MAKING DEMOCRACY WORK

The Media Tool Box 1

The Media and the Law

Christel and Hendrik Bussiek

fesmedia Africa

Content

Foreword

It is not yet widely recognised but it is a fact: The African continent is a leading force in having established a consensus on principles (and practical guidelines to implement them) regarding the free flow of information and freedom of expression. And yet, it is also a fact that the actual implementation of these principles on the ground is still lacking in many parts of the continent. But things are on the move.

This African move was marked, in the course of the last decade or so, by a number of important milestones, to name just a few: The two Windhoek conferences on the Independence of the Media (1992) and the African Charter on Broadcasting (2001), the adoption of the Protocol on Culture, Information and Sport as well as the Declaration on Information and Communications Technology by the Heads of State of the Southern African Development Community (SADC) in 2001, and finally (and probably most importantly) the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002.

This last document carries particular weight because the Commission is the authoritative organ of the African Union (AU) mandated to interpret the African Charter on Human and Peoples' Rights which is binding for all member states of the AU. And it is definitely one of the most progressive

documents of its kind worldwide. Africans can be proud of it.

This set of tool boxes is meant to encourage and support the translation of these principles into reality, using the cited African documents as benchmarks. In addition, these boxes refer to positive (and negative) experiences gained in those countries that can be considered as being the most advanced on the way towards democratic, participatory and effective legal and political reforms in the fields of:

- The Media and the Law
- Broadcasting Regulation
- Public Broadcasting
- Access to Information

If you are looking for ready-made recipes, applicable to all African countries, you will probably be disappointed. Instead, you will find options to choose from. These options are taken from experiences gained on the African continent and beyond. And these options are considered using the criteria of compliance with the agreed African principles, as well as practicability and affordability. It is left to you, the readers and campaigners for the proper implementation of the basic human right to freedom of expression and freedom of information, to make the choices that will be applicable and adequate to your social and cultural environment.
The authors, Christel and Hendrik Bussiek, have not engaged in an academic discourse. They rather share their vast practical experience from being involved, in one way or the other, in media reform

processes in African countries and beyond: e.g. in Botswana, Kenya, South Africa, Zambia, former Yugoslavia and the former German Democratic Republic. But it is not just personal experiences being shared. Reference is also made to African and international debates on media related issues. The result, in my opinion, is a fairly comprehensive overview of all available (and tested) options, outlining their particular advantages and disadvantages. And since they are presented not in "legalese" but in an easy-to-read laymen's language I am confident that these boxes will provide helpful tools to tackle the task of crafting a better information and media environment.

My special thanks to the authors for their immense efforts and to …Goje, a South African artist, who readily provided his linoprint "Making Democracy Work" which beautifully illustrates the main aim of this Tool Box: reconciling African traditions and culture with the necessities of modern democratic information societies.

Peter Schellschmidt
Head of Media Project Southern Africa
Friedrich Ebert Foundation

PS Comments, additions, ideas are always welcome. Please send them to: fesmedia@fesmedia.org

1. About this Box

Basically it's all very simple, really. There are stories to tell. People want to know and they want to share what they know with other people, that's what makes us human. With there being more and more of us, and hence more and more stories to tell, we can no longer rely on hearing them face to face from our neighbour. We need someone to collect them for us, from far and wide, every day. That's what journalists do (and where they get their name from) and that's why we have "the media".

Relations between the two groups - those who tell the story and those who want to be told - are pretty straightforward: Listeners/readers/viewers need to be able to trust the media and rely on them to tell them the truth or the full story. This is what journalistic ethics are all about. They spell out in what way the media are accountable to their public. If they lose people's trust, they cease to be effective mediators/communicators and risk going out of business.

Where things get a lot more complicated is when the third group of people comes into play: those who do not want a story 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, trying to avoid close scrutiny of their work by the media and through them the public, or seeking to hide uncomfortable facts, mismanagement or corruption from the citizens on whose behalf they are supposed to be working. Unfortunately they are also the ones with the most power to limit the scope of the media. They must not be allowed to abuse their authority in order to suppress stories, often citing “national security” or “right to privacy” concerns as facile justifications for doing so.

