make recommendations for reform and harmonization of the laws.

All public bodies and private entities to which the Act applies have to submit annual reports on their activities in this regard to the Commissioner who, in turn, will submit an annual report to parliament.

## Protection of whistleblowers

Access to information legislation usually deals with information to be released by public authorities at the request of citizens. But what if an employee him/herself comes across records that reveal a case of corruption or abuse of public funds or a serious threat to public health, safety or to the environment? Disclosure of such information by employees of private companies or civil servants is increasingly seen as a key element in the fight against corruption and mismanagement and in strengthening transparency and accountability. People who blow the whistle, i.e. alert the public when breaches of rules occur – whistleblowers – thus need to be protected.

The United Nations Convention against Corruption of 2003 recognises whistleblowing as a tool in the fight against corruption. It says in Article 33:

*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

In the same year the African Union adopted a Convention on Preventing and Combating Corruption, which entered into force in August 2008. This means to:

*...promote and strengthen the development in Africa, by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.*

Article 5 enjoins member states to:

*...adopt measures that ensure citizens report instances of corruption without fear of consequent reprisals.*

The Southern African Development Community (SADC) took the lead in this regard in 2001 when its heads of state or government signed the SADC Protocol against Corruption. In this protocol member states commit to:

*... adopt measures, which will create, maintain and strengthen ... systems for protecting individuals who, in good faith, report acts of corruption.*

The African Platform on Access to Information expressly calls for 'whistleblower protection':

*To ensure the free flow of information in the public interest, adequate protections against legal, administrative and employment-related sanctions should be provided for those who disclose information on wrong-doing and other information in the public interest.*

## IN A NUTSHELL

The premise in line with the Declaration of Principles on Freedom of Expression in Africa is that public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

### The 14 key principles on The Right of Access to Information according to the African Platform on Access to Information are:

1. Access to Information is a fundamental right accessible to everyone
2. Maximum disclosure
3. Established by law
4. Applies to public bodies and private bodies
5. Clear and unambiguous process
6. Obligation to publish information
7. Language and accessibility
8. Limited exemptions.
9. Independent oversight bodies
10. Right to personal data
11. Whistleblower protection
12. Right of appeal
13. Duty to collect and manage information
14. Duty to fully implement access to information laws



# BROADCASTING

## TOPICS

- THE NEED FOR REGULATION
- TYPES OF BROADCASTING

### The need for broadcasting regulation

Most countries keep the regulation of print media to a minimum. So what is different when it comes to broadcasting, radio and television? Why not simply allow hundreds of radio or TV stations to flourish, as is the case with newspapers, and leave it to the market to decide which of them will make it in the long run?

There are a number of short and long answers to that, but basically they boil down to the relative scarcity of available non-interfering frequency space.

Newspaper publishers can put out whatever volumes they wish and can afford to buy newsprint for. Broadcasters traditionally transmit their messages via 'the airwaves' which they share with a number of other users like the police or emergency services, for example, as well as cellphone networks. To ensure clear transmission and reception for all users, all have to transmit strictly within their band, which is their allotted segment of the frequency spectrum only.

Use of the frequency spectrum as a whole is regulated by international treaties administered by the International Telecommunications Union (ITU), a United Nations agency tasked with coordinating global telecommunications and services. All countries in the world are signatories to these agreements meant to facilitate easy worldwide communication and avoid unwanted overspill or interference both within and between countries.

For a radio station of good sound quality, for example, FM transmission is really the only way to go, not short-, long-, or medium wave. FM broadcasting is generally restricted to the segment from 87,5 to 108 Megahertz, able to carry a total of around 35 channels in any given geographic area, the lower the technical quality of transmitters and receivers, the less channels can be accommodated without interfering with each other. The transmission of television signals takes up a lot more space on the frequency spectrum, and thus the number of possible TV channels in a particular region or country is even more limited.

All of these limitations apply to the traditional way of terrestrial broadcasting where the radio or TV signal is fed into a transmitter and carried over the airwaves (analogue transmission) with the help of masts, antennae and repeaters over a specific radius or a whole country.

### Changing the game: Digital broadcasting

Digital technologies and transmission via cable, satellite or internet are changing the technological environment.

The ITU has set a deadline of 17 June 2015 for the phasing out of analogue broadcasters using ultra-high frequency (UHF) bands (470-862 MHz) in Africa, the Middle East and the Islamic Republic of Iran. The ITU has also set the 17 June 2020 as the deadline for very high frequency (VHF) bands (174-230 MHz) to change over, or migrate, to digital television broadcasting technology, on both the transmission and the reception side. These deadlines refer only to the digitisation of television broadcasting and mean that from that deadline on the ITU will no longer protect from frequency interference. Deadlines for the digitisation of radio have not yet been determined.

The switch-over from analogue to digital broadcasting will expand the potential for a greater convergence of services, with digital terrestrial broadcasting supporting mobile reception of video, internet and multimedia data. Digitisation of television is seen as a means of enhancing the viewer's experience by enabling better quality viewing through wide-screen, high definition pictures and surround sound, as well as interactive services. It also allows for innovations such as handheld TV broadcasting devices (Digital Video Broadcasting – Handheld, or DVB-H), and will mean greater bandwidth for telecommunication services. Importantly, it will also allow for the creation of many more television channels through greater spectrum efficiency.

What impact are all these developments having in the context of broadcasting regulation? If, as a result of digitisation, the spectrum especially for TV transmission will grow exponentially and there will be a multitude of available channels for broadcasting, the traditional argument for regulation in this sector of the media – the scarcity of frequencies - will fall away. Will this then mean the end of the need for regulation altogether?

### Public property: Access to broadcasting as a right

Some media experts suggest that in future the "scarcity rationale" should be replaced by a "public property rationale". The spectrum, be it small or huge, still remains public property. And there must be a mechanism to ensure that all citizens, regardless of their economic status, have access to broadcasting. If there was no public oversight over the spectrum and the free market reigned supreme,

private companies might give access to their programmes only to those households able to pay for their services, and offer quality services at a correspondingly high price only. This would create a society of different classes with different standards of information and run counter to the democratic principle of equality and equal access to information.

Regulation will continue to be needed to guarantee fair rules of competition, adherence to certain programme requirements and standards as well as technical standards, and respect for the rights of audiences. With a dramatic widening of choices it becomes even more important for the regulator to ensure equal chances of access to broadcasting and distribution facilities, and to prevent over-concentration of ownership and control over broadcasting by one or a handful of owners.

The regulator must see to it that free-to-air services, financed publicly and/or by advertisements, remain meaningful and of sufficient standard and appeal, compared to all other offerings in the market. Access to attractive programmes must not be restricted to viewers who can afford to pay a subscription or a per view fee.

And what about satellite broadcasting? In many countries, the regulation of distribution of television or radio signals via satellite forms part of the duties of the broadcasting regulator. The international trend is to follow an 'open skies' policy that allows for regulation of trans-border services in their country of origin only. Many regulators have decided to go the pragmatic route and not try to prevent the reception of any spill-over signals that may be available in their respective countries even though they are not intended for that market.

Finally, there is the internet which carries radio and TV programmes as well. The various options of governing cyberspace under international debate are: geographically based law, international treaties, international organisations or voluntary acceptance of technical protocols.

As a general rule, internet radio does not need a licence anywhere because there is no real justification for it – neither the "scarcity rationale" nor the "public property rationale".

## Types of broadcasting

Following on from colonial times, states in Africa held on to their monopoly over broadcasting in their territories for decades, with the national state broadcaster being the only one on-air. This has changed dramatically over the past twenty years and the Declaration of Principles on Freedom of Expression in Africa expressly acknowledges the importance of players other than the state. It says in Clause V (1):

*States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.*

A national public service able to reach all citizens equally, regardless of where they live and in what financial circumstances, remains essential. This will be explored further in a subsequent module. At the same time, people have a right to choice, and the broadcasting framework should provide for the establishment of a plurality and diversity of stations and channels. In an attempt to achieve all of these objectives, most countries have over the years developed a mix of broadcasting models which is known as the three-tier system, consisting of

- *public service broadcasting services controlled by the public;*
- *commercial broadcasting services run as businesses; and*
- *community broadcasting services.*

### Public service broadcasting

Public service broadcasting derives its mandate - and often the bulk of its budget - from the public it serves and thus has to be accountable to the public.

In Africa, the vision and mandate of public service broadcasting is informed by the Declaration of Principles on Freedom of Expression in Africa, the African Charter on Broadcasting of 2001, as well as the 1995 policy document "On The Move" and 2007 draft policy paper "Now is the Time" by the Southern African Broadcasting Association, in which state/public broadcasters in Southern Africa commit themselves to the aim of public service broadcasting (see also Module 9 specifically on public service broadcasting).

The vision can be summarised as follows:

- *to serve the overall public interest and be accountable to all strata of society as represented by an independent board,*
- *to ensure full respect for freedom of expression, promote the free flow of information and ideas, assist people to make informed decisions and facilitate and strengthen democracy.*

The public broadcasters' mandate is:

- *to provide access to a wide range of information and ideas from the various sectors of society,*
- *to report on news and current affairs in a way which is not influenced by political, commercial or other special interests and therefore comprehensive, fair and balanced (editorial independence),*
- *to contribute to economic, social and cultural development in Africa by providing a credible forum for democratic debate on how to meet common challenges ,*
- *to hold those in power in every sector of society accountable,*
- *to empower and inspire citizens, especially the poor and marginalised, in their quest to improve*

*the quality of their lives,*

- *to provide credible and varied programming for all interests, those of the general public as well as minority audiences, irrespective of religious beliefs, political persuasion, culture, race and gender*
- *to promote the principles of free speech and expression, as well as free access to communication by enabling all citizens, regardless of their social status, to communicate freely on the airwaves,*
- *to promote and develop local content, for example through adherence to minimum quotas and*
- *to provide universal access to their services, with their signal seeking to reach all corners of the country.*

In Kenya, Article 34 (4) of the 2010 Constitution spells out a vision for state-owned media including a public broadcaster:

*All State-owned media shall—*

- (a) be free to determine independently the editorial content of their broadcasts or other communications;*
- (b) be impartial; and*
- (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.*

### **Commercial broadcasting**

This second tier is fairly self-explanatory. The main purpose of commercial - or private - broadcasting services is to make money. They seek to serve the financial interests of their owners by targeting and developing a specific market, and thus maximizing the return on shareholders' investment. They finance themselves mainly by selling air time, and their survival (and profit) ultimately depends on the size and nature of audiences they are capable of delivering to prospective advertisers and sponsors. For this reason they may mainly broadcast entertaining, easy-listening programmes - those most likely to attract the largest numbers of listeners or viewers.

The specific objectives of commercial broadcasting services depend on their respective target audiences. These are generally defined in terms of age and/or interest groups and addressed by different formats. Most of them go for a tried and tested winning formula in terms of subject matter, presentation style and, especially important in the case of radio, genre of music played. This may have a positive and a negative side: it can (and often does) result in rather formulaic programming, i.e. predictable and, in the longer run, boring fare. But it may also offer an especially attractive service for niche markets and special interests – as long as they are profitable, of course – say lovers of sports or fine music, for example.

Because they keep - and need to keep - a close eye on their market, private operators are often more flexible and quicker to react to developments in society and popular demand than larger, public bodies with their more elaborate structures and bureaucratic procedures. Good commercial broadcasters will thus create healthy competition and keep the public broadcasters on their toes.

In countries where freedom of expression is practised, quite a number of commercial stations also offer programmes that might well be described as a 'public service': extensive coverage of current affairs, talk shows (phone-ins) and studio discussions on topical issues, and comprehensive reporting on political parties campaigning for elections. The less attention a national broadcaster pays to discharging its public duties, the greater the chance for private operators to offer an attractive and balanced programme that appeals to large audiences. In countries where the national and often so-called public broadcaster is still run by the state, commercial stations can present a more credible alternative, even though their coverage area is usually restricted to the more densely populated regions.

### **Community broadcasting**

- *geographic community: people residing in a particular geographic area,*
- *or a community of interest. This interest can be cultural, religious (...) or institutional (...)*

The essence of community broadcasting is for a community to run its own station - the community itself and no one else (within the existing laws, of course) decides what should go on air. For this reason, the station must really be owned, managed and shaped by the people it serves. It responds to the community's expressed needs and priorities and is accountable to community structures. It is managed and controlled by a board democratically elected from and by members of the community.

### **5 Principles of Community Broadcasting<sup>13</sup>**

#### *Community ownership and control*

Whatever the legal structure, stakeholders from the community have a say in developing the broadcaster's policies and objectives, and community members have both a sense of ownership and a real ability to shape the station to suit their wishes and needs (Girard 2007). Where governance structures are representative and processes are democratic, a community service is more likely to be sustainable (Fairbairn 2009).

#### *Community participation*

Within community participation lies the formula necessary to create a station that listeners tune in to every day, and which community members identify with and support. Meaningful participation happens at all levels, and includes activities such as involvement in the station's governance structures, consultation on programme topics and formats, training, the production and distribution of programmes, audience research, and finance.

#### *Community service*

Community broadcasting exists to support and contribute to a community's social, economic and cultural development, although each station has its own way of achieving this (Girard 2007 in Lush and Urgoiti, 2012).

<sup>13</sup> This is an excerpt of the publication titled *Participation Pays*, published in the 2012 *fesmedia Africa Series* written by Lush and Gabriel Urgoiti. It was shortened for the purposes of this publication. The publication is available on the website of *fesmedia Africa*.

### *Independence*

Regardless of who owns them, community media should be independent of government, donors, advertisers and other institutions. This does not mean that they do not have relationships with these institutions, or that they cannot receive funding from them. Funding relationships need to be governed by clear and transparent agreements that protect the non-partisan nature of service that broadcasters provide to their communities.

### *Not-for-profit*

A not-for-profit structure is an important way of distinguishing community media from other media forms, and safeguards community media from purely commercial interests. This not-for-profit status does not mean a broadcaster cannot generate income from a variety of sources (e.g. advertising, listener's subscriptions, community member's contributions, sponsorship, donor funding etc). It means that the money it makes is reinvested into the station and the community (Mtimde 2000 in Lush and Urgoiti, 2012).

In legal terms a community radio could be constituted as either:

1. *a voluntary association - a body, group or organisation that people join to pursue a lawful aim and which is not for the purpose of gain or profit; or*
2. *a company not for gain; or*
3. *a trust - a body set up by community organisations to look after and administer a broadcasting service for the benefit of the community.*

The mandate of community radios does not include the making of profits. The constitution of such a service will stipulate that any surplus it may make is to be used to develop the service or to benefit the community at large, that no payment of dividends is made to its members, that any salaries paid to staff must be reasonable, and that upon its dissolution, all assets shall be given to a non-profit community related purpose.

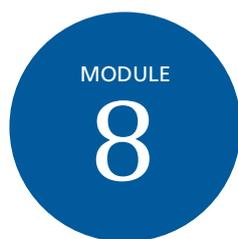
The Media Institute of Southern Africa (MISA) summarises the essence of community radio in terms of the five A's: It must be:

1. **Available** to the community residents so that they can participate in the programmes, express their needs and wants or discuss issues of interest relating to their own community, allowing for community development.
2. **Accessible**, so that community members can reach the station and benefit from it. It should be based within the community it is serving. Community members should have equal access to the station.
3. **Affordable** to the community.
4. **Acceptable** to everybody in the community by catering for all. It should be sensitive and respect the community's language, traditions, beliefs and culture.
5. **Accountable** to the community that it serves.

### IN A NUTSHELL:

With digital broadcasting, regulation no longer focuses on the fair distribution of frequencies but aims at

1. providing access to broadcasting for citizens
2. enabling a diverse broadcasting environment (with public-not state, commercial and community broadcasters)



# THE BROADCASTING REGULATOR

## TOPICS

- THE BROADCASTING REGULATOR
- TYPES OF BROADCASTING REGULATORS
- GOVERNANCE OF BROADCASTING REGULATORS
- WHAT A BROADCASTING REGULATOR REGULATES

## The broadcasting regulator

One of the fundamental characteristics of democracy is the separation of powers, typically between the legislative, the judiciary and the executive. In the field of broadcasting, a similar separation of responsibilities applies between government, regulator and service providers.

### Responsibilities of the different entities with regards to broadcasting

1. Government & parliament	formulate and pass appropriate national policy framework & legislation
2. Independent regulator	Licensing of broadcasters
3. Service providers	Providing service & programmes

Once parliament has developed the national policy framework and the appropriate legislation is in place, it should have no further powers over the broadcast media. This is where the independent regulator takes over. The Declaration of Principles on Freedom of Expression in Africa says in its Clause VII (1):

*Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.*

The UN Human Rights Council also underlined the importance of having independent broadcasting regulators:

*It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.*

In South Africa such a regulator has been in place since 1994. Its independence is guaranteed by the constitution, which says in Article 192:

*National legislation must establish an independent authority to regulate broadcasting in the public*

*interest, and to ensure fairness and a diversity of views broadly representing South African society.*

In Kenya, the 2010 Constitution provides for an independent broadcasting regulator in Article 34 (3):

*Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—*

- (a) are necessary to regulate the airwaves and other forms of signal distribution; and*
- (b) are independent of control by government, political interests or commercial interests.*

The regulator will draw up position papers and regulations to specify how the objectives set by legislation are to be implemented. This will include details on licensing: clear procedures for applications, and criteria and conditions to be met for licences to be awarded.

Once the licence is granted, the service provider - the broadcaster - will operate independently from government and the regulator for the duration of the licensing period, with the regulator keeping an eye on whether the service is indeed complying with the law and its licence conditions (monitoring).

### Spectrum management

The basis for the work of the regulator is the management of the radio spectrum. Radio spectrum means the part of the electromagnetic spectrum which is reserved for radio frequencies (which are lower than around 300 GHz). Different parts of this spectrum are used for different radio transmission technologies and applications, among them television and radio services, transport, telecommunications, alarms, remote controls, as well as radio communications for defence and police services. The medium frequency band (300 – 3000 kHz) is used, among others, for AM broadcasts, the very high frequency (VHF) band (30 – 300 MHz) for FM radio and television broadcasts, and the ultra-high frequency (UHF) band (300 – 3000 MHz) for television.

Obviously, with such a multiplicity of users, this spectrum needs to be managed very carefully – not just for reasons of quality but also of safety. The VHF band, for example, is used not only for FM radio and television but also for

mobile phones, amateur and weather radio and, not least, for air-traffic communications.

In compliance with the worldwide spectrum allocations decided on by the International Telecommunications Union (ITU) and its World Radio Conference (WRC) all countries draw up their own national frequency tables. Within this framework the regulators will allocate the various frequencies for the various users, as specified by national legislation.

### Types of broadcasting regulators

In regard to broadcasting there are, broadly, three recognized ways to handle regulation and licensing:

1. There are two separate authorities, one dealing with broadcasting, the other with telecommunications - this is the model used in Uganda, for example.

In practice, this means that a broadcasting service will need to apply for the go-ahead to both authorities separately before being allowed on air. Many developing countries prefer this model – for good reasons. Regulation of broadcasting is primarily about shaping the overall broadcasting landscape as well as about broad programme content and professional principles designed to further the aims of a democratic society. Telecommunications regulation, on the other hand, is first and foremost about purely technical and economic matters of transmission. Both fields of work need different kinds of expertise – not readily found in the same kind of people.

2. A broadcasting authority acts as a “one-stop-shop” and decides autonomously on the granting of licences and frequencies - after the telecommunications authority has determined the frequency spectrum for use by broadcasting services.

In this scenario, the telecommunications authority will ‘hand over’ the entire broadcasting frequency spectrum to be managed by the broadcasting authority (example: Germany).

3. An integrated communications authority, usually consisting of two separate departments, is in charge of both broadcasting and telecommunications issues – an approach applied in South Africa and Britain.

Experience in countries where the two arms of regulation (telecommunications and broadcasting) were combined into one body has shown that the two groups do not merge easily but tend to talk past each other and end up operating separately, much like they used to in their previously separate bodies.

Experience in Europe also shows that in a combined body the necessary arms-length relationship between the state

and the regulator may be jeopardised. While the state has a role to play in the area of telecommunications, due to its international responsibilities in this field, the broadcasting regulator needs to be completely independent if it is to play the role expected from it in a democratic society.

Whichever model is chosen, it should be kept in mind that industrialised countries had the chance to develop their broadcasting industries over many decades with the help of specialised regulators and are only now about to consider or create combined authorities. Countries which are still in the process of building up a vibrant broadcasting landscape will probably be better served by a specialised body in charge of broadcasting only and a separate one for telecommunication.

### Governance of broadcasting regulators

The regulatory authority will have a governing board or a council that decides on policies and supervises management, which in turn will be responsible for the day-to-day running of affairs. The Declaration of Principles on Freedom of Expression in Africa says in its Clause VII (2):

*The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.*

### Guidelines for an effective governing body

1. The appointments procedure for governing bodies of an independent broadcasting regulator must ensure that the risk of political or commercial interference is minimal.
2. Persons with vested interests of a political or commercial nature, i.e. office bearers with the state and political parties or those with a financial interest in the broadcasting industry, must be excluded from membership.
3. Members should be reasonably representative of society at large and have the necessary expertise to fulfil their duties.
4. The appointments process should be open, transparent and democratic.
5. Once appointed, members will serve for a term (or several terms) of office as set by law.
6. They can only be dismissed by the appointing body under clearly prescribed circumstances.
  - a. For example when they become office bearers with the state or a political party or involved in the broadcasting industry.
  - b. Other reasons may be a criminal conviction or failure to perform their duties for a specified period of time.

Such strict rules are meant to protect members’ independence and allow them to make decisions freely in accordance with their mandate, even if such decisions may be unpopular with the appointing body.

### Accountability of regulator

With the regulator deriving its mandate from the public it must also be answerable to the public. The Declaration of Principles on Freedom of Expression in Africa says in Clause VII (3):

*Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.*

The logical choice and ideal “multi-party body” is, of course, the elected parliament and/or a portfolio committee in charge of communication.

## What does a broadcasting regulator do?

### Licensing of broadcasters

Broadcasting regulation is meant to ensure that all the various interests and aims set out in the broad policy framework are taken care of. The regulator’s prime function is to enable and promote quality broadcasting: diverse, independent, vibrant and stimulating services of all shapes and sizes that respect and help to realise people’s right to know and entertain them. With this overarching goal in mind, its main task is to issue licences.

These are valid for a specified period of time and linked to a number of clearly spelled out general and specific conditions. Adherence to these conditions will be monitored by the regulator on an ongoing basis and violations will be sanctioned, in extreme cases by revoking the licence.

Internationally, there are two schools of thought with regard to licensing:

1. In the free market approach, which allows for as many operators as can be accommodated on the frequency spectrum, market forces will determine which will survive and which will not.
2. A more “guided” market approach has the objective to ensure that new players are economically viable and that they contribute to the diversity of services offered.

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### Accordingly, there are two basic ways of granting licences:

1. **Auction:** Available frequencies are auctioned to the highest bidder.

Pros:

- The advantage is that the manner of allocation is transparent to all applicants.

Cons:

- The disadvantage is that the auctioning process limits the circle of potential applicants to those with the most cash available.
- An auction can also lead to problems later if the bidder paid too much for the licence and cannot then provide an adequate service.

2. **Beauty contest:** Available frequencies are publicly tendered and the regulator issues licences to successful competitors according to pre-set criteria. The main criteria for allocation will be the profile of intended programming, the nature of ownership and the viability of the proposed service.

Pros

- The advantage is that the regulator can actively contribute to creating a diverse broadcasting landscape and broaden choices for the audience.

Cons:

- The disadvantage is that, if these criteria are not clearly defined, the decision process might be perceived as subjective.

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Internationally, the beauty contest is the preferred option.

The regulator does not necessarily put all technically available frequencies up for tender or not all at the same time. It may prefer a more cautious approach: finding out what the prevailing circumstances and economic conditions are in the country as a whole, as well as in the various regions, and establish how many broadcasters are likely to be sustainable.

### Criteria for licensing of broadcasters

1. The demand for the proposed broadcasting service within the proposed licence area, taking into account the already existing services;
2. The type of service applicants propose to provide, e.g. music to speech ratio; ratio of original to repeat programming; space devoted to news and current affairs - national, international and local; sports coverage; children’s programming; the range and type of music to be played; features and documentaries; minority language programming; plans, if any, for the purchase of broadcast material from other broadcast organisations and independent producers;
3. The quantity, quality, range and type of local programming and the extent of programme production relating to local culture, as well as the extent to which the applicant will create opportunities for local talent in journalism, music, drama and entertainment;
4. The undertaking by the applicant to service audience groups neglected by other broadcasters, or to cater to the needs of particular communities;
5. The expected technical quality of the proposed service, taking into account developments in broadcasting technology;
6. The capability, expertise and experience of the applicant;
7. The financial means and business record of the applicant;
8. Transparent ownership and control structures in line with existing provisions on media concentration.

### Step by Step licensing procedure

Bearing in mind that the regulator plays a facilitating role and needs to be seen by all to be fair and even-handed in its decisions, the licensing process should be easy,

unbureaucratic and transparent, with the various steps to be followed clearly outlined. The licencing procedure should be outlined in legislation:

1. Available frequencies will be put up for public tender in advertisements in all major papers.
2. To assist potential tenderers, the regulator will provide information packages for the relevant broadcasting categories outlining the particular criteria which will be considered.
3. Within a reasonably short period, say 30 days, after the deadline for applications, the regulator will publish a list of all applicants in the national media, giving particulars of the applicant, the licence area and the nature of the proposed service.
4. The regulator will invite interested persons to lodge objections and/or representations – in writing - within two weeks from the date of such notice.
5. The regulator should hold public hearings into the applications, with the option of having closed sessions in cases where confidential business information might be compromised.
6. The regulator should be required to decide on applications within a reasonable time specified in legislation and provide written reasons for its decisions.
7. All licences will be granted for a specified period of time and be renewable.

Given the amount of investment required for setting up and running a broadcasting service, operators need to be able to plan well ahead and be reasonably sure that their licences will be renewed as long as they keep doing what they set out, and are expected, to do.

#### **Licence conditions for broadcasters**

Programme decisions are made by broadcasters independently, on the basis of professional criteria, tastes, entertainment value and the public's right to know. This is the essence of their editorial independence and applies equally to all three tiers of broadcasting.

The regulator, therefore, will not interfere in matters of programme content or presentation. It will, however, set certain conditions for the licences and will monitor that all services do indeed comply with their respective licence conditions.

If a service licensed as a youth channel, for example, were suddenly to offer sports coverage only, the regulator would intervene.

Other conditions could refer to local content including the manner in which they cover elections.

Standard licence conditions underline the need to abide by the law, relevant regulations and the code of conduct for broadcasters.

Furthermore, the regulator will set the term of licences (in South Africa, for example, 15 years for public and commercial free-to-air television and subscription services, 10 years for public and commercial radio stations and

five years for community and low power stations and channels);

License conditions stipulate which records licensees should keep to facilitate monitoring of compliance with conditions, and what information should be regularly submitted to the regulator (this includes logs of programmes, records of sponsorship and advertising and, in the case of community broadcasters, details of all funds received).

Licensees are required to keep recordings of all programmes for a set length of time but do not need to submit these to the regulator unless requested.

During the application process, bidders often seek to show that they will exceed the minimum requirements set by regulation in areas such as local content and news provision. The licence granted then compels them to actually deliver on their promises. These pledges made by the licensee, might have given it the competitive edge over other applicants. Therefore binding licensees to such pledges, limits the chance that applicants will make wild promises merely to win the licence and then not comply.

In addition to their specific licence conditions, broadcasters also have to adhere to other regulations developed by the regulator (through a public process). These include:

1. Regulations specific to the type of broadcaster, outlining the minimum requirements applicable for commercial radio stations, for commercial free-to-air television services, for subscription services and for community broadcasters. Among others these will set the number of minutes of news which must be aired daily, the maximum number of minutes of advertising per hour and other programming requirements.
2. Regulations applicable across all the different broadcasters, such as local content regulations, sports rights rules (aimed at ensuring that sports events of national importance are aired on free-to-air television) and requirements for advertising and sponsorship.
3. The licence/coverage area.

#### **Additional license conditions for community broadcasters**

The standard conditions for community broadcasters usually further stipulate that entities must be:

1. Non-profit
2. That any surplus made must be ploughed back into the station or into community projects.

#### **Local content**

Regulators may set quotas to be met by the various stations or even in certain programme genres such as drama or children's programmes.

The proponents of such regulation point to the need for broadcasting in any particular country to have its own

recognisable flavour and identity and reflect the reality that people find themselves in. This applies across the board from music to soap operas. Listeners and viewers can easily relate to material produced specifically for them and take pride as a community in the achievements of their own actors, musicians and the like.

Research has shown again and again that local programming is extremely popular with most audiences. It can also make good business sense by developing the quality of local production and creating employment.

### Language diversity

Most African countries are multi-lingual and the issue of language needs to be addressed by society as a whole, not just the broadcast regulator. The Declaration of Principles on Freedom of Expression in Africa in its Clause III speaks of an "obligation ... to take positive measures to promote diversity" by, among other things, "the promotion and protection of African voices, including through media in local languages".

In Namibia, for example, the public broadcaster operates 9 different radio stations and broadcasts television programmes, news in particular, in the 9 different tongues on different days throughout the week. Commercial broadcasters, on the other hand, are free to choose their languages according to their target audiences. Community stations, by their very nature, speak the language(s) of their communities.

### Advertising and sponsorship

Commercial services are often free to decide on the amount of advertising they air and it is in their own interest to make sure they keep the right balance, so as not to lose either audiences or advertisers.

Community radios, are or should be allowed to make a surplus. However, they are bound in their programming by the principles of community ownership, control and participation, which must flow back into the radio stations or the communities.

Advertising time on services partly (or largely) funded through public monies, on the other hand, is often limited by the regulator to allow for a level playing field with the commercial sector, where the sale of airtime is the only source of revenue. Limitations used are restrictions on minutes per hour and the prohibition of advertising during certain periods such as, for example, after eight in the evening or on Sundays or public holidays. The public broadcaster should also not be allowed to offer below-market rates to ensure fair competition.

Possible restrictions regarding the kind of advertising in all three tiers of broadcasting relate mainly to items considered harmful to health, such as tobacco or alcohol products. General standards are usually set either by self-regulatory bodies of the advertising industry or by the regulator in consultation with the industry.

In regard to sponsorship, the general practice is that:

- A programme or series of programmes sponsored in whole or in part be clearly identified as such by appropriate credits at the beginning and/or end of the programme;
- Broadcasters ensure that editorial integrity is not influenced by the presence of sponsorship;
- Sponsorship of news and current affairs be prohibited; weather forecasts and sports bulletins may be sponsored;
- Sponsorship of children's programming must be appropriate and not promote products unsuitable for use by children.

### Monitoring and penalties

Adherence to licence conditions is monitored by the regulator through checking of all the reports submitted by licensees (including content logs). Spot checks are also conducted and at times stations and channels are required to submit recorded material in order to ensure that the written records match what was actually aired.

Many broadcasting laws therefore oblige operators:

- To keep and store sound and video recordings of all programmes broadcast for a set minimum period
- To produce such material for examination on demand by the regulator

Most Broadcasting Acts include provisions for penalties. These range from a warning to fines to the suspension or even withdrawal of the licence. If a broadcaster is in breach of its licence conditions, of the law, or of regulations issued by the regulator, it will first receive a warning, specifying remedial measures to be undertaken. If the broadcaster does not take appropriate action within a specified period, a fine will be imposed. Serial offenders or those who persistently ignore the regulator's rulings may have their licence suspended for a certain period or, in extremely serious cases, even withdrawn. Such a drastic step, however, is a rare exception.

### IN A NUTSHELL:

With regards to regulation and the regulator it is important to keep in mind:

1. The regulator should play a facilitating role.
2. The Declaration of Principles on Freedom of Expression in Africa Clause VII (1):

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should

- a) be independent and
- b) adequately protected against interference, particularly of a political or economic nature.





## PUBLIC SERVICE BROADCASTING

### TOPICS

- THE ROLE OF PUBLIC SERVICE BROADCASTERS
- GOVERNANCE OF PUBLIC BROADCASTERS
- FUNDING OF PUBLIC BROADCASTERS

### The role of public service broadcasters

The mandate of public broadcasting has been defined in module 7 in general terms. But what precisely distinguishes public service broadcasting from the other types - state, commercial and community service broadcasting? The European Broadcasting Union offers the simplest, most pared-down definition.

Public service broadcasting, it says, is broadcasting:

- *Made for the public*
- *Financed by the public*
- *Controlled by the public*

UNESCO gives a wider, more philosophical definition:

*Public broadcasting is defined as a meeting place where all citizens are welcome and considered equals. It is an information and education tool, accessible to all and meant for all, whatever their social or economic status. Its mandate is not restricted to information and cultural development – public broadcasting must also appeal to the imagination, and entertain. But it does so with a concern for quality that distinguishes it from commercial broadcasting.*

On the African continent, the Southern African Broadcasting Association (SABA), an association of all state or public broadcasters in the Southern African Development Community (SADC) region, has developed the first and, up to now, most instructive document on the mission of public broadcasting. It says in its 1995 policy paper “On the Move”:

*If democracy is to take root and have meaning beyond the formal electoral process, people in Southern Africa must be in a position to understand the changes taking place around them. They must be enabled to actively participate in processes and decisions which affect them and make informed choices. Public broadcasting, in providing access to a wide range of information and ideas, serves as an instrument of popular empowerment through its programming.*

The same policy paper then sets out to pinpoint more precisely what it is that makes public service broadcasting a unique service quite different from the other types of

broadcasting citing in a number of ways. Only public service broadcasting, it says, is in a position to provide all of the following:

#### **1. A diversity of programmes for all**

Public service broadcasting provides programming for all, in which everyone, be it the general public or minority audiences, will find material to inform, entertain and enrich themselves.