The rights and sometimes widely divergent interests of these three groups of people need to be accommodated. There is bound to be friction, and some common understanding of the rules of the game will help to keep it manageable. The sole purpose of media law in a democratic society, therefore, is that of law generally: to enable all citizens to exercise their rights while not violating those of others in the process. Any limitations placed on the media by law are justified only to prevent such violations. Media law is meant to make sure that the stories do get told, the full stories and as many of them as possible.

This Tool Box attempts to help open up and shed some light on a subject which is sometimes made out to appear more complicated and awe-inspiring than it really is. The tools offered are a number of useful facts, experiences and arguments which should come in handy in the often controversial debate on the topic. They also include options for

addressing legal issues – without drifting into legalese.

The point of departure is the principle of media freedom/freedom of expression and what exactly it entails – which may be more than what some of its official standard bearers from ministries of information and related portfolios have in mind when they pontificate on it in their speeches on press freedom day and similar special occasions.

Then there will be a closer look at the more practical side of things: How do the media and the people who make them tick, the journalists, exercise their freedom, what are the professional standards and ethics that guide them, and how best can one ensure that they actually abide by them - in the interest of the general public? The emphasis will be on effective self-regulation through voluntary mechanisms, rather than statutory bodies. Likewise, it will be argued that legal provisions aimed at the media specifically should be approached with caution and kept to a minimum. For limitations on media freedom to be acceptable in a democratic society, they must be - and shown as well as understood to be - necessary, reasonable and justifiable.

There are no fool-proof, easy-to-follow recipes for creating the best of all media worlds, but there are indeed some basic ingredients. Add to these the distinctive local flavours - the socio-economic conditions, the history, the broadly shared cultural and moral norms, and the aspirations that bind the members of any specific society - and you will get a

result that is most likely to work for that particular country. This can not be decreed from above. Instead it needs to be developed by all concerned together.

So the Tool Box is not meant for media practitioners only. The authors sincerely hope that it will be interesting for all those dedicated to creating and nurturing a free and open society. “If the people of any country want and work for a more transparent and efficient government and economy”, says Nobel laureate Joseph Stiglitz, “then they must fight for the freedom of those who disseminate information. They must fight for the right to know and the right to tell it like it is”.

2. Principles of media freedom

When last did you hear someone in authority say publicly that democracy is a bad thing? Or that they do not believe in the concept of a free press?

Democracy, and media freedom as one of its pillars, are hailed and accepted as politically correct across Africa. There is generally no quarrel with the idea as such, at the conceptual level. It's only at the everyday working level, when reality starts to bite, that attitudes tend to get a whole lot more ambiguous. We've all heard the favourite cautionaries: "You can only go so far in a fledgling democracy". Or: "We need first to unite as a nation rather than have a plethora of views and interests". Or even: "Don't you think that democratic freedoms are more of a Western concept and somewhat alien to African traditions?"

In 1992, when the new wave of democratisation swept across the continent, in particular its southern part, the then Under-Secretary-General of the United Nations, Dr. James Jonah from Sierra Leone, had this to say:

> "I believe if you ask any person whether he or she wishes to live in a society of government by

> consent, of the rule of law, and of respect for human rights, you will receive a positive answer. For I believe that the desire for freedom is innate to every person. I would, therefore, like to articulate before you what I would label the universalist foundation of democracy, namely – that every person, given the opportunity, would choose to live in a democracy. Africans are no exception."[1]

Jonah went on to point out that democracy, of course, is not just about multi-partyism and elections:

> "Democracy must be supported by a civic culture of openness and toleration. An informed and educated populace is most likely to be capable of maintaining and respecting democratic norms."[2]

In the same year, the Zambian media academic Francis P. Kasoma wrote:

> "Africans are endlessly and ceaselessly sharing experiences and ideas about the vicissitudes of nature and how well or badly the family, the clan and the tribe is coping with it. The exchanges are free and fair with everyone who has some contribution given a chance to express himself or herself. The curtailment of free exchange of views among equals is frowned on as belittling and dehumanising to those who are made to suffer it. The Bemba people of Zambia have a saying which has counterparts in many of Africa's tribes. They

> say: ‘Amano mambulwa’ meaning ‘knowledge or experience ought to be shared. No one person should be regarded as all-wise and all-knowing’. Everyone in society has knowledge and experience which, if shared, would make the community wiser and able to cope with the rigors of life.”[3]

Constitutional foundations

In line with the centrality of informational freedom in its widest sense to any democratic dispensation, most countries in Africa list it among the basic rights in their constitutions. Some make specific mention of the freedom of the media in this regard. Malawi’s basic law, for example, states:

> “The press shall have the right to report and publish freely, within Malawi and abroad …” (Section 36).

The constitution of Mozambique expressly protects

> “the right to information, the freedom of the press, and the independence of the media, as well as broadcasting rights and the right to reply” (Section 74).

Section 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”.

The 1996 Constitution of South Africa guarantees

> "the right to freedom of expression" which specifically includes "freedom of the press and other media" (Section 16).

Other constitutions spell out generally applicable provisions, without specific reference to the media. In Botswana, Section 12 (1) says that

> "except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence".

And Zimbabwe's basic law protects the

> "freedom to hold opinions and to receive and impart ideas and information without interference" (Section 20 [1]).

To any reasonable observer that would seem to be clearly and unequivocally put and guarantee all-round protection. Still, there have been attempts by the authorities in countries where freedom of expression is not expressly mentioned in the constitution (in Zimbabwe and elsewhere), to argue that therefore this right is not guaranteed in the case

of the media. This, of course, is wrong - for obvious reasons:

1. Freedom of expression applies to all human beings without qualification. That is the meaning of a basic or fundamental human right. It is not a 'privilege' that may or may not be granted.

2. The purpose of the media - or the journalists' job - is to receive ideas and information by way of research and to impart these ideas and information in print or broadcast form. Any interference in such receiving and imparting constitutes a breach of their right to freedom of expression. In addition, such interference also impairs the right of readers, listeners and viewers to freely receive information and ideas. Thus two sets of rights are violated where the state interferes with the dissemination of information/ideas from the media to the public.

3. In large modern societies it is no longer possible to realise the right to freedom of expression through direct communication only. Citizens need a medium - the press, sound and television broadcasting - to engage with each other. The media provide a forum which helps individuals to realise their right to freedom of expression. The freedom of the media is thus an integral part of every citizen's freedom of expression.

International conventions

In its very first session in 1946 the United Nation's General Assembly adopted Resolution 59 (I) which stated:

> "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."

All UN member countries are signatories to these declarations of founding principles and thus legally bound by them.

The European Court of Human Rights, in a decision handed down in 1980, makes one important further clarification on the scope of free expression thus protected:

> "Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. … It is applicable not only to information or ideas that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society".[5]

The African consensus

The African Charter on Human and Peoples' Rights, adopted in 1981 and in force since 1986, equally lists informational freedom as one of the basic rights of all citizens. It says in its 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."

More recently, the African Union's Commission on Human & Peoples' Rights reaffirmed this in its 2002

"Declaration of Principles on Freedom of Expression". - Because this Banjul Declaration is such a fundamental document and can be used as a reference point for all media sectors, it is included in this Tool Box as an appendix. - Chapter I of the Declaration guarantees and spells out freedom of expression in these words:

> "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."

In 2001, heads of state of the Southern African Development Community countries signed the SADC Protocol on Culture, Information and Sport (2001). In section 17 (a) member states commit themselves to the

> "promotion, establishment and growth of independent media, as well as free flow of information".

Section 18 (4) says:

> “Member States agree to create a political and economic environment conducive to the growth of pluralistic media.”