It is a service to the general public in all its variety, diversity and controversy, and not only to the supposedly important or more powerful sections of the public. Because public service broadcasting serves the population in its entirety, regardless of cultural backgrounds, political convictions, sexual orientations, religious beliefs, languages or skin colours, it is by definition non-discriminatory. To achieve its goals, its signal must cover, more or less, the country as a whole and be accessible to all. This rules out facilities which exclude parts of the population, for example decoders for pay-TV.

#### **2. A forum for democratic debate**

Public service broadcasting offers a forum for democratic debate with news and current affairs reporting which is balanced and explanatory, and which counterbalances the trend towards trivialisation and sensationalism.

Public service broadcasting should always strive to get all voices on the airwaves regardless of how popular the viewpoints expressed may be. It thus gives meaning to the twin basic rights of freedom of expression and information.

State-controlled broadcasting is, by definition, biased in favour of the government and cannot provide an open forum for democratic debate. Market-driven radio and TV stations are more often tempted to trivialise and sensationalise in order to boost their ratings. Quite a number of commercial broadcasters are not licensed to or avoid broadcasting, news and current affairs programmes to escape difficulties with state authorities. Community radios, by nature, will provide such a forum only on a much more limited, local scale.

### **3. A showcase for culture**

Public service broadcasting offers a showcase for culture by promoting the various cultures of the people as well as covering developments in the intellectual and artistic fields.

A good public service broadcaster will provide more than just a sprinkling of cultural items here and there-tucked away in late night spots for the exclusive enjoyment of a few high-brow members of the audience. A national public service broadcaster will give expression to national cultural identity in all its variety. It will also become an active player by developing - mutually beneficial - partnerships with the film industry, radio and TV production houses, the theatre, musicians, and all other cultural institutions.

### **4. A vehicle for development**

Public service broadcasting runs extensive promotional campaigns for development in areas like health, agriculture, nutrition, civic education, environmental protection and family planning.

This can be done in a variety of ways so as to both transmit a message effectively and make for good listening or viewing. Depending on where such material is to be placed, it will come in the form of advertisement-like spots, documentaries, entertainment and talk shows, radio drama, soap operas, or films.

Commercial stations may accept the occasional radio or TV spot from government departments or public bodies to demonstrate their sense of social responsibility, or they may run sponsored and thus potentially biased programmes for commercially attractive target groups only. Community radios will obviously act as vehicles for development as well, but have only a limited reach.

### **5. Unrestricted public access to events of significance**

Public service broadcasting will offer extensive live coverage of important events in a variety of fields from politics to culture and sports: debates in parliament, festivals or national competitions, football tournaments. Such events of significance must not be confined to commercial radio or TV outlets which either do not cover the entire country or exclude the majority who do not have pay-TV decoders.

### **6. A reference standard for quality and creativity**

Public service broadcasting should set the standard of quality both in radio and TV, thus making the public more demanding of all channels and keeping both commercial and community broadcasters on their toes. They can provide a counterweight to the uniformity of the fare offered by commercial competitors who often do little more than copy successful recipes with only slight variations.

Public service broadcasters can dare to be creative and innovative and unorthodox in their programming without constantly aiming at maximum audience figures. This is well worth noting and runs counter to a common misunderstanding: serving the public as a whole and being accessible to the public as a whole does not mean trying to please all the people all the time by providing one-size-fits-all type of programming or appealing to the

lowest common denominator with regard to content or presentation. The diversity which is the mark of a good public broadcaster will manifest itself both in form and subject matter.

### **7. Extensive original production**

Public broadcasters will not allow themselves to become mere redistribution machines for readymade, cheap material offered by the international music, film and TV industry.

They will retain control over their programming in order to give the public a distinctive product, one that the audience will recognise as a true reflection of the reality they live in. The best way to achieve this is through home-grown material, most often sourced from local production houses.

### **8. A continuous service to the public**

Public broadcasting provides a continuous service to the public. Most economies [in Africa] are not strong enough to sustain nation-wide commercial radio and television stations. The majority of the population, being rural and poor, cannot and will not be served by commercial broadcasting geared only and exclusively to the delivery of consumers to the market.

Altogether this may sound like a very ambitious vision indeed for a public service broadcaster. And so it is. But it is also a reality in many parts of the world, even if no such organisation will always score full marks on all counts. The public will expect and demand, though, that it keeps trying and improving its performance in line with this vision. That is what the notion of accountability is all about, and that's the essence of what makes public service broadcasting special.

### **Election coverage**

This is one area where the performance of the media is often given particular attention or viewed with heightened concern or scepticism, not infrequently leading to the demand for regulation in the interest of fairness. Generally, the public broadcaster will have the primary obligation to ensure appropriate election coverage, in line with its public mandate.

Internationally, there are different approaches:

<b>Country and approach</b>	<b>Particularity/characteristic of approach</b>
1. In South Africa, the regulator has the duty to ensure that the broadcast media treat all political parties equitably during the election period.	In doing so the regulator regards itself to be primarily accountable to the broad public rather than to political parties contesting elections or to broadcasters.
2. In some countries (e.g. in Europe) it is entirely up to each broadcasting service how to cover elections in its news, talk shows or any other programming - using the professional standard of news value as a benchmark, while professional ethics still apply.	In addition, all political parties are given free air time for spots of between 30 seconds and two minutes in which they address the electorate in whichever way they see fit. The length and frequency of such spots will vary according to the parties' numerical strength in the outgoing legislature or the previous election.
3. Other countries (like the USA) have legal provisions which provide for "equal opportunities" for candidates in the use of broadcasting facilities plus massive and paid advertising.	If one candidate appears on a programme, all other candidates must be given equal free time - only regularly scheduled news broadcasts are exempted from this rule.
4. In the UK, the BBC broadcasts a special series of programmes before a general election. In covering election stories during news bulletins, the principle of news value continues to apply.	The allocation of time is decided by a Committee on Party Political Broadcasting made up of representatives of the political parties in parliament and broadcasters.

In countries where the national broadcaster is still controlled by the state, Article 17 of the African Union's Charter on Democracy, Elections and Governance of 2007, which is binding for member states, must be implemented:

... *State Parties shall:*

3. *Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.*

The Declaration of Principles on Freedom of Expression in Africa in its Clause VI gives special responsibilities to the public broadcaster:

... *the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.*

Democratic societies will respect the editorial independence of broadcasters in covering election campaigns according to professional news values in their news and current affairs programmes. They must ensure, however, that all political parties are treated equitably. To this end, appropriate guidelines are developed by the regulator to provide for opportunities for candidates in the use of broadcasting facilities, bearing in mind that fairness and equity should not be judged in terms of quantity only. Broadcasters should seek to achieve fairness through the quality of their journalism, rather than simply the amount of time given to contesting parties.

In 2005 the Southern African Broadcasting Association adopted Guidelines and Principles for Broadcast Coverage of Elections in the SADC Region which are worth considering in other regions of Africa as well - and worth quoting here at some length:

## Broadcasting Election Guidelines

### Article 1

The aim of election coverage is to ensure that the electorate is empowered to make an informed choice.

In light of this, the public is entitled to accurate, fair, impartial and balanced information about the election procedures, and the positions of political parties/independents and/or candidates on issues. Broadcasters are therefore committed to make every effort to present all available and relevant information to the public.

Broadcasters will further ensure that coverage of the elections will be designed to emphasise the relevance of elections and encourage participation by all citizens in the election process.

### Article 2

Broadcasters will ensure that they focus on issues of relevance and interest to citizens and not purely cover events of political parties/contestants.

### Article 3

Broadcasters will provide opportunities for the public to take part in political debates on election issues. Participants of such broadcasts must be as representative as possible of different views and sectors of society.

## Article 4

Broadcasters have the responsibility to treat all political parties/contestants equitably. They shall to this end facilitate fair play.

Equitable treatment does not mean equal treatment nor does it mean that broadcasters will abandon their news values and/or processes. Equitable treatment means fair treatment in both news, current affairs and discussion programmes. Fairness is achieved over time. It is unlikely to be achieved in a single programme. Broadcasters will be consistent in their treatment of political parties/contestants.

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## Governance of public broadcasters

The Declaration of Principles on Freedom of Expression in Africa says in its Clause VI:

*State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:*

- *public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;*
- *the editorial independence of public service broadcasters should be guaranteed ...*

Internationally, the governance of public service broadcasters is structured in a number of different ways – not all of them equally (or truly) democratic, as it turns out on closer scrutiny:

The British Broadcasting Corporation (BBC) - the mother of all public broadcasting - is often cited as the shining example to emulate in all respects.

However, the UK government has the sole right to appoint the trust which supervises and regulates the BBC.

Hence this is not a model to follow in a different context as the appointment of members of the board by government is incompatible with a public service broadcaster's independence.

In South Africa members of the board of the South African Broadcasting Corporation (SABC) are selected following a public and transparent process:

- The parliamentary committee responsible for broadcasting policy advertises the posts and calls upon all relevant groups in society as well as individuals to nominate candidates.
- The committee shortlists nominees and invites them for interviews in public hearings.

- According to a provision in the Broadcasting Act of 1999, "the members of the Board must, when viewed collectively, represent a broad cross-section of the population of the Republic".
- The committee finally decides on its list of candidates.
- This list is published, passed on to parliament for approval and to the President for appointment.

Over the years some downsides of this model have come to light:

- In a country where one party has the overwhelming majority in parliament, that party is tempted to select members of the board who are sympathetic to it without giving much consideration to the opposition and minorities.
- Another flaw is the nature of ownership of the SABC: it is a company with government as the sole shareholder. This opens up the route for the minister in charge to interfere.

To address these and other shortcomings the government decided in 2011 to embark on a thorough broadcasting policy review process.

## Representation on a governing body

Most public service broadcasting legislation contains a provision that the supervisory bodies have to be broadly representative of the population. Among other aspects of equal representation this means that it is necessary to ensure that both men and women are appointed to these bodies. This is in line with the African Charter on Human and Peoples' Rights regarding the rights of women, which states that there should be a gender balance in all state and public decision making structures and institutions and that a gender perspective should be integrated into all policy decisions, legislation, programmes and strategies.

### Characteristics of a board

Boards are not meant to meddle with the actual business of broadcasting. Their duties are basically twofold:

1. Internally, to appoint, give (general) direction to and supervise the management.
2. Externally, to defend the public broadcaster's interests and shield it from any outside interference or attempt to compromise its independence.

In very practical terms the board gives the management, editors, journalists and other employees the room to work freely and get on with the job without wasting time on continually watching their backs.

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In summary, the most important trends and common characteristics in the governance of public service broadcasting today are:

- The government does not play a role in the affairs of the public broadcaster.
  - Public service broadcasters are public corporations, not owned by the state but set up by law as independent institutions.
  - Parliaments play a key role in the selection and appointment of board members.
  - The participation of civil society organisations and the public as a whole in the appointments process is strong and clearly laid down in law.
  - Office bearers with the state or political parties and persons with a business interest in broadcasting are not eligible to become board members.
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#### Accountability of the public broadcaster

The Declaration of Principles on Freedom of Expression in Africa says in its Clause VI:

*State and government controlled broadcasters should be ... accountable to the public through the legislature rather than the government ...*

Examples:

- In the UK, the supervisory body of the BBC (the Trust) submits its annual report to parliament through the Secretary of State for Culture, Media and Sport.
- In Germany, the broadcasting councils are accountable only to the public, their meetings are open to the public and they do not report to any state institution; the finances of the broadcasters are checked by the Auditor General.
- In South Africa, the SABC is accountable to the minister (as the shareholder), the parliamentary committee in charge of communications and the broadcasting regulator (which sets the licence conditions).

A tricky issue in many African countries is the fact that the staffs of public broadcasters are civil servants. This often results in a moral conflict of interest. Civil servants owe their loyalty to the government, whereas an independent public broadcasting service must not serve a particular government but the public at large.

Conclusion: Employees at public service broadcasters should not be civil servants.

#### Funding of public broadcasters

The Declaration of Principles on Freedom of Expression in Africa says in its Clause VI:

*Public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.*

This provision addresses two important concerns:

1. Funding must be "adequate" for the organisation to fulfil its public mandate. In other words: public service broadcasters cannot operate on a shoestring budget but must be provided with sufficient resources if they are to successfully fulfil the wide variety of duties and tasks expected of them.
2. Funding must be organised in a way that safeguards the public service broadcaster's autonomy against any influence brought to bear by outside forces - be they political or commercial.

Traditionally, public service broadcasters were, by definition, funded by public money – either in the form of licence fees to be paid by the audience or state grants. However, increasing financial constraints on governments have led most countries to practise or at least consider a combination of funding options.

These include:

1. Licence fees
2. Levies on services (for example electricity or telephone)
3. Advertisements
4. Sponsorships
5. State funds
6. Levies on commercial broadcasters
7. A mix of some or all of these sources.

The BBC and the Japanese NHK are in the main funded by licence fees only; fees are paid by all owners of TV and/or radio sets.

The public broadcasters' revenue in many African countries, as well as in Italy, the Netherlands, France and Germany derives from a mix of licence fees and advertising.

In addition most African governments also provide state funds for the national broadcaster. In New Zealand, public service broadcasting is funded mainly by advertising, in Australia and Canada by a government grant. All of these forms of funding have their pros and cons.

Pros	Cons
<b>Type of Funding: licence fees&amp; levies on services/utilities</b>	
Associated with good quality and diverse programming	<ul style="list-style-type: none"> <li>the process of collecting fees from every single household is a major organisational feat</li> </ul>
Completely independent source of revenue	<ul style="list-style-type: none"> <li>the licence fee cannot be imposed by the broadcaster on its own</li> <li>needs to have a legal basis</li> <li>amount must be approved by some public authority</li> <li>Danger of dependency on goodwill of the state</li> </ul>
<p>There are mechanisms to help avoid such dependency. In Germany, an independent panel of experts adjusts and determines the amount payable by listeners and viewers every few years and recommends these for adoption by the legislature. The public broadcasters list their perceived needs to this panel, the experts make their own assessment and then come up with their recommendation. Politicians do try to intervene in the process, seeking to discipline public broadcasters by having lower amounts awarded, but by law they can only reject the panel's recommendation if it is not "socially acceptable". In some South-East European countries the setting of the fee is left to the independent broadcasting regulator.</p>	
<ul style="list-style-type: none"> <li>Programme producers are aware that it is their audience that pays them for their work</li> <li>Audiences feel entitled to demand that the broadcaster deliver value for money</li> </ul>	<ul style="list-style-type: none"> <li>Producing quality content in the technology-intensive field of broadcasting is very costly</li> <li>It's usually impossible to cover all the financial needs exclusively through fees.</li> </ul>
<ul style="list-style-type: none"> <li>Such a fee will be widely acceptable only if the service is indeed perceived as a truly public one.</li> <li>Fees could be collected by the broadcaster itself, or by an agency set up for this purpose, as it is done in many African countries or in Germany.</li> </ul>	<ul style="list-style-type: none"> <li>If the service is not perceived to be a public one, it will be seen as just another burdensome tax.</li> <li>Means spending urgently needed money on the establishment of yet another bureaucracy</li> </ul>
<p>Alternatively, public authorities such as the revenue service could be in charge of fee collection, as is the practice in France and Belgium. In other countries, such as Greece, Turkey, Egypt, Algeria or Morocco, a levy in the form of a certain percentage is added on to all electricity bills as a broadcasting fee. In Poland, Hungary, Mozambique, Montenegro and Italy a similar levy is payable on telephone bills, or owners of a vehicle with a radio pay an additional charge on their vehicle tax. These systems are easy to administer and socially just.</p>	

Pros	Cons
In most countries with public broadcasters, public acceptance of the broadcasting fee, as reflected in the number of people who pay up voluntarily, is relatively high.	<ul style="list-style-type: none"> <li>People may not be able to afford payment at all. Exemptions could be difficult to implement correctly and fairly.</li> <li>The level of the fee has to remain affordable to the broad majority.</li> </ul>

Taking the Declaration of Principles on Freedom of Expression's principle as a benchmark, the fact is that licence fees alone will not provide "adequate" funding as envisaged.

Pros	Cons
<b>Type of funding: advertising and sponsorship</b>	
Market for TV and radio ads expands with advent of commercial broadcasting	<ul style="list-style-type: none"> <li>Advertisers budgets largely stay the same</li> <li>Competition increases</li> <li>Advertisers often prefer commercial channels with more precisely defined target groups</li> <li>Internet platforms have drawn advertisers away from broadcasting.</li> </ul>
<p>As a result, the proportion of advertising income in the overall budgets of public service broadcasters has generally decreased.</p>	
Additional revenue from selling airtime is a financial necessity	<ul style="list-style-type: none"> <li>Makes public service broadcaster vulnerable to pressure from commercial interests and endangers quality of programming</li> <li>Pressure to target audiences the advertisers are interested in (need for high ratings) instead of also offering content to certain groups and minorities in society</li> <li>Pressure to give preference to low quality programming and neglecting controversial topics or formats</li> </ul>

"The higher the advertising figure as a proportion of total revenues," a study commissioned by the BBC on the situation of public broadcasters in 20 countries found, "the less distinctive a broadcaster is likely to be". With less and less to distinguish them from commercial operations they will be in danger of digging their own graves: people will start asking why they should be entitled to any public financial support at all. To protect the private sector, broadcasting regulators all over the world have introduced restrictions on advertisements aired on public services, either by limiting total advertising time per day or per hour, or by banning advertising on Sundays and public holidays, for example. Sponsorships may also be restricted in regard to children's programmes, documentaries or religious programmes.

Pros	Cons
<b>Type of funding: state funding</b>	
<ul style="list-style-type: none"> <li>Democratic states have a constitutional obligation to guarantee broadcasting freedom and therefore ensure funding (European Broadcasting Union Argument)</li> <li>The state has the obligation to provide citizens in the entire country with broadcasting services - in line with the right to universal access.</li> </ul>	<ul style="list-style-type: none"> <li>There is a danger that governments exert undue influence over programme policy and over editorial content</li> <li>Broadcaster will be exposed to changing policy objectives and priorities of government.</li> <li>The organisation is likely to be regarded as on a par with state institutions regarding conditions of employment or remuneration but being bound by state salary structures unsuitable to a creative and competitive environment</li> </ul>
<ul style="list-style-type: none"> <li>In line with the argument to universal access the state should make the necessary investment in new technologies, say the transformation from analogue to digital signal distribution, likely to be beyond the means of even the most cost-efficiently run public service broadcasting operation.</li> <li>In South-East Europe, the state covers the transmission costs of the public broadcaster - an uncontroversial item hardly leaving room for political manipulation</li> </ul>	<ul style="list-style-type: none"> <li>Funding the service - totally or partially from state coffers means having that much less available for other government activities/programmes.</li> </ul>

To avoid such insecurity and the possibility of state interference, the broadcasting law could provide for an independent commission, tasked to establish the needs of the broadcaster and then recommend to parliament a certain budget vote to be dedicated for public service broadcasting for a certain period of time, and to be cost- and inflation-adjusted. Another solution could be to oblige the state by law to finance certain activities. In South-East Europe, for example, the state finances programming in the areas of science and education development, development of culture as well as programmes for minorities. The state and the broadcaster negotiate and conclude a contract on the amount to be provided, with the legal proviso that this must not influence the editorial independence and autonomy of the public broadcaster.

### Conclusion: The middle way

The logical way to go, therefore, seems to be a mix of income from all three sources, well balanced so as to derive the maximum benefits and avoid the inherent dangers. This is the pragmatic option followed in most countries. The question of how best to arrive at the proper mix and in a manner best suited to conditions in Africa was discussed during a high level conference attended by broadcasting regulators, national and commercial broadcasters, parliamentarians and experts from Southern Africa in Maputo, Mozambique in September 2004. The

conference looked at a number of options, broadly in line with what has been discussed so far:

#### Licence fees:

- They should be set by an independent broadcasting regulator, or, if this is not possible, by parliament on the advice of an independent panel of experts.
- The amount should be fixed for a certain number of years, to allow for stable funding, and be adjusted in line with inflation.
- Fees could be collected as a levy on electricity or telephone bills.

#### Advertising and sponsorships:

This source of income remains necessary and should be managed in a way that has the least impact on the character of the broadcaster as a public service and does not come at the expense of people's right to information, education and entertainment.

#### State funds:

- The government should guarantee universal access to the public broadcaster by funding its transmission costs.
- The state could be obliged to fund certain public interest programmes in the fields of education and culture as well as for minorities.
- Safeguards must be put in place to ensure editorial independence.
- The contribution from the public purse should be determined independently (for example through parliament).

### IN A NUTSHELL:

The public service broadcaster should:

- Offer a diversity of programmes for all
- Be a forum for democratic debate
- Provide a showcase for culture
- Be a vehicle for development
- Offer unrestricted public access to events of significance
- Be a reference standard for quality
- Offer extensive original production
- Provide a continuous service to the public

In order to fulfil its roles:

- Editorial independence has to be guaranteed
- The public service broadcaster needs to be governed by an independent board broadly representing society
- The public broadcaster has to be adequately funded in a way that ensures its independence





## MEDIA DIVERSITY

### TOPICS

- THE IMPORTANCE OF MEDIA DIVERSITY
- PROMOTION OF OWNERSHIP
- TACKLING DIFFERENT OWNERSHIP ISSUES
- STATE-OWNED MEDIA

### The importance of media diversity

#### Basics

1. Pluralism or the existence of a large number of media does not automatically lead to diversity.
2. Media diversity - media owned by a range of different players, with different viewpoints and perspectives that appeal to diverse audiences, in a range of languages - is critical to ensure that the needs of all audiences are met and that readers, viewers and listeners have access to the widest possible range of information and opinion.
3. Many people argue that the marketplace will ensure diversity. However, experience has shown that this is not necessarily so.
4. Like other businesses, the privately owned media are subject to the rules of the market: if they want to survive and make a profit they must seek to maximise their output while at the same time minimising their input.

There is nothing sinister about this principle as such. It is how the market works and how consumers all hope to be able to buy quality goods at fair prices, thanks to the healthy competition between the different providers.

#### Trend: ownership concentration

Since the beginning of the 21st century, newspaper houses around the world have found that they need to consolidate their businesses in the face of competition from internet-based news portals. This often decreases their circulation figures and means less income from advertisements.

In order to meet these challenges, old and new, many media houses are downsizing their operations: bringing several papers under one umbrella, making better use of the technical infrastructure (printing presses, computers) and staff: having fewer journalists overall work simultaneously for a number of titles and internet publications at the same time. Concentration of ownership and downsizing thus can easily lead to just 'more of the same'.

All this is happening worldwide and Africa is no exception. In Uganda, the market is dominated by two conglomerates; one of them partly owned by government and both are active in print and broadcasting media. The

same goes for Kenya: two groups are the major players and both are privately owned. And in South Africa four major companies dominate the newspaper market.

#### The need for media diversity

While media concentration in Africa is gathering pace, public debate on the phenomenon and its consequences is only just beginning. Little research has been done so far, few viable options have been developed for managing the process. In Europe and the Americas, media concentration has long been a very real threat to media diversity and as such has attracted much attention from academics, policy makers and civil society.

Harcourt and Verhulst, the authors of a study on media ownership in Europe emphasise the crucial role of media diversity, (1998: 1-2)<sup>14</sup>:

1. *The media are relied upon in democratic societies for the protection and promotion of human rights and democracy.*
2. *Diversity of the media and accurate and honest reporting of the news are considered to be vital for guaranteeing pluralism of opinion, adequate political representation, and a citizen's participation in a democratic society.*
3. *A pluralistic media is seen to meet the demands of democracy by providing citizens with a broad range of information and opinions; to represent minorities by giving them the opportunity and space to maintain their separate existence in the larger society.*
4. *It is also seen to reduce the likelihood of social conflict by increasing understanding between conflicting groups or interests; to contribute to overall cultural variety and to facilitate social and cultural change, particularly when it provides access to weak or marginal social groups.*

<sup>14</sup> Quoted in "RESPONSE TO CONSULTATION ON MEDIA OWNERSHIP RULES BY DCMS and DTI (November 2001)" on <http://www.cpb.org.uk/body.php?subject=gov&id=156&f=1>

### Recognition of the importance of media diversity

A Council of Europe report on the same subject, Media Diversity in Europe (December 2002), makes this important point:

*In Europe, cultural diversity is an integral part of European cultural identity. The ability of the media to reflect the cultural diversity depends on the plurality of the media.*

Replace "Europe" with "Africa" and the relevance of the statement for this continent becomes immediately clear.

The need for pluralism is recognised by jurisprudence worldwide. For example, the Inter-American Court of Human Rights found in 1985:

*It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.*

The Human Rights Committee of the United Nations stipulates:

*State parties should take appropriate action ... to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.*

And the Declaration on Principles of Principles on Freedom of Expression in Africa says in its Clause XIV (3):

*States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.*

### Promotion of media diversity

What can policy makers do to promote media pluralism and media diversity?

Basically there are two ways of arriving at the desired and necessary plurality of media:

1. To trust the market to sort things out by itself
2. To actively encourage and stimulate diversity and put measures in place to prevent media concentration.

#### Laissez-faire approach

The school of thought favouring the laissez-faire approach says there is no fighting global trends and big media companies are not a bad thing anyway. Specific measures to prevent concentration of media ownership, it is argued,

are no longer required. Media concentration has become a fact of life and is no longer perceived as a problem which public policy should tackle. Where problems do arise, i.e. where there is a danger of monopolies forming, these should best be addressed by general competition law and not by measures aimed at preventing media concentration specifically.

The argument in favour of this view generally goes like this:

- Pluralism has been established as a result of the explosion of choice and diversity in the media. Regulations to bring about such pluralism are therefore no longer needed.
- The "new media", especially the internet, will replace old media structures and thus bring about media democracy.
- The checks and balances of the market itself are the best way to ensure "consumer welfare". Any intervention by the state would be unacceptable because it would mean interference with property rights and freedom of expression.
- Regulatory restrictions should be relaxed rather than tightened, in order to stimulate the creation of large enterprises able to compete globally.
- In view of increasing convergence and globalisation, governments and regulators in individual countries cannot tackle media concentration effectively anyway. Globalisation must be accepted as a given and the only way to go.
- There is also a case being made for some measure of concentration in the very interest of media diversity. In the longer term, the argument goes, only bigger companies will be able to ensure a plurality of views and voices due to a simple economic rationale: Because of the high costs of technology and infrastructure inputs in the modern world of global communications, entry requirements for companies wanting to participate in the information society are extremely demanding. Only companies with sufficient capital will be able to start up, stay afloat and thus contribute to a pluralistic media landscape. Therefore, rapid and increasing concentration in the telecommunications, media and information industries is unavoidable and, indeed, necessary.
- An additional argument cited in favour of bigger companies running the industry is the protection of editorial independence. Small, independently owned papers, the proponents of this view say, are easily vulnerable due to their precarious financial status and thus always in danger of attack from, for example, local business or politicians. Only big media have the means to withstand such pressure and to consistently hold business and government accountable.

These are valid points. But they need to be carefully checked against market realities and other prevailing circumstances in any specific society and the way that society wants to go.

- One might end up with less than a handful of publishers or just one media house gaining an overwhelming share of circulation.

- Such a development may not necessarily be inconsistent with democratic norms, but it certainly does not foster diversity and pluralism.
- What if as a result of the privatisation of state media, for example, these end up in the hands of the same entrepreneurs who already share the private media market among them?
- The effect of having one or two controlling private players would not be very different from the old state-controlled media set-up: the scope of voices heard would be diminished and with it the vibrancy and strength of a democratic society.

### The “guided” market approach

- The proponents of a “guided” market approach acknowledge that a functioning mass media market can be an effective way of achieving pluralism.
- They warn, however, that the media as a means of freedom of expression cannot be treated the same way as other commodities such as sausages or cars.
- What needs to be discussed is whether the ownership patterns of the media industry should arise purely from an economic and industrial logic or be shaped by public policy in the interests of democracy.

This is an ongoing debate around the world. A large part of broadcasting regulation is aimed at ensuring diversity. These regulations are outlined below.

### Examples for the guided market

- In many countries subsidies are given to particular media (i.e. in Australia aboriginal media is subsidised, and in many countries in Europe support is provided to ensure that each town and/or city has at least two newspapers).
- In France, for example, government subsidises all newspapers regardless of their political stance to make sure that people's basic informational needs are met. Many francophone African countries have a similar approach, while the funds might be smaller.
- In other countries indirect support is granted to media through tax breaks/incentives, subsidies on paper and printing costs etc., or through the promotion of training for people from different gender and language groups to enter the media field.
- South Africa is trying to promote diversity in a more formalised fashion through a Media Development and Diversity Agency (MDDA) set up in 2003 “to help create an enabling environment for media development and diversity... (and) redress exclusion and marginalisation of historically disadvantaged communities and persons from access to the media”, as the MDDA Act 2002 says in its preamble.

According to its founding document, the agency is mandated to:

- *encourage ownership and control of, and access to, media by historically disadvantaged communities, historically diminished indigenous language and cultural groups;*

- *encourage the channelling of resources to community and small commercial media;*
- *encourage human resource development and capacity building in the media industry, especially amongst historically disadvantaged groups;*
- *encourage research regarding media development and diversity.*

New media outlets, especially community media, are subsidised through funds supplied by government, big players in the industry and foreign donors. Up to 2009 the MDDA had awarded grants of R77 million in total (US\$ 10.5 million [January 2010]) to more than 230 projects. The Agency has nine board members – six appointed by the President on the recommendation of Parliament after a public nomination process, and the other three selected by the funders (broadcasting, the print industry and government). This board has full autonomy to set criteria for and select projects to be supported.

### Supporting (local) producers

Policy makers and legislators can also develop policies in order to create an enabling environment for a vibrant local media production industry:

- Government could provide support for the development of the local independent television and film sector (South Africa has a National Film and Video Foundation as well as provincial film agencies).
- Other incentives could include tax incentives (to attract foreign film companies to the country as well as promote the local industry), ways to promote the development of content in a range of languages (including on the internet) etc.
- Laws and regulations could further introduce incentives for commissioning newly established production companies, and for including women in key positions in production.

### Tackling different ownership issues

The issue of ownership of broadcasting services as a legitimate area of regulation is often overlooked, especially in the initial euphoria of ending the state monopoly over broadcasting, with privatisation appearing to be the obvious solution.

Only later, sometimes too late (as has been the case in a number of industrialised countries where the principles of the free market were traditionally given free reign in the media industry) it turns out that:

- Privatisation alone does not necessarily produce diversity.
- At worst, it may result simply in the privatisation of the monopoly itself – with the old monopolist, the state, being replaced by one or two powerful business conglomerates.

### What policymakers can do

- Legislators should decide whether to impose certain ownership restrictions by law or rather to define what is meant to be achieved and then give the responsibility for implementing these goals to the regulator.
- Parliamentarians further need to consider whether or not existing competition law is sufficient to deal with potential limitations on competition, or if broadcasting needs to be specially regulated (due to the social importance of ensuring diverse content).

### Different forms of regulation for different forms of ownership

Internationally, regulation regarding the various kinds of ownership takes various forms:

#### 1. Restrictions on foreign ownership

Foreign ownership of broadcasting companies is restricted in most countries.

- Japan, for example, does not allow any foreign ownership.
- States in the European Union allow only up to 49 per cent ownership of shares in the hands of investors from outside the EU.
- In South Africa, no foreign person or entity may own or control more than 20 per cent of any broadcasting licence.
- In the UK, Australia and Ireland foreign ownership is allowed by special approval only, granted by the regulator or the national treasury.

#### 2. Shareholding of TV licensees in other TV operators

Most countries also restrict multiple ownership of TV stations by their own nationals to avoid monopolies and thus partisan control of public opinion.

- In South Africa, no person shall exercise control over more than one TV licence; in the US not more than two television companies.
- In Australia the concept of licence area is taken into account: A TV licensee is not allowed to have shares in another service operating in the same area.
- Other countries look at market share: a TV licensee will not be allowed to hold more than a certain percentage of the market, e.g. 30 per cent in Germany, 15 per cent in the UK.

#### 3. Shareholding of TV licensees in radio stations and vice versa

And what about TV companies which also run radio stations, as is the case in Kenya, for example?

- Many countries have no limitations in place to allow for economies of scale, for example the US and Germany.
- Others do not permit the issuing of national, but only regional or local radio station licences to a TV company (Hungary).
- Australia follows its licence area concept: multiple shareholding is not allowed in the same region.

#### 4. Shareholding in more than one radio station

- In many African countries, media houses are allowed to run as many radio stations as they please; the same goes for states like Germany, Sweden or the US.
- Other countries seek to avoid monopolies or oligopolies in this sector:
  - In South Africa, no person shall exercise control over more than two FM or two AM commercial radio stations.
  - In Hungary, Ireland or the Netherlands multiple shareholding in radio stations is not allowed in the same licence area.
  - The UK allows shareholding in up to 35 local stations or a maximum of four local plus one national station.

#### 5. Cross-ownership between print and broadcasting media

The regulation of combined ownership of print and broadcasting media is a complicated issue.

- Germany and Sweden took the easy road: newspaper publishers are allowed to own radio or television stations as well.
- South Africa opted for a rather complicated model: a newspaper is able to acquire or retain a financial interest in a radio or television licence, but only as long as its Audit Bureau of Circulation figures do not exceed the limit of 25 per cent.
- France has a similar approach: a newspaper which controls up to 30 per cent of the daily press is not allowed to control any other media.
- In the US or Australia a publisher based in New York or Sydney, for example, is not allowed to run broadcasting stations in the same city, but free to do so in San Francisco or Perth.

#### Conclusion: What policymakers should consider

- In determining ownership regulations, different considerations must be taken into account – including financial viability.
- For example, in some countries the establishment of a viable television station may be possible only with substantial foreign investment.
- In others, the advertising industry may be too small to support a range of independent players and so companies will need to share costs across different services.
- The size of the market should also be considered.
- Creative solutions need to be found to fit the circumstances in each individual country.

### Media owners and editorial independence

Not only policy makers have to be worried about the promotion of pluralism and diversity in the media - the editors themselves need to do their bit by preserving their independence from the purely commercial or political interests of the owners.