In section 20 the Protocol enjoins member states to

> “take necessary measures to ensure the freedom and independence of the media",

and defines “media independence” as

> “editorial independence, whereby editorial Policy and decisions are made by the media without interference".

All in all then: As far as constitutional principles and declarations of official policy are concerned there seems to be wide consensus on the fact that the media are indeed - and are meant to be - free.

3. Who or what is a journalist

The people in the front line to actually exercise media freedom in their daily work are notoriously hard to define - there seems to be never ending debate in Africa and elsewhere in the world on what exactly is a "journalist". Is that more than a fancy, modern name for the good old reporter, or the town crier/messenger/story teller in earlier times? What qualifies a person to write or broadcast for public consumption on a daily basis? Do they have to meet any specific requirements? Are there clearly defined career paths? What is their training? Are they professionals? If so, do they need to be regulated like other professionals? – Of course this debate is not only academic. Whatever the answers given to these questions will have wide ranging consequences for both media practitioners (surely "journalist" is a better term than that) and the media as a whole, as well as their status in society.

Aggrey Klaaste, one of Africa's most respected journalists and best known as editor of the South African *Sowetan*, is said to have always emphasised, especially to the youngsters in the profession, "that there was nothing special about being a journalist; it was just being at the right place

at the right time and recording it"[6]. Sounds simple enough, and is certainly a good way of exploding any intimidating or grandiose myths about the profession. Look more closely, as Klaaste would probably have been the first to encourage everyone to do, and you come up with a lot of questions. How do you find the right place and the right time, and what in fact do you record of what you are witnessing? What guides you in making your choices?

A journalist is in the business of collecting, analysing and communicating information. In a way that is indeed nothing special: most people do it every day, on a person to person level. The main difference is twofold: Journalists have (should have!) a much larger audience than the proverbial woman in the street and hence more influence in shaping public opinion. And, to put it bluntly, they do it for money - which may result in conflicts of interests ("do I tell the story or do I keep my job?"). They will also, as an important part of their duties, regularly approach individuals and institutions for information to impart to their audiences. This can only work on the understanding that they do so in their professional capacity, not to satisfy their personal curiosity.

So journalists are a special kind of animal after all and do carry special responsibilities. In the interest of society as a whole, then, shouldn't there be some way of regulating the profession to make sure that its members act in accordance with those responsibilities, that they toe the line? If so, who should do the regulating? And what line could there reasonably be for them to toe?

Registration?

The easiest and seemingly most innocuous way of keeping a check on specific professional groups is to compile a list made available to the public. Surely there can be no harm in that in the case of journalists either, the argument frequently goes: it would keep imposters out and serve to increase the individual accredited member's status and public recognition. There are lists of recognized plumbers, estate agents, doctors and a host of others 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.

And there's the rub, or rather two rubs: Who draws up the list and who sets the criteria? And if you strike a journalist off the list, what about his basic human right to freedom of expression as guaranteed in the constitution? This may sound repetitive and like an easy cop-out for journalists famously unwilling to submit to any kind of control, even the most pragmatic or benign. But there is no running away from this simple, basic reality if indeed human rights are to be taken seriously.

Nevertheless, there have been several attempts by state authorities in Africa over the years to introduce compulsory registration for journalists. In Uganda, for example, the Press and Journalists Statute of 1995 laid down such a requirement – so far widely ignored by media practitioners. Only about 100 of them, mainly those employed by the state-controlled media, have complied with the procedure. In Kenya,

a Press Council Bill of 1995 provided for the "registering and disciplining of journalists". The Bill did not make it into law because of constitutional concerns. In South Africa, the apartheid regime repeatedly attempted to introduce registration for journalists - and found all its attempts blocked because journalists and employers stood together in resisting the measure. Nigeria had compulsory accreditation for journalists under military dictatorship. The only government to have been 'successful' in this regard in the recent past was the one in Zimbabwe where compulsory accreditation was introduced in 2002.

In Zambia, compulsory registration of journalists to be introduced by government was judged unconstitutional by the country's High Court in 1997.[7] The envisaged procedure was to oblige journalists to become members of a Media Association of Zambia and to register with a statutory Media Council. Among the reasons given by the presiding judge are the following:

> "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].