The Declaration of Principles on Freedom of Expression in Africa says in its Clause VIII (4):

*Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.*

Editors of newspapers around the world have devised ways of protecting journalistic professionalism against undue influence from owners. The most common of these is the adoption of a charter or editorial statute which guarantees a paper's editorial independence.

#### Pros

- If market forces alone cannot guarantee media diversity and even private media owners may be a danger to press freedom - could that not be taken as a strong argument in favour of a different, back-to-the-old-ways approach: state control of the print media or at least a dual system of privately and state-owned newspapers?
- If the publisher or editor of a newspaper has the right to select information for publishing and influence public opinion, on what grounds could a government be excluded from playing such a role - after all it represents the collective will of the people and acts on their behalf?
- Could it not even be said that governments are responsible for providing information to their citizens as a social service in the same way that they provide educational facilities and health care?
- Of course governments need to keep people informed on their activities, policies and plans - if only because they want to be re-elected for having done a good job.
- **So it is in their own best interest to use the most effective and credible vehicle of communication.**

#### Cons

- The nub of the matter, though, is that many if not most state-owned and government-controlled media are neither effective nor credible.
- In countries where people now have a choice on what they will spend their hard-earned money on, more often than not this is a copy of a privately owned newspaper, even though it may be more expensive than the subsidised state-owned one.
- In Zambia, for example, the two state-owned dailies had a combined circulation of 17 500 copies in 2010 while the privately owned daily sold 47 000 copies. In Mozambique, the government-controlled daily has a circulation of 15 000, compared to 35 000 for the two private dailies. Many countries do not have any state-run print media at all, for example Kenya and South Africa.
- Citizens these days expect the media to help them keep a check on the elected representatives' performance, not to act as the government's mouthpiece.
- Governments - like all the other big players in society - have their public relations departments or their "spin doctors", professional communicators, who should know how best to get their employer's

message across. The more informative the content and the more professional the packaging of the message, the more of a hearing it will get.

### State-funding media with taxpayer money?

As for state-funding of media: In a multi-party political context where the different voices are organised in different groupings, it would surely be undemocratic to use public revenue for government outlets only. So, to be fair, should all opposition parties perhaps run their own newspapers too, also subsidised by the taxpayer?

Party-political publications - be they government or opposition - are by nature partisan: predictably one-sided and in the long run boring, preaching to the converted. Why then should either the government or the opposition seek to transport their messages through boring media that lack credibility?

- Rather than maintain one-way channels of communication through their own organs, they will operate more effectively if they put their case before an independent media and argue for their policies in open and dynamic debate. This is how democracy works and what the media are for.
- This kind of open competition for space and attention will improve the quality of debate not just among the political players but also in the media generally.
- Where there are powerful government-controlled outlets, the private media are often tempted to position themselves in the opposite corner in order to compete.
- This can result in a needlessly antagonistic, even hostile attitude towards government as a whole and the private papers, rightly or wrongly, being summarily pigeon-holed as "opposition media".
- In a truly open market - without the state playing a role - the media in their entirety will (and, in fact, do in mature democracies) mirror the entire spectrum of viewpoints and opinions in any given society.

#### Conclusion about state owned media

- The goal should therefore be abolishing state-owned media.
- As a transitional solution one could think of placing state-owned and/or controlled print media and news agencies under an independent supervisory mechanism to enable non-partisan editing.
- This could be an independent media commission, made up of suitably qualified representatives of the public at large (as is the case in Ghana).
- The same body could also be in charge of privatising state-owned publications in a manner that guarantees diversity of ownership, the widest possible distribution, and editorial independence (the Reuters example of a trust to protect such independence could serve as a model).

### IN A NUTSHELL

- Policy makers and legislators should develop policies in order to create an enabling environment for a vibrant local media production industry.
- State-owned media should be abolished.
- In determining ownership regulations, different considerations must be taken into account – including financial viability.
  - In some countries the establishment of a viable television station may be possible only with substantial foreign investment.
  - In others, the advertising industry may be too small to support a range of independent players and so companies will need to share costs across different services.
  - The size of the market should also be considered.
- Creative solutions need to be found to fit the circumstances in each individual country.

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# 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**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

## **PART I Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the

realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## **PART II Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

## **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

## **Article 4**

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under

international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

#### **Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### **PART III**

#### **Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and

shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### **Article 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

#### **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It

shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

**Article 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

**Article 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

**Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

**Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

**Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### **Article 15**

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### **Article 16**

Everyone shall have the right to recognition everywhere as a person before the law.

#### **Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others

and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### **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.

#### **Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

#### **Article 21**

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.

#### **Article 22**

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 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.

### Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

### Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

### Article 25

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;

(c) To have access, on general terms of equality, to public service in his country.

### Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

## PART IV

### Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

### Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

### Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant

to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### **Article 31**

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

#### **Article 32**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

#### **Article 33**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

#### **Article 34**

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the

vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

#### **Article 35**

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

#### **Article 36**

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

#### **Article 37**

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

#### **Article 38**

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

#### **Article 39**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

**Article 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

**Article 41**

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

**Article 42**

1.

(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

**Article 43**

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

**Article 44**

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

**Article 45**

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

**PART V****Article 46**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the

specialized agencies in regard to the matters dealt with in the present Covenant.

### Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

## PART VI

### Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

### Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

### Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

### Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering

and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

### Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

### Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

## 2

## WINDHOEK DECLARATION ON PROMOTING AN INDEPENDENT AND PLURALISTIC AFRICAN PRESS (1991)

The declaration, endorsed by the UNESCO General Conference in 1991, is not truly a code of ethics, but does aim at improving news media in Africa.

We the participants in the United Nations/ United Nations Educational, Scientific and Cultural Organization Seminar on Promoting an Independent and Pluralistic African Press, held in Windhoek, Namibia, from 29 April to 3 May 1991,

Recalling the Universal Declaration of Human Rights,

Recalling General Assembly resolution 59(I) of 14 December 1946 stating that freedom of information is a fundamental human right, and General Assembly resolution 45/76 A of 11 December 1990 on information in the service of humanity,

Recalling resolution 25C/104 of the General Conference of UNESCO of 1989 in which the main focus is the promotion of "the free flow of ideas by word and image at international as well as national levels",

Noting with appreciation the statements made by the United Nations Under-Secretary –General for Public Information and the Assistant Director-General for Communication, Information and Informatics of UNESCO at the opening of the Seminar,

Expressing our sincere appreciation to the United Nations and UNESCO for organizing the Seminar,

Expressing also our sincere appreciation to all the intergovernmental, governmental and non-governmental bodies and organizations, in particular the United Nations Development Programme (UNDP), which contributed to the United Nations/UNESCO effort to organize the Seminar,

Expressing our gratitude to the Government and people of the Republic of Namibia for their kind hospitality which facilitated the success of the Seminar,

Declare that:

1. Consistent with article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development.

2. By an independent press, we mean a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.

3. By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.

4. The welcome changes that an increasing number of African States are now undergoing towards multi-party democracies provide the climate in which an independent and pluralistic press can emerge.

5. The world-wide trend towards democracy and freedom of information and expression is a fundamental contribution to the fulfilment of human aspirations.

6. In Africa today, despite the positive developments in some countries, in many countries journalists, editors and publishers are victims of repression—they are murdered, arrested, detained and censored, and are restricted by economic and political pressures such as restrictions on newsprint, licensing systems which restrict the opportunity to publish, visa restrictions which prevent the free movement of journalists, restrictions on the exchange of news and information, and limitations on the circulation of newspapers within countries and across national borders. In some countries, one-party States control the totality of information.

7. Today, at least 17 journalists, editors or publishers are in African prisons, and 48 African journalists were killed in the exercise of their profession between 1969 and 1990.

8. The General Assembly of the United Nations should include in the agenda of its next session an item on the declaration of censorship as a grave violation of human rights falling within the purview of the Commission on Human Rights.

9. African States should be encouraged to provide constitutional guarantees of freedom of the press and freedom of association.

10. To encourage and consolidate the positive changes taking place in Africa, and to counter the negative ones, the international community—specifically, international organizations (governmental as well as non-governmental), development agencies and professional associations—should as a matter of priority direct funding support towards the development and establishment of non-governmental newspapers, magazines and periodicals that reflect the society as a whole and the different points of view within the communities they serve.

11. All funding should aim to encourage pluralism as well as independence. As a consequence, the public media

## APPENDICES

should be funded only where authorities guarantee a constitutional and effective freedom of information and expression and the independence of the press.

12. To assist in the preservation of the freedoms enumerated above, the establishment of truly independent, representative associations, syndicates or trade unions of journalists, and associations of editors and publishers, is a matter of priority in all the countries of Africa where such bodies do not now exist.

13. The national media and labour relations laws of African countries should be drafted in such a way as to ensure that such representative associations can exist and fulfil their important tasks in defence of press freedom.

14. As a sign of good faith, African Governments that have jailed journalists for their professional activities should free them immediately. Journalists who have had to leave their countries should be free to return to resume their professional activities.

15. Cooperation between publishers within Africa, and between publishers of the North and South (for example through the principle of twinning), should be encouraged and supported.

16. As a matter of urgency, the United Nations and UNESCO, and particularly the International Programme for the Development of Communication (IPDC), should initiate detailed research, in cooperation with governmental (especially UNDP) and non-governmental donor agencies, relevant non-governmental organizations and professional associations, into the following specific areas:

(i) identification of economic barriers to the establishment of news media outlets, including restrictive import duties, tariffs and quotas for such things as newsprint, printing equipment, and typesetting and word processing machinery, and taxes on the sale of newspapers, as a prelude to their removal;

(ii) training of journalists and managers and the availability of professional training institutions and courses;

(iii) legal barriers to the recognition and effective operation of trade unions or associations of journalists, editors and publishers;

(iv) a register of available funding from development and other agencies, the conditions attaching to the release of such funds, and the methods of applying for them;

(v) the state of press freedom, country by country, in Africa.

17. In view of the importance of radio and television in the field of news and information, the United Nations and UNESCO are invited to recommend to the General Assembly and the General Conference the convening of a similar seminar of journalists and managers of radio and television services in Africa, to explore the possibility of applying similar concepts of independence and pluralism to those media.

18. The international community should contribute to the achievement and implementation of the initiatives and projects set out in the annex to this Declaration.

19. This Declaration should be presented by the Secretary General of the United Nations to the United Nations General Assembly, and by the Director-General of UNESCO to the General Conference of UNESCO.

## 3

AFRICAN CHARTER ON  
BROADCASTING (2001)**UNESCO conference to celebrate the 10th anniversary of the original Windhoek Declaration held in Windhoek 3-5 May**

*Acknowledging* the enduring relevance and importance of the Windhoek Declaration to the protection and promotion of freedom of expression and of the media;

*Noting* that freedom of expression includes the right to communicate and access to means of communication;

*Mindful* of the fact that the Windhoek Declaration focuses on the print media and recalling Paragraph 17 of the Windhoek Declaration, which recommended that a similar seminar be convened to address the need for independence and pluralism in radio and television broadcasting;

*Recognising* that the political, economic and technological environment in which the Windhoek Declaration was adopted has changed significantly and that there is a need to complement and expand upon the original Declaration;

*Aware* of the existence of serious barriers to free, independent and pluralistic broadcasting and to the right to communicate through broadcasting in Africa;

Cognisant of the fact that for the vast majority of the peoples of Africa, the broadcast media remains the main source of public communication and information;

*Recalling* the fact that the frequency spectrum is a public resource which must be managed in the public interest;

**We the Participants of Windhoek + 10 Declare that:****PART I: GENERAL REGULATORY ISSUES**

1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.

2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.

3. Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrum is allocated to broadcasting uses.

4. The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting.

5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.

6. Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.

7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.

8. The development of appropriate technology for the reception of broadcasting signals should be promoted.

**PART II: PUBLIC SERVICE BROADCASTING**

All State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.

Public service broadcasters should, like broadcasting and telecommunications regulators, be governed by bodies which are protected against interference. The public service mandate of public service broadcasters should clearly defined. The editorial independence of public service broadcasters should be guaranteed.

Public service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.

Without detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers.

The transmission infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms.

### **PART III: COMMUNITY BROADCASTING**

Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit.

There should be a clear recognition, including by the international community, of the difference between decentralised public broadcasting and community broadcasting.

The right of community broadcasters to have access to the Internet, for the benefit of their respective communities, should be promoted.

### **PART IV: TELECOMMUNICATIONS AND CONVERGENCE**

The right to communicate includes access to telephones, email, Internet and other telecommunications systems, including through the promotion of community-controlled information communication technology centres.

Telecommunications law and policy should promote the goal of universal service and access, including through access clauses in privatisation and liberalisation processes, and proactive measures by the State.

The international community and African governments should mobilise resources for funding research to keep abreast of the rapidly changing media and technology landscape in Africa.

African governments should promote the development of online media and African content, including through the formulation of non-restrictive policies on new information and communications technologies.

Training of media practitioners in electronic communication, research and publishing skills needs to be supported and expanded, in order to promote access to, and dissemination of, global information.

### **PART V: IMPLEMENTATION**

UNESCO should distribute the African Charter on Broadcasting 2001 as broadly as possible, including to stakeholders and the general public, both in Africa and worldwide.

Media organizations and civil society in Africa are encouraged to use the Charter as a lobbying tool and as their starting point in the development of national and regional broadcasting policies. To this end media organisations and civil society are encouraged to initiate public awareness campaigns, to form coalitions on broadcasting reform, to formulate broadcasting policies, to develop specific models for regulatory bodies and public service broadcasting, and to lobby relevant official actors.

All debates about broadcasting should take into account the needs of the commercial broadcasting sector.

UNESCO should undertake an audit of the Charter every five years, given the pace of development in the broadcasting field.

UNESCO should raise with member governments the importance of broadcast productions being given special status and recognised as cultural goods under the World Trade Organization rules.

UNESCO should take measures to promote the inclusion of the theme of media, communications and development in an appropriate manner during the UN Summit on the Information Society in 2003.

## 4

## DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION IN AFRICA (2002)

**ACHPR /Res.62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002)**

**The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002:**

**Reaffirming** the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

**Concerned** at violations of these rights by States Party to the Charter;

**Taking into consideration** the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press, the Final Report of the African Conference of "The Journalist and Human Rights in Africa" held in Tunis, Tunisia from 31st October to 1st November 1992, the Resolution on Freedom of Expression adopted by the African Commission on Human and Peoples' Rights in Tripoli on 7th May 2001, the Statement of the Seminar on "Freedom of Expression and the African Charter" held from 23rd to 25th November 2000 in Johannesburg, South Africa and the first and second meetings of the Commission's Working Group on Freedom of Expression held in Cape town, South Africa from 10th to 11th February 2002 and in Pretoria, South Africa on 1st May 2002 respectively;

**Decides** to adopt and to recommend to African States the Declaration of Principles on Freedom of Expression in Africa annexed hereto;

**Decides** to follow up on the implementation of this Declaration.

**Declaration of Principles on Freedom of Expression in Africa**

### Preamble

Reaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

Reaffirming Article 9 of the African Charter on Human and Peoples' Rights;

Desiring to promote the free flow of information and ideas and greater respect for freedom of expression;

Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;

Convinced that laws and customs that repress freedom of expression are a disservice to society;

Recalling that freedom of expression is a fundamental human right guaranteed by the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international documents and national constitutions;

Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy;

Aware of the particular importance of the broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy;

Noting that oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting;

Noting the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies;

Mindful of the evolving human rights and human development environment in Africa, especially in light of the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, the principles of the Constitutive Act of the African Union, 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa's Development (NEPAD); and

Recognising the need to ensure the right to freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:

### I The Guarantee of Freedom of Expression

1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including

across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

### **II Interference with Freedom of Expression**

1. No one shall be subject to arbitrary interference with his or her freedom of expression. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

### **III Diversity**

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things-:

- availability and promotion of a range of information and ideas to the public; - pluralistic access to the media and other means of communication, including by vulnerable or marginalized groups, such as women, children and refugees, as well as linguistic and cultural groups;

- the promotion and protection of African voices, including through media in local languages; and - the promotion of the use of local languages in public affairs, including in the courts.

### **IV Freedom of Information**

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles: - everyone has the right to access information held by public bodies; - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right; - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts; - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest; - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and - secrecy laws shall be amended as necessary to comply with freedom of information principles. 3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

### **V Private Broadcasting**

1. States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression. 2. The broadcast regulatory system shall encourage private

and community broadcasting in accordance with the following principles: - there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community; - an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions; - licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and - community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

### **VI Public Broadcasting**

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles: - public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature; - the editorial independence of public service broadcasters should be guaranteed;

- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets; - public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and - the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

### **VII Regulatory Bodies for Broadcast and Telecommunications**

1. Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature. 2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party. 3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

### **VIII Print Media**

1. Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression. 2. Any print media published by a public authority should be protected adequately against undue political interference. 3. Efforts should be made to increase the scope of circulation of the print media, particularly to rural communities. 4. Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.

**IX Complaints**

1. A public complaints system for print or broadcasting should be available in accordance with the following principles: - complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and - the complaints system shall be widely accessible.
2. Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
3. Effective self-regulation is the best system for promoting high standards in the media.

**X Promoting Professionalism**

1. Media practitioners shall be free to organise themselves into unions and associations. 2. The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.

**XI Attacks on Media Practitioners**

1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public. 2. States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies. 3. In times of conflict, States shall respect the status of media practitioners as non-combatants.

**XII Protecting Reputations**

1. States should ensure that their laws relating to defamation conform to the following standards: - no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances; - public figures shall be required to tolerate a greater degree of criticism; and - sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others. 2. Privacy laws shall not inhibit the dissemination of information of public interest.

**XIII Criminal Measures**

1. States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.
2. Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

**XIV Economic Measures**

1. States shall promote a general economic environment in which the media can flourish. 2. States shall not use their power over the placement of public advertising as a means to interfere with media content. 3. States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

**XV Protection of Sources and other journalistic material**

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles: - the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence; - the information or similar information leading to the same result cannot be obtained elsewhere; - the public interest in disclosure outweighs the harm to freedom of expression; and - disclosure has been ordered by a court, after a full hearing.

**XVI Implementation**

States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles.

Done in Banjul, 23rd October 2002.

## 5

## GUIDELINES AND PRINCIPLES FOR BROADCAST COVERAGE OF ELECTIONS IN THE SADC REGION (2005)

**Adopted September 2005 at the annual general meeting of the Southern African Broadcasting Association (SABA) in Arusha, Tanzania.**

### Preamble

**We**, the Chief Executives of public broadcasting services in the Southern African Development Community (SADC),

**Guided** by the laws of our individual countries and the protocols, conventions, guidelines and treaties endorsed, signed, and/or ratified by our governments in the region in their desire to ensure the success of democratic processes, and in particular: the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa (2002), the SADC Principles and Guidelines Governing Democratic Elections (2004), the SADC Protocol on Culture, Information and Sport (2001) and the SADC Declaration on Gender and Development (1997)

**Determined** to create regional principles to guide coverage of elections,

**Dedicated** to highlighting the duty of all broadcasters, large or small, rich or poor, to contribute to and ensure free, fair and transparent elections in any way they can,

**Committed** to ensuring free and fair elections,

Hereby agree on and adopt the Broadcasting Code of Conduct for Covering Elections as follows

### A. Editorial Guidelines

#### Article 1

The aim of election coverage is to ensure that the electorate is empowered to make an informed choice.

In light of this, the public is entitled to accurate, fair impartial and balanced information about the election procedures, and the positions of political parties/independents and/or candidates on issues. Broadcasters are therefore committed to make every effort to present all available and relevant information to the public.

Broadcasters will further ensure that coverage of the elections will be designed to emphasise the relevance of elections and encourage participation by all citizens in the election process.

#### Article 2

Broadcasters will ensure that they focus on issues of

relevance and interest to citizens and not purely cover events of political parties/contestants.

#### Article 3

Broadcasters will provide opportunities for the public to take part in political debates on election issues. Participants of such broadcasts must be as representative as possible of different views and sectors of society.

#### Article 4

Broadcasters have the responsibility to treat all political parties/contestants equitably. They shall to this end facilitate fair play.

Equitable treatment does not mean equal treatment nor does it mean that broadcasters will abandon their news values and/or processes. Equitable treatment means fair treatment in both news, current affairs and discussion programmes. Fairness is achieved over time. It is unlikely to be achieved in a single programme. Broadcasters will be consistent in their treatment of political parties/contestants.

Broadcasters will not only rely on political parties or candidates to bring information but will proactively seek out information and participation in discussions.

#### Article 5

In an election campaign there is a risk of incumbents trying to use their position to advance their election prospect. Broadcasters should regard with caution any statement or action by an official of an incumbent party and need to check thoroughly whether for example public appearances of government officials are strictly on government business or part of their election campaign.

#### Article 6

Broadcasters will make sure that any impression of one-sidedness is avoided in all programming. They must act and be seen to be acting in a fair and independent manner and not be influenced by political or other interests.

Staff members who hold political office, and/or are office bearers with a political party, and/or active in political campaigning and/or standing for parliament, will not be allowed to broadcast and/or participate in editorial decision making during the election period.

Staff members, in the execution of their duties, will not wear or exhibit symbols or colours or appear with clothes or insignia associated with any political party or contestant

during the election period.

Broadcasters and their staff members will not accept gifts, favours or special treatment by political parties or other interests that compromise their professional integrity.

#### **Article 7**

Broadcasters will afford political parties and/or candidates the right of reply where a report aired under the editorial responsibility of the broadcaster contains inaccurate information or unfair criticism based on a distortion of facts. The opportunity to reply must be given within at least 24 hours in a programme of similar weight and audience. Broadcasters should in this regard take special care immediately prior to the election date in order to ensure timely correction of such distortions.

In instances of conflict about this right of reply, broadcasters shall ensure timeous independent arbitration.

#### **Article 8**

Broadcasters shall not broadcast views that could incite violence or advocate hatred that is based on race, ethnicity, gender, religion or political conviction, and that constitute incitement to cause harm.

#### **Article 9**

Public opinion polls should be treated with caution and in reporting the findings of such polls broadcasters shall inform the public on the source of the poll, the commissioning agency, the period of time over which it was conducted, the sample size and the likely margin of error. Similar care must be applied when dealing with exit polls.

#### **Article 10**

Broadcasters have an obligation to inform the public of the election results, as they become available. Special care should be taken to ensure the accuracy of all results broadcast.

### **B. Guidelines on party election broadcasts and political advertisements**

#### **1. Definitions**

1.1 Party election broadcasts are free time slots allocated to political parties/contestants to inform the electorate of their policies.

1.2. Political advertisements are paid for advertisements intended to advance the interests of any political party.

#### **2. Guidelines**

2.1 Broadcasters shall where applicable in terms of country laws afford political parties/contestants equitable and fair access to party election broadcasts and political advertisements.

2.2 Broadcasters shall ensure in such instances that they develop transparent formulae for calculating the allocation of air time, including the amount of time and the time of

broadcast, to be provided to individual political parties/contestants.

2.3 Broadcasters shall timeously develop guidelines on submission of such party election broadcasts and political advertisements including details of the required formats and technical standards. Broadcasters shall publish them widely.

2.4 Broadcasters shall develop transparent mechanisms and procedures to ensure that political advertisements and party election broadcasts are not unilaterally edited or amended without consent of political parties and contestants. Such alterations are only possible if such advertisements or broadcasts do not comply with reasonable technical standards, laws of the country or any electoral codes.

2.5 Should a political party or contestant in such instances refuse to edit or amend such advertisement or broadcast, the broadcaster has the right to refuse to air it. Broadcasters

should be indemnified by political parties against any cost, damage or loss incurred or sustained as a result of any claim arising from such broadcasts or advertisements.

### **C. Implementation**

In order to effect implementation of these guidelines and principles, broadcasters will:

1. Develop editorial codes and policies or review existing codes using these guidelines as minimum standards, and ensure awareness of such codes.
2. Publish these guidelines and any other internal codes to enable the public to monitor the performance of the broadcaster and hold it accountable.
3. Establish internal complaints procedures to channel and resolve complaints from the public. Broadcasters will encourage aggrieved parties to use existing independent arbitration mechanisms.
4. Ensure proper planning and resource allocation for election coverage.
5. Ensure that staff members are adequately trained in order to fulfil obligations as required by these guidelines and principles.

### **D. Requirements for the implementation of these Guidelines and Principles**

In order to adhere to and implement these guidelines, broadcasters require:

1. To be allowed to operate in an environment free of violence and intimidation. All electoral stakeholders must respect the rights of broadcasters to cover the elections. Any electoral institutions shall make all stakeholders aware of the role of broadcasters.
2. Adequate, additional state funding for coverage of the election period through government, parliament, and or any electoral commission.



## AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE (2007), AFRICAN UNION

**Adopted by the Eighth Ordinary Session of the African Union Assembly, held in Addis Ababa, Ethiopia, 30 January 2007**

### Preamble

We, the Member States of the African Union (AU);

Inspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasise the significance of good governance, popular participation, the rule of law and human rights;

Recognising the contributions of the African Union and Regional Economic Communities to the promotion, nurturing, strengthening and consolidation of democracy and governance;

Reaffirming our collective will to work relentlessly to deepen and consolidate the rule of law, peace, security and development in our countries;

Guided by our common mission to strengthen and consolidate institutions for good governance, continental unity and solidarity;

Committed to promote the universal values and principles of democracy, good governance, human rights and the right to development;

Cognizant of the historical and cultural conditions in Africa;

Seeking to entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies;

Concerned about the unconstitutional changes of governments that are one of the essential causes of insecurity, instability and violent conflict in Africa;

Determined to promote and strengthen good governance through the institutionalization of transparency, accountability and participatory democracy;

Convinced of the need to enhance the election observation missions in the role they play, particularly as they are an important contributory factor to ensuring the regularity, transparency and credibility of elections;

Desirous to enhance the relevant Declarations and Decisions of the OAU/AU (including the 1990 Declaration on the political and socio-economic situation in Africa and

the fundamental changes taking place in the world, the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development, the 1999 Algiers Declaration on Unconstitutional Changes of Government, the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa, the 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union);

Committed to implementing Decision EX.CL/Dec.31(III) adopted in Maputo, Mozambique, in July 2003 and Decision EX.CL/124(V) adopted in Addis Ababa, Ethiopia, in May 2004 respectively, by the adoption of an African Charter on Democracy, Elections and Governance;

HAVE AGREED AS FOLLOWS:

### Chapter 1

#### Definitions

##### Article 1

In this Charter, unless otherwise stated, the following expressions shall have the following meaning:

"AU" means the African Union;

"African Human Rights Commission" means the African Commission on Human and Peoples' Rights;

"African Peer Review Mechanism" APRM means the African Peer Review Mechanism;

"Assembly" means the Assembly of Heads of State and Government of the African Union;

"Commission" means the Commission of the Union;

"Constitutive Act" means the Constitutive Act of the Union;

"Charter" means the African Charter on Democracy, Elections and Governance;

"Member States" means the Member States of the African Union;

"National Electoral Body" means a competent authority, established by the relevant legal instruments of a State Party, responsible for organizing and supervising elections;

"NEPAD" means the New Partnership for Africa's Development;

“Peace and Security Council” means the Peace and Security Council of the African Union;

“Regional Economic Communities” means the regional integration blocs of the African Union;

“State Party” means any Member State of the African Union which has ratified or acceded to this Charter and deposited the instruments for ratification or accession with the Chairperson of the African Union Commission;

“Union” means the African Union.

## Chapter 2

### Objectives

#### Article 2

The objectives of this Charter are to:

1. Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights;
2. Promote and enhance adherence to the principle of the rule of law premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties;
3. Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments;
4. Prohibit, reject and condemn unconstitutional change of government in any Member State as a serious threat to stability, peace, security and development;
5. Promote and protect the independence of the judiciary;
6. Nurture, support and consolidate good governance by promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance;
7. Encourage effective coordination and harmonization of governance policies amongst State Parties with the aim of promoting regional and continental integration;
8. Promote State Parties’ sustainable development and human security;
9. Promote the fight against corruption in conformity with the provisions of the AU Convention on Preventing and Combating Corruption adopted in Maputo, Mozambique in July 2003;
10. Promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs;
11. Promote gender balance and equality in the governance and development processes;
12. Enhance cooperation between the Union, Regional Economic Communities and the International Community on democracy, elections and governance; and
13. Promote best practices in the management of elections for purposes of political stability and good governance.

## Chapter 3

### Principles

#### Article 3

State Parties shall implement this Charter in accordance with the following principles:

1. Respect for human rights and democratic principles;
2. Access to and exercise of state power in accordance with the constitution of the State Party and the principle of the rule of law;
3. Promotion of a system of government that is representative;
4. Holding of regular, transparent, free and fair elections;
5. Separation of powers;
6. Promotion of gender equality in public and private institutions;
7. Effective participation of citizens in democratic and development processes and in governance of public affairs;
8. Transparency and fairness in the management of public affairs;
9. Condemnation and rejection of acts of corruption, related offenses and impunity;
10. Condemnation and total rejection of unconstitutional changes of government;
11. Strengthening political pluralism and recognising the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.

## Chapter 4

### Democracy, Rule of Law and Human Rights

#### Article 4

1. State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.
2. State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.

### Article 5

State Parties shall take all appropriate measures to ensure constitutional rule, particularly constitutional transfer of power.

### Article 6

State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility.

### Article 7

State Parties shall take all necessary measures to strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity and endow them with the necessary resources.

### Article 8

1. State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance.

2. State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups.

3. State Parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation.

### Article 9

State Parties undertake to design and implement social and economic policies and programmes that promote sustainable development and human security.

### Article 10

1. State Parties shall entrench the principle of the supremacy of the constitution in the political organization of the State.

2. State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.

3. State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society.

## Chapter 5

### The Culture of Democracy and Peace

#### Article 11

The State Parties undertake to develop the necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace.

#### Article 12

State Parties undertake to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace.

To this end, State Parties shall:

1. Promote good governance by ensuring transparent and accountable administration.

2. Strengthen political institutions to entrench a culture of democracy and peace.

3. Create conducive conditions for civil society organizations to exist and operate within the law.

4. Integrate civic education in their educational curricula and develop appropriate programmes and activities.

#### Article 13

State Parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace.

## Chapter 6

### Democratic Institutions

#### Article 14

1. State Parties shall strengthen and institutionalize constitutional civilian control over the armed and security forces to ensure the consolidation of democracy and constitutional order.

2. State Parties shall take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.

3. State Parties shall cooperate with each other to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.

#### Article 15

1. State Parties shall establish public institutions that promote and support democracy and constitutional order.

2. State Parties shall ensure that the independence or autonomy of the said institutions is guaranteed by the constitution.

3. State Parties shall ensure that these institutions are accountable to competent national organs.

4. State Parties shall provide the above-mentioned institutions with resources to perform their assigned missions efficiently and effectively.

**Article 16**

State Parties shall cooperate at regional and continental levels in building and consolidating democracy through exchange of experiences.

**Chapter 7****Democratic Elections****Article 17**

State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.

To this end, State Parties shall:

1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner.
3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.
4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.

**Article 18**

1. State Parties may request the Commission, through the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund, to provide advisory services or assistance for strengthening and developing their electoral institutions and processes.

2. The Commission may at any time, in consultation with the State Party concerned, send special advisory missions to provide assistance to that State Party for strengthening its electoral institutions and processes.

**Article 19**

1. Each State Party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission.

2. Each State Party shall guarantee conditions of security, free access to information, non-interference, freedom of movement and full cooperation with the electoral observer mission.

**Article 20**

The Chairperson of the Commission shall first send an exploratory mission during the period prior to elections. This mission shall obtain any useful information and documentation, and brief the Chairperson, stating

whether the necessary conditions have been established and if the environment is conducive to the holding of transparent, free and fair elections in conformity with the principles of the Union governing democratic elections.

**Article 21**

1. The Commission shall ensure that these missions are independent and shall provide them with the necessary resources for that purpose.

2. Electoral observer missions shall be conducted by appropriate and competent experts in the area of election monitoring, drawn from continental and national institutions such as, but not limited to, the Pan-African Parliament, national electoral bodies, national legislatures and eminent persons taking due cognizance of the principles of regional representation and gender equality.

3. Electoral observer missions shall be conducted in an objective, impartial and transparent manner.

4. All electoral observer missions shall present the report of their activities to the Chairperson of the Commission within a reasonable time.

5. A copy of the report shall be submitted to the State Party concerned within a reasonable time.

**Article 22**

State Parties shall create a conducive environment for independent and impartial national monitoring or observation mechanisms.

**Chapter 8****Sanctions in Cases of Unconstitutional Changes of Government****Article 23**

State Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:

1. Any putsch or coup d'Etat against a democratically elected government.
2. Any intervention by mercenaries to replace a democratically elected government.
3. Any replacement of a democratically elected government by armed dissidents or rebels.
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections; or
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

### Article 24

When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, herein after referred to as the Protocol.

### Article 25

1. When the Peace and Security Council observes that there has been an unconstitutional change of government in a State Party, and that diplomatic initiatives have failed, it shall suspend the said State Party from the exercise of its right to participate in the activities of the Union in accordance with the provisions of articles 30 of the Constitutive Act and 7 (g) of the Protocol. The suspension shall take effect immediately.

2. However, the suspended State Party shall continue to fulfill its obligations to the Union, in particular with regard to those relating to respect of human rights.

3. Notwithstanding the suspension of the State Party, the Union shall maintain diplomatic contacts and take any initiatives to restore democracy in that State Party.

4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.

5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.

6. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act.

7. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.

8. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government.

9. State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition.

10. State Parties shall encourage conclusion of bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance.

### Article 26

The Peace and Security Council shall lift sanctions once the situation that led to the suspension is resolved.