That is convincingly argued and comprehensively answers the question why there is no room for compulsory licensing or registration of journalists in a democratic dispensation. For this reason registration of journalists by state authorities or state-controlled commissions is unknown in Europe, Australia or the Americas. German press law, for example, drawing a lesson from the country's Nazi past between 1933 and 1945 when journalists were forced to register with the Ministry of Propaganda, expressly states that

> "press activities … may not be rendered dependent upon any form of registration or admission"[8].

For practical purposes, journalists are issued with press cards by unions, associations or their employers. These cards are accepted as proof of identification by all organisations, including state authorities.

Minimum qualifications?

If registration is out of the question because it would violate basic rights and democratic principles, shouldn't there at least be certain minimum qualifications for entry into the journalistic profession? While this may seem reasonable in order to safeguard certain minimum standards in the media, the obvious answer is no. The profession is based on the right to freedom of expression. This right belongs to all persons and is not contingent on any formal education or training.

There are also a number of practical reasons why there can be no set minimum requirements.

In its judgement, referred to above, in regard to a statutory Media Council with powers to introduce specific qualifications as legal requirements for being employed as a journalist, the High Court in Zambia also found that such a measure would be likely to violate the rights of all those already active in the field:

> "Those (journalists) who would fail to meet whatever standards, which may be set (by the Media Council), would lose their right to work as journalists, a threat and possibility they have

> never faced until the decision was made, thereby depriving them of a right of livelihood they previously enjoyed".[9]

It is up to media owners and editors to choose the right person to work in a particular position for their particular publication. This makes perfect sense: There is a great variety of media with different formats and levels of sophistication, and hence different personnel requirements. And the range of possible subject matter for journalists to cover is unlimited: they deal with virtually all aspects of life. Therefore their training and experience should be equally unlimited and un-prescribed. Obviously, gaining pertinent qualifications, knowledge and experience will increase a journalist's employability and effectiveness.

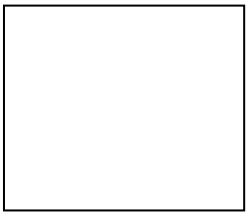
In respect of versatility, journalists can perhaps best be compared to politicians who also have to be able to address the totality of people's concerns (with no obligation either to first obtain training or a licence to do their job). This does not mean that all of them will be all-rounders, equally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

Finally, what about some obligatory formal grounding in the theory and practice of journalism? Such basic training is certainly desirable and often acquired beforehand by those wishing to enter the field at colleges or universities, or 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. However, to make such formal journalistic training a condition for entry into the profession would limit access and thus, again, be in breach of the right to freedom of expression.

Given the all-encompassing nature of journalistic work, 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 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 Africa, never had any formal journalistic training at all.

Unlike doctors or lawyers - the two analogies most frequently drawn in the attempt to justify the need for professional regulation - journalists do not work within a defined body of knowledge or clearly prescribed set of regulations, where ignorance or violation result in foreseeable, in the worst case even lethal outcomes. However, the fact that journalists do not require a licence or any specific qualifications to practice their craft does not mean that they can write and talk as they please. Being a journalist is not a licence to kill with words.



4. Professional standards

Apart from a few remnants of state media here and there, media today are a business, potentially a very profitable business and hence one where competition is tough. Carrying the banner for freedom of expression while at the same time keeping a firm eye on the bottom line is not for the faint hearted. The results the world over - in print and on the air - are not always pleasing, as we all know. And the juggling act becomes even tougher in poorer economies with smaller markets and limited customer spending power. Given the necessity to sell most of a paper's print run on the streets, for example, the temptation to attract buyers with sensationalist headlines (and stories) is great. Eventually, anything goes, as long as it sells.

Whether in print or on air, media fast food - sloppy, careless, openly partisan product without background and attention to reliably established facts - is not just a travesty of journalism. It may be cheaper to produce but in the longer run it does not even make good business sense. Loss of credibility will translate into loss of customers.