## Chapter 9

### Political, Economic and Social Governance

#### Article 27

In order to advance political, economic and social governance, State Parties shall commit themselves to:

1. Strengthening the capacity of parliaments and legally recognised political parties to perform their core functions;

2. Fostering popular participation and partnership with civil society organizations;

3. Undertaking regular reforms of the legal and justice systems;

4. Improving public sector management;

5. Improving efficiency and effectiveness of public services and combating corruption;

6. Promoting the development of the private sector through, inter alia, enabling legislative and regulatory framework;

7. Development and utilisation of information and communication technologies;

8. Promoting freedom of expression, in particular freedom of the press and fostering a professional media;

9. Harnessing the democratic values of the traditional institutions; and

10. Preventing the spread and combating the impact of diseases such as Malaria, Tuberculosis, HIV/AIDS, Ebola fever, and Avian Flu.

#### Article 28

State Parties shall ensure and promote strong partnerships and dialogue between government, civil society and private sector.

#### Article 29

1. State Parties shall recognize the crucial role of women in development and strengthening of democracy.

2. State Parties shall create the necessary conditions for full and active participation of women in the decision-making processes and structures at all levels as a fundamental element in the promotion and exercise of a democratic culture.

3. State Parties shall take all possible measures to encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures.

#### Article 30

State Parties shall promote citizen participation in the development process through appropriate structures.

**Article 31**

1. State Parties shall promote participation of social groups with special needs, including the Youth and people with disabilities, in the governance process.

2. State Parties shall ensure systematic and comprehensive civic education in order to encourage full participation of social groups with special needs in democracy and development processes.

**Article 32**

State Parties shall strive to institutionalize good political governance through:

1. Accountable, efficient and effective public administration;
2. Strengthening the functioning and effectiveness of parliaments;
3. An independent judiciary;
4. Relevant reforms of public institutions including the security sector;
5. Harmonious relationships in society including civil-military relations;
6. Consolidating sustainable multiparty political systems;
7. Organising regular, free and fair elections; and
8. Entrenching and respecting the principle of the rule of law.

**Article 33**

State Parties shall institutionalize good economic and corporate governance through, inter alia:

1. Effective and efficient public sector management;
2. Promoting transparency in public finance management;
3. Preventing and combating corruption and related offences;
4. Efficient management of public debt;
5. Prudent and sustainable utilization of public resources;
6. Equitable allocation of the nation's wealth and natural resources;
7. Poverty alleviation;
8. Enabling legislative and regulatory framework for private sector development;
9. Providing a conducive environment for foreign capital inflows;

10. Developing tax policies that encourage investment;

11. Preventing and combating crime;

12. Elaborating and implementing economic development strategies including private-public sector partnerships;

13. An efficient and effective tax system premised upon transparency and accountability.

**Article 34**

State Parties shall decentralize power to democratically elected local authorities as provided in national laws.

**Article 35**

Given the enduring and vital role of traditional authorities, particularly in rural communities, the State Parties shall strive to find appropriate ways and means to increase their integration and effectiveness within the larger democratic system.

**Article 36**

State Parties shall promote and deepen democratic governance by implementing the principles and core values of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance and, where applicable, the African Peer Review Mechanism (APRM).

**Article 37**

State Parties shall pursue sustainable development and human security through achievement of NEPAD objectives and the United Nations Millennium Development Goals (MDGs).

**Article 38**

1. State Parties shall promote peace, security and stability in their respective countries, regions and in the continent by fostering participatory political systems with well-functioning and, if need be, inclusive institutions;

2. State Parties shall promote solidarity amongst Member States and support the conflict prevention and resolution initiatives that the Union may undertake in conformity with the Protocol establishing the Peace and Security Council.

**Article 39**

State Parties shall promote a culture of respect, compromise, consensus and tolerance as a means to mitigate conflicts, promote political stability and security, and to harness the creative energies of the African peoples.

**Article 40**

State Parties shall adopt and implement policies, strategies and programmes required to generate productive employment, mitigate the impact of diseases and alleviate poverty and eradicate extreme poverty and illiteracy.

### Article 41

State Parties shall undertake to provide and enable access to basic social services to the people.

### Article 42

State Parties shall implement policies and strategies to protect the environment to achieve sustainable development for the benefit of the present and future generations. In this regard, State Parties are encouraged to accede to the relevant treaties and other international legal instruments.

### Article 43

1. State Parties shall endeavour to provide free and compulsory basic education to all, especially girls, rural inhabitants, minorities, people with disabilities and other marginalized social groups.

2. In addition, State Parties shall ensure the literacy of citizens above compulsory school age, particularly women, rural inhabitants, minorities, people with disabilities, and other marginalized social groups.

## Chapter 10

### Mechanisms for Application

#### Article 44

**To give effect to the commitments contained in this Charter:**

##### 1. Individual State Party Level

State Parties commit themselves to implement the objectives, apply the principles and respect the commitments enshrined in this Charter as follows:

(a) State Parties shall initiate appropriate measures including legislative, executive and administrative actions to bring State Parties' national laws and regulations into conformity with this Charter;

(b) State Parties shall take all necessary measures in accordance with constitutional provisions and procedures to ensure the wider dissemination of the Charter and all relevant legislation as may be necessary for the implementation of its fundamental principles;

(c) State Parties shall promote political will as a necessary condition for the attainment of the goals set forth in this Charter;

(d) State Parties shall incorporate the commitments and principles of the Charter in their national policies and strategies.

##### 2. Commission Level

###### A. At Continental Level

(a) The Commission shall develop benchmarks for implementation of the commitments and principles of this

Charter and evaluate compliance by State Parties;

(b) The Commission shall promote the creation of favourable conditions for democratic governance in the African Continent, in particular by facilitating the harmonization of policies and laws of State Parties;

(c) The Commission shall take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund provide the needed assistance and resources to State Parties in support of electoral processes;

(d) The Commission shall ensure that effect is given to the decisions of the Union in regard to unconstitutional change of government on the Continent.

###### B. At Regional Level

The Commission shall establish a framework for cooperation with Regional Economic Communities on the implementation of the principles of the Charter. In this regard, it shall commit the Regional Economic Communities (RECs) to:

a) Encourage Member States to ratify or adhere to this Charter.

b) Designate focal points for coordination, evaluation and monitoring of the implementation of the commitments and principles enshrined in this Charter in order to ensure massive participation of stakeholders, particularly civil society organizations, in the process.

#### Article 45

The Commission shall:

(a) Act as the central coordinating structure for the implementation of this Charter;

(b) Assist State Parties in implementing the Charter;

(c) Coordinate evaluation on implementation of the Charter with other key organs of the Union including the Pan-African Parliament, the Peace and Security Council, the African Human Rights Commission, the African Court of Justice and Human Rights, the Economic, Social and Cultural Council, the Regional Economic Communities and appropriate national-level structures.

## Chapter 11

### Final Clauses

#### Article 46

In conformity with applicable provisions of the Constitutive Act and the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the Assembly and the Peace and Security Council shall determine the appropriate measures to be imposed on any State Party that violates this Charter.

**Article 47**

1. This Charter shall be open for signature, ratification and accession by Member States of the Union in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission.

**Article 48**

This Charter shall enter into force thirty (30) days after the deposit of fifteen (15) Instruments of Ratification.

**Article 49**

1. State Parties shall submit every two years, from the date the Charter comes into force, a report to the Commission on the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter;
2. A copy of the report shall be submitted to the relevant organs of the Union for appropriate action within their respective mandates;
3. The Commission shall prepare and submit to the Assembly, through the Executive Council, a synthesized report on the implementation of the Charter;
4. The Assembly shall take appropriate measures aimed at addressing issues raised in the report.

**Article 50**

1. Any State Party may submit proposals for the amendment or revision of this Charter;
2. Proposals for amendment or revision shall be submitted to the Chairperson of the Commission who shall transmit same to State Parties within thirty (30) days of receipt thereof;
3. The Assembly, upon the advice of the Executive Council, shall examine these proposals at its session following notification, provided all State Parties have been notified at least three (3) months before the beginning of the session;
4. The Assembly shall adopt amendments or revisions by consensus or failing which, by two-thirds majority;
5. The amendments or revisions shall enter into force when approved by two-thirds majority of State Parties.

**Article 51**

1. The Chairperson of the Commission shall be the depository of this Charter;
2. The Chairperson of the Commission shall inform all Member States of the signature, ratification, accession, entry into force, reservations, requests for amendments and approvals thereof;
3. Upon entry into force of this Charter, the Chairperson

of the Commission shall register it with the Secretary General of the United Nations in accordance with Article 102 of the Charter of the United Nations.

**Article 52**

None of the provisions of the present Charter shall affect more favourable provisions relating to democracy, elections and governance contained in the national legislation of State Parties or in any other regional, continental or international conventions or agreements applicable in these State Parties.

**Article 53**

This Charter, drawn up in four (4) original texts, in Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Chairperson of the Commission who shall transmit certified copies of same to all Member States and the United Nations General Secretariat.



## HUMAN RIGHTS COMMITTEE: GENERAL COMMENT NO 34: ARTICLE 19 OF THE COVENANT: FREEDOM OF OPINION AND EXPRESSION

102nd session, Geneva, 11-29 July 2011

### General remarks

1. This general comment replaces general comment No. 10 (nineteenth session).

2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.

3. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.

5. Taking account of the specific terms of article 19, paragraph 1, as well as the relationship of opinion and thought (article 18), a reservation to paragraph 1 would be incompatible with the object and purpose of the Covenant. Furthermore, although freedom of opinion is not listed among those rights that may not be derogated from pursuant to the provisions of article 4 of the Covenant, it is recalled that, "in those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4". Freedom of opinion is one such element, since it can never become necessary to derogate from it during a state of emergency.

6. Taking account of the relationship of freedom of expression to the other rights in the Covenant, while reservations to particular elements of article 19, paragraph 2 may be acceptable, a general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant.

7. The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. All branches of the State (executive, legislative and

judicial) and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities. The obligation also requires States parties to ensure that persons are protected from any acts of private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.

8. States parties are required to ensure that the rights contained in article 19 of the Covenant are given effect to in the domestic law of the State, in a manner consistent with the guidance provided by the Committee in its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant. It is recalled that States parties should provide the Committee, in accordance with reports submitted pursuant to article 40, with the relevant domestic legal rules, administrative practices and judicial decisions, as well as relevant policy level and other sectorial practices relating to the rights protected by article 19, taking into account the issues discussed in the present general comment. They should also include information on remedies available if those rights are violated.

### Freedom of opinion

9. Paragraph 1 of article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction. Freedom of opinion extends to the right to change an opinion whenever and for whatever reason a person so freely chooses. No person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature. It is incompatible with paragraph 1 to criminalise the holding of an opinion. The harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.

10. Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion.

### Freedom of expression

11. Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to

seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. It may also include commercial advertising. The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.

12. Paragraph 2 protects all forms of expression and the means of their dissemination. Such forms include spoken, written and sign language and such non-verbal expression as images and objects of art. Means of expression include books, newspapers, pamphlets, posters, banners, dress and legal submissions. They include all forms of audio-visual as well as electronic and internet-based modes of expression.

#### **Freedom of expression and the media**

13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.

14. As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.

15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network to exchange ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

16. States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

17. Issues concerning the media are discussed further in the section of this general comment that addresses restrictions on freedom of expression.

#### **Right of Access to information**

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this General Comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output. Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to have his or her records rectified. Pursuant to article 10 of the Covenant, a prisoner does not lose the entitlement to access to his medical records. The Committee, in general comment No. 32 on article 14, set out the various entitlements to information that are held by those accused of a criminal offence. Pursuant to the provisions of article 2, persons should be in receipt of information regarding their Covenant rights in general. Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities.

19. To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant. Fees for requests for information should not be such as to constitute an unreasonable impediment to access to information. Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failures to respond to requests.

#### **Freedom of expression and political rights**

20. The Committee, in general comment No. 25 on participation in public affairs and the right to vote, elaborated on the importance of freedom of expression for the conduct of public affairs and the effective exercise of the right to vote. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives

is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint. The attention of States parties is drawn to the guidance that general comment No. 25 provides with regard to the promotion and the protection of freedom of expression in that context.

### The application of article 19 (3)

21. Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*), or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed. The Committee also recalls the provisions of article 5, paragraph 1 of the Covenant according to which “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.

22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

23. States Parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstances, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress.

24. Restrictions must be provided by law. Law may include laws of parliamentary privilege and laws of contempt of court. Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is

not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.

25. For purposes of paragraph 3, a norm, to be characterised as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

26. Laws restricting the rights enumerated in article 19, paragraph 2, including the laws referred to in paragraph 24, must not only comply with the strict requirements of article 19, paragraph 3 of the Covenant but must also themselves be compatible with the provisions, aims and objectives of the Covenant. Laws must not violate the non-discrimination provisions of the Covenant. Laws must not provide for penalties that are incompatible with the Covenant, such as corporal punishment.

27. It is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression. If, with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law.

28. The first of the legitimate grounds for restriction listed in paragraph 3 is that of respect for the rights or reputations of others. The term “rights” includes human rights as recognised in the Covenant and more generally in international human rights law. For example, it may be legitimate to restrict freedom of expression in order to protect the right to vote under article 25, as well as rights under article 17 (See para. 37). Such restrictions must be constructed with care: while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate, including, for example, calls for the boycotting of a non-compulsory vote. The term “others” relates to other persons individually or as members of a community. Thus, it may, for instance, refer to individual members of a community defined by its religious faith or ethnicity.

29. The second legitimate ground is that of protection of national security or of public order (*ordre public*), or of public health or morals.

30. Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in

the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.

31. On the basis of maintenance of public order (ordre public) it may, for instance, be permissible in certain circumstances to regulate speech-making in a particular public place. Contempt of court proceedings relating to forms of expression may be tested against the public order (ordre public) ground. In order to comply with paragraph 3, such proceedings and the penalty imposed must be shown to be warranted in the exercise of a courts power to maintain orderly proceedings. Such proceedings should not in any way be used to restrict the legitimate exercise of defence rights.

32. The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

33. Restrictions must be "necessary" for a legitimate purpose. Thus, for instance, a prohibition on commercial advertising in one language, with a view to protecting the language of a particular community, violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression. On the other hand, the Committee has considered that a State party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the right and freedom of children of that faith in a school district.

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected...The principle of proportionality has to be respected not only in the law that frames the

35. restrictions but also by the administrative and judicial authorities in applying the law. The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

36. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the

specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

37. The Committee reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary. In this regard, the Committee recalls that the scope of this freedom is not to be assessed by reference to a "margin of appreciation" and in order for the Committee to carry out this function, a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.

#### **Limitative scope of restrictions on freedom of expression in certain specific areas**

38. Among restrictions on political discourse that have given the Committee cause for concern are the prohibition of door-to-door canvassing, restrictions on the number and type of written materials that may be distributed during election campaigns, blocking access during election periods to sources, including local and international media, of political commentary, and limiting access of opposition parties and politicians to media outlets. Every restriction should be compatible with paragraph 3. For instance, it may be legitimate for a State party to restrict political polling imminently preceding an election in order to maintain the integrity of the electoral process.

39. As noted earlier in paragraphs 13 and 20, concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit, public figures benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majeste, desacato, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. States parties should not prohibit criticism of institutions, such as the army or the administration.

40. States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3. Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. Such circumstances may never include a ban on a particular publication

unless specific content, that is not severable, can be legitimately prohibited under paragraph 3. States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.

41. The Committee reiterates its observation in general comment No. 10 that "because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression". The State should not have monopoly control over the media and should promote plurality of the media. Consequently, State parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.

42. Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisements are not employed to the effect of impeding freedom of expression. Furthermore, private media must not be put at a disadvantage compared to public media in such matters as access to means of dissemination/distribution and access to news.

43. The penalisation of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.

44. Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to extent that they are

45. compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government.

46. Journalism is a function shared by a wide range of actors, including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or

elsewhere, and general State systems of registration or licensing of

47. journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and, or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

48. It is normally incompatible with paragraph 3 to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings) to travel outside the State party, to restrict the entry into the State party of foreign journalists to those from specified countries or to restrict freedom of movement of journalists and human rights investigators within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses). States parties should recognise and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.

49. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to an unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities.

50. Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expressions that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice.[ In any event, a public interest in the subject matter of the criticism should be recognised as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously - such a practice has a chilling effect that

may unduly restrict the exercise of freedom of expression of the person concerned and others.

51. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

52. Laws that penalise the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression they should not go beyond what is permitted in paragraph 3 or required under article 20.

#### **The relationship of articles 19 and 20**

53. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

54. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.

55. It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every other case, in which the State restricts freedom of expression, it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.



## AFRICAN PLATFORM ON ACCESS TO INFORMATION

**Adopted by the Pan African Conference on Access to Information in Cape Town, South Africa on 19 September 2011**

### Preamble

We, participants at the Pan African Conference on Access to Information, organised by the Windhoek+20 Campaign on Access to Information in Africa in partnership with the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the African Union Commission (AUC) and the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples' Rights in Cape Town, South Africa, September 17 – 19, 2011:

Reaffirming the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press and viewing the significant progress that has been made in the past 20 years on freedom of expression, access to information and the free flow of information;

Stating that access to information (ATI) is the right of all natural and legal persons, which consists of the right to seek, access and receive information from public bodies and private bodies performing a public function and the duty of the state to provide such information;

Emphasising that access to information is an integral part of the fundamental human right of freedom of expression, essential for the recognition and achievement of every person's civil, political and socio-economic rights, and as a mechanism to promote democratic accountability, good governance;

Acknowledging that access to information is instrumental to fostering access to education and health care, gender equality, children's rights, a clean environment, sustainable development and the fight against corruption;

Recalling Article 19 of the Universal Declaration of Human Rights of 10 December 1948, which guarantees that:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers",

Article 19 of the International Covenant on Civil and Political Rights and the UN Human Rights Council General Comment No. 34 adopted in 2011 which states that Article 19(2) of the ICCPR includes the right of access to information held by public bodies, and Article 1.2 of the UNESCO Constitution;

Underlining Article 9 of the African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity (OAU) on 27 June 1981, which provides that, "Every individual shall have the right to receive information";

Reaffirming Article IV(1) of the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session held in October 2002, which provides that "Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law";

Cognisant of the African Union Convention on Preventing and Combating Corruption, the African Charter on Values and Principles of Public Service and Administration, the African Charter on Democracy, Elections and Governance, the African Youth Charter and the African Statistics Charter, all of which promote transparency in public life.

Welcoming the efforts of the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information in developing a Model Law for AU Member States on Access to Information, aimed at assisting Member States in formulating, adopting or reviewing access to information legislation and its implementation;

Mindful of the efforts of international organisations and others to develop principles and declarations on the right of access to information and freedom of expression including the 2010 Brisbane Declaration "Freedom of Information: The Right to Know", the Atlanta Declaration and African Regional Findings, the Accra Agenda for Action, the Lagos Declaration on the Right of Access to Information, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, and the Declaration of Table Mountain;

Aware that the World Summit on the Information Society (WSIS) brought to the forefront the importance of access to information in the modern world through the Geneva Declaration of Principles and Tunis Commitment and that the Internet Governance Forum (IGF) plays a crucial role in bringing together all of the stakeholders to facilitate an international internet governance debate that includes issues of access and openness;

Recognising the work of the African Union Commission to give practical expression to the various instruments of the African Union on freedom of expression and access to information, through such initiatives as the Pan African Media Network and portal, the new AU website, social networks, the media center, training programmes, ensuring

media access to the AUC leadership, and publication of other information materials among others; as well as its efforts in promoting Information and Communications Technology (ICTs) in Africa;

Encouraged that over 90 countries around the world have adopted comprehensive national access to information laws or regulations including ten in Africa; that many countries in Africa have joined the Extractive Industries Transparency Initiative, the International Aid Transparency Initiative and the Open Government Partnership; and that the Economic Community of West African States is moving towards adoption of a binding Supplementary Act for a Uniform Legal

Framework on Freedom of Expression and Right to Information;

Concerned that most African nations have not yet adopted comprehensive ATI laws or regulations and that significant problems remain with both the substantive provisions of many of those that have adopted laws and the full implementation of the laws;

Acknowledging that civil society organisations and government bodies around the world have adopted 28 September as International Right to Know Day;

Convinced that it is of critical importance that clear and comprehensive principles are established to guide the promotion and protection of the right of access to information in Africa through the adoption and effective implementation of appropriate national laws and regulations;

**Resolve to adopt the following Principles on The Right of Access to Information:**

#### **Key Principles**

1. **Fundamental Right Accessible to Everyone.** Access to information is a fundamental human right, in accordance with Article 9 of the African Charter on Human and Peoples' Rights. It is open to everyone, and no one should be privileged or prejudiced in the exercise of this right on account of belonging to a class or group howsoever defined, and whether in terms of gender, class, race, political association, occupation, sexual orientation, age, nationality, HIV status, and other bases as cited in many African constitutions. It is not required that anyone must demonstrate a specific legal or personal interest in the information requested or sought or otherwise required to provide justification for seeking access to the information.

2. **Maximum Disclosure.** The presumption is that all information held by public bodies is public and as such should be subject to disclosure. Only in limited circumstances set out in these principles below may disclosure be denied.

3. **Established in Law.** The right of access to information shall be established by law in each African country. Such law shall be binding and enforceable and based on the principle of maximum disclosure. The law shall take precedence over other conflicting laws that limit access to information.

4. **Applies to Public Bodies and Private Bodies.** The obligations of ATI shall apply to all public bodies, as well as to private bodies that are owned or controlled by the government, utilise public funds, perform functions or provide services on behalf of public institutions, or have exclusive contracts to exploit natural resources (with regards to said funds, functions, services or resources), or which are in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to the exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

5. **Clear and Unambiguous Process.** The law shall include procedures for the exercise of the right. The process to obtain information should be simple and fast and take advantage of new information and communication technologies where possible. Bodies falling under the scope of the ATI law should provide assistance to requesters in order to ensure that they receive the information they need. The information provided should be provided in a form understandable to the requestor. Information should be disclosed within a clear and reasonable deadline provided for by law. It should be available at low or no cost.

6. **Obligation to Publish Information.** Public and relevant private bodies shall be obliged to proactively release information in a timely manner about their functions, powers, structures, officials, decisions, expenditures, budgets, and other information relating to their activities that is of public interest. The dissemination should use all reasonable means of communications, including ICTs, to maximise access to all communities and sectors of society.

7. **Language and Accessibility.** To the greatest extent possible, information should be available in the language of the person seeking it, in an accessible location, in a format that is as accessible as possible, and, in particular, ensures that it is accessible to those who may be particularly affected by the subject matter of the information.

8. **Limited Exemptions.** The right of access to information shall only be limited by provisions expressly provided for in the law. Those exemptions should be strictly defined and the withholding of information should only be allowed if the body can demonstrate that there would be a significant harm if the information is released and that the public interest in withholding the information is clearly shown to be greater than the public interest in disclosure. Information can only be withheld for the period that the harm would occur. No information relating to human rights abuses or imminent dangers to public health, environment, or safety may be withheld.

9. **Oversight Bodies.** Independent bodies such as an ombudsperson or information commissioner should be established to monitor and hold government bodies and relevant private entities to account on their access to information disclosure practices, to receive and decide upon complaints, and generally oversee the implementation of the access to information legislation. The oversight body should be adequately funded.

10. Right to Personal Data. All persons have a right to access and correct their personal data held by third parties.

11. Whistleblower Protection. To ensure the free flow of information in the public interest, adequate protections against legal, administrative and employment-related sanctions should be provided for those who disclose information on wrong-doing and other information in the public interest.

12. Right of Appeal. Everyone has a right to appeal administratively any action that hinders or denies access to information or any failure to proactively disclose information. They have a right to further appeal to an independent body and to finally seek judicial review of all limits of their right of access to information.

13. Duty to Collect and Manage Information. Public and relevant private bodies have a duty to collect information on their operations and activities on behalf of their citizens. They also have a duty to respect minimum standards in relation to the management of this information to ensure that it may easily be made accessible to citizens.

14. Duty to Fully Implement. Public and relevant private bodies have an obligation to ensure the law is fully implemented. This includes internal procedures and processes and the designation of responsible officials.

### Application of Principles

These principles are essential to development, democracy, equality, and the provision of public service, and are applicable to, amongst others, the following:

1. Enabling Environment. Governments should ensure that the legal frameworks create an enabling environment allowing individuals, civil society organisations including trade unions, media organisations, and private businesses to fully enjoy access to information, thus fostering active participation in socio-economic life by all, in particular people living in poverty and those discriminated against or marginalised.

2. Elections and Electoral Processes: Governments and election management bodies have a positive obligation to provide the public with information before, during and after elections, not to interfere with media coverage, to encourage public participation and proactively publish campaign spending and contributions.

3. Disadvantaged Communities: Governments have a particular obligation to facilitate access to information by disadvantaged minority groups and minority language speakers, as well as marginalised groups including women, children, rural people, the poor and persons with disabilities. Information should be available at no costs to these groups. This especially applies to information that contributes to the long-term empowerment of the groups. Governments also have an obligation to ensure equitable and affordable access to ICTs for those with special needs and for other disadvantaged persons and groups.

4. Women: Governments, civil society and the media have an obligation to facilitate women's equal access to information, so that they can defend their rights

and participate in public life. Civil society organisations should be encouraged to make the best use of access to information mechanisms to monitor governments' fulfilment of commitments to further gender equality, to demand the enhanced delivery of services targeted at women and to ensure that the public funds they are entitled to actually reach them. The collection, management and release of information should be gender disaggregated.

5. Children and Youth: Governments have an obligation to encourage the mass media to disseminate information and material of social and cultural benefit to children and the youth. Governments are further encouraged to facilitate the exchange and dissemination of such information and material from a diversity of cultural, national and international sources as well as the production and dissemination of information specifically for children and youth and wherever reasonably possible facilitate and encourage access to such information by children and youth.

6. Environmental Information: Governments and inter-governmental organisations should increase their efforts in implementing Principle 10 of the 1992 Rio Declaration on the Environment and Development on the right of access to information, public participation and access to justice on environmental issues. Governments should adopt appropriate legislation and regulations to promote access and proactive release of environmental information, guarantee openness, fight secrecy in institutional practices, and repeal that which hinders public availability of environmental information. Governments' capacity to supply environmental information and civil society organisations' demand for such information, as well as engagement in decision-making processes and the ability to hold governments and other actors accountable for actions affecting the environment should be strengthened.

7. Education: Taking into account the close connection between the right of access to information and the right to education, governments have the duty to make publicly available information about educational policies and assessments of their impacts, school performance data, and budgets for education at all government levels. Governments also have a positive obligation to provide information for each school, in particular, schools' admission policies and admission lists, information on management practices, school governance, and other relevant aspects.

8. Health: Governments have a duty to provide access to information with a view to ensuring and improving access to health care services and enhancing accountability regarding their provision. Civil society actors should be encouraged to implement actions to expand the reach of this type of information to all sectors in society, promote the exercise of the right to information to advance the right to health and counter its violations, undertake advocacy and monitoring actions and directly involve individuals in them. Enhanced access to health-related information shall not preclude the protection of individuals' right to privacy.

9. The Fight Against Corruption: By contributing to openness and accountability, access to information can be a useful tool in anti-corruption efforts. Besides ensuring that access to information legislation is effectively

implemented, governments have a duty to guarantee a broader legal and institutional framework conducive to preventing and combatting corruption. Civil society organisations and plural media independent of powerful political and commercial interests are critical actors in unveiling and fighting corrupt practices, and their use of access to information laws and other mechanisms enhancing transparency should be encouraged.

10. Aid Transparency. Governments, donors and recipients have a duty to make all information relating to development assistance including grants, loans and transfers to public and private bodies, and assessments on the use and effects of such assistance fully public in a proactive manner based on the principles of the International Aid Transparency Initiative.

11. Natural Resources Transparency. Governments should proactively publish all information including policies, impact assessments, agreements, subsidies, licenses, permits and revenues relating to the exploitation of natural resources including the extractive industries, water, fisheries, and forests. Private bodies which are exploiting natural resources should be required to publicly disclose the terms of such agreements and payments made to governments based on the principles developed by the Extractive Industries Transparency Initiative (EITI).

12. Media and Information Literacy. Governments, civil society, education institutions, and the media have an obligation to promote media and information literacy, to assist individuals and communities to ensure that all members of society can understand and take advantage of new technologies, and to be able to participate intelligently and actively in public matters, and enforce their right of access to information. Citizens should be empowered to be able to consume information critically and express their views on such information, as well as be enabled to seek corrections where applicable.

13. Access to Information and Communications Technologies. Governments have an obligation to (i) use ICTs and other media to ensure maximum disclosure and dissemination of information; (ii) promote and facilitate unhindered public access to such technologies for all citizens and especially for disadvantaged minority groups and minority language speakers, as well as marginalised people such as women, children, rural people, the poor and persons with disabilities.

14. Apply in Other Spheres. The principles stated above on the right of access to information also apply to various spheres that have not been listed.

#### **Call to Action**

**In light of the above, the Conference calls on:  
UNESCO to:**

- Endorse, through its General Conference, the "African Platform on Access to Information" and the proclamation of 28 September as International Right to Information Day, also recommending the endorsement of this International Day by the United Nations General Assembly, as a date to raise awareness about the importance of the right of access to information throughout the world;

- Develop and implement internal policies facilitating access to information held by UNESCO in line with this Declaration, and to encourage the adoption of similar policies by other UN agencies.

#### **UN Economic Commission for Africa:**

- Develop as part of the RIO +20 Earth Summit a regional convention on access to environmental information, public participation and access to justice based on Principle 10 of the 1992 Rio Declaration and the UNEP Bali Guidelines.

#### **The African Union, its Organs and Institutions:**

- The African Commission on Human and Peoples' Rights to promote 28 September as African Right to Information Day;
- The African Commission on Human and Peoples' Rights to adopt a resolution authorising the Special Rapporteur on Freedom of Expression and Access to Information to expand Article IV of the Declaration of Principles on Freedom of Expression in Africa to incorporate the principles of this Declaration.
- The African Commission on Human and Peoples' Rights to complete and approve the proposed Africa Model Law for AU Member States on Access to Information;
- The African Union Commission to take forward this Declaration by (1) proposing to the next AU summit in January 2012 to adopt 28 September as African "Right to Information Day"; and (2) initiate an Experts Group to develop further instruments on access to information;
- The Pan-African Parliament (PAP) to endorse this Declaration;
- All African Union bodies to promote the respect of the principles in this Declaration by national governments and provide assistance in implementing them;
- The New Partnership for African Development (NEPAD) to adopt the revised African Peer Review Mechanism (APRM), which includes transparency and access to information;
- The African Union should develop and implement internal policies on access to information held by AU bodies based on this Declaration.

#### **Other African Regional Organisations and Institutions:**

- All Regional Economic Communities (RECs) should develop internal policies on access to information held by those bodies based on this Declaration;
- ECOWAS to review and adopt the Supplementary Act for a Uniform Legal Framework on Freedom of Expression and Right to Information in West Africa;
- The Southern African Development Community (SADC) to revise the Protocol on Culture, Information and Sport to include principles on access to information;
- Inter-governmental Agency on Development (IGAD) to develop and adopt a Protocol on access to information based on this Declaration;
- The East African Community (EAC) to develop and

adopt a Protocol on access to information based on this Declaration;

- The African Development Bank (ADB) to adopt a revised public access policy based on the Transparency Charter for International Financial Institutions.

**National Governments of AU member states to:**

- Adopt or revise existing comprehensive laws on access to information in line with the principles in this Declaration and the proposed AU Model Law, and fully implement them;
- Harmonise legal frameworks to ensure access to information including repealing or revising antiquated laws which restrict access and ensuring that new laws are compatible with the ATI principles;
- Engage with civil society and other stakeholders to ensure widespread information demand and effective implementation of laws and policies to advance access to information by all persons, especially marginalised groups.
- Join and implement multi-stakeholder efforts including the Extractive Industries Transparency Initiative (EITI), the Construction Sector Transparency Initiative (CoST) and the Medicines Transparency Alliance (MeTA) to further transparency;
- Promote availability of public domain information through ICTs and public access to ICTs;
- Support AU efforts to adopt an instrument on access to information;
- Officially recognise 28 September as International and African “Right to Information Day”;
- Adopt and effectively implement legislation and policies ensuring whistleblower-protection.

**Civil Society to:**

- Engage with governments in developing, enhancing and implementing ATI laws;
- Monitor progress on the implementation of ATI laws including sectoral laws;
- Create awareness on ATI and provide assistance to facilitate information access by the general public as well as by specific audiences (including women, minority groups and minority language speakers, children, rural communities, individuals with disabilities or living in poverty);
- Ensure transparency in their own activities;
- Promote September 28 as African and International Right to Information Day and, in particular, carry out activities on that date every year to advance the recognition, awareness and enjoyment of the right of access to information by all sectors of society.

**Media to:**

- Respect editorial independence, professional ethics and journalism standards in their provision of information;
- Recognise the need for transparency and accountability with regard to their own output and institutions, while safeguarding the principal of protecting sources;

- Respect and promote equality, and provide equitable representation within their information output;
- Promote the widest possible access to their information output;
- Enhance mechanisms for audience participation and response;
- Recognise and be responsive to gender differences in regard to audience and market research;
- Popularise the importance of, and issues around, access to information.
- Make optimum use of ATI laws to access information for the public interest.

**Business Sector Companies and Corporations to:**

- Join multi-stakeholder initiatives promoting transparency including EITI, CoST and MeTA;
- Adopt corporate and social responsibility (CSR) policies that promote transparency and accountability, including access to information and protection of whistleblowers;
- Proactively disclose information of public interest including on pollution releases and other environmental issues;
- Support government and CSO efforts to improve access to information in society.

**Public and Private Donors to:**

- Ensure that all information relating to the use of development assistance and its effects are made public;
- Ensure that all information relating to development assistance is made available in conformity with the International Aid Transparency Initiative (IATI) standards;
- Encourage and support governments in the adoption and full implementation of access to information laws and policies;
- Support civil society and governments’ efforts to promote access to information.

*Adopted in Cape Town, South Africa, on this 19th Day of September 2011 upon a motion for adoption moved by Advocate Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and Peoples’ Rights, and seconded by Hon. Norris Tweah, Deputy Minister of Information of the Republic of Liberia.*





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