This is not just a problem for the yellow press. "Cheap" journalism gives the profession as a whole

a bad name. It betrays the trust of the public and violates their right to know. It also presents authoritarian governments with a welcome excuse to intervene and regulate, ostensibly “in the interest of the public” and of “fair” reporting. All in all: plenty of good reasons for media professionals themselves to make sure that standards are observed and upheld.

Introducing codes of professional standards

Journalists worldwide, including most countries of Africa, have formulated and adopted codes of professional standards or codes of ethics. Some were initially hesitant to do so because they feared this would mean an additional, self-inflicted burden of rules and restrictions on their already stressful deadline driven working lives. At first glance, looking at the sheer length of some of these documents, such an impression might be justified.

Remember, though, that such codes are not just yet more regulations, imposed from above. They are the essence of experience gained by practitioners in the field over time, and thus useful and proven tools to improve the quality of one's work. Working to the highest possible professional standards is the most important prerequisite for being able to be bold as a journalist and avoid self-censorship. Lack of professionalism undermines customer confidence and can ultimately put journalists out of their jobs. It invites sanctions from the authorities and litigation from aggrieved parties. A code will not just help to avoid mistakes. It will enhance the standing of the

profession and thus strengthen and safeguard media freedom.

Comparative studies of press codes worldwide show that they may vary in scope and amount of detail, but have a largely similar overall pattern. All of them seek to perform three major functions:

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

Before going into some more detail on what exactly such a code should entail, just a few general remarks.

The media's purpose is to get information and messages across. They also need to separate the chaff from the wheat. Space on paper and an on air is limited, so not each and every story can be told. To make their selection, journalists use their professional judgement. Not every private foible, for example, however juicy, needs to be publicly exposed. People's "right to know" is no excuse for cheap voyeurism. If the media are to be successful communicators they must be credible and accountable. Readers/listeners/viewers must be able to rely on them giving them factual and relevant information, clearly separating opinion from fact, correcting inaccuracies or mistakes that may have

occurred, reacting to their queries, criticisms and concerns. A set of standards clearly spelt out in a public document is a useful yardstick against which to measure the media's performance.

Contrary to what some like to think, journalists don't pluck their stories out of thin air. Information is sourced - from documents and, most importantly, from people. These people need to be able to trust the journalist they pass information to. Their information must not be distorted or misused. If they give it on condition of anonymity, that agreement must be honoured and their identity protected - not bragged about (»by the way, and just between the two of us«) to colleagues over a beer or revealed to the authorities under questioning. Similarly, journalists must not allow themselves to be used by sources to plant dubious stories or misinformation. Only those who, in their daily interactions and published work, show themselves to be worthy of the trust of both their sources and their public will ultimately make it in the profession.

Finally: a common code helps to bind the media fraternity - not exactly famous for its fraternal intra-professional relationships, given the highly competitive, often personality driven business it operates in - closer together. Not a bad thing that, especially when the going gets tough, with increasing economic or political pressures. The industry as a whole is more likely to stay in good health if it puts its own house in order - and is seen to be doing so. And the solidarity achieved in the process of working out a generally accepted internal set of rules will give it added strength to fend off

attempts by state authorities to impose statutory regulatory bodies, codes, complaints commissions or other measures designed to clip its wings.

For example: The Botswana Code

In many countries in Africa, the media have introduced such codes of professional standards. Journalists in Botswana recently assessed these documents as well as other examples in use worldwide. Their own code, formulated on the basis of this research and approved in early 2004, is therefore the most advanced and can be used as a template for comparing existing codes or developing new ones in other countries.

The code starts off by setting “general standards“. It says that journalists must - among other things - “take reasonable steps to ensure that they disseminate accurate and balanced information, and that their comments upon events are genuine and honest”. And “they must never publish information that they know to be false or maliciously make unfounded allegations about others that are intended to harm their reputation”.

The code goes on to spell out the need for accuracy in more detail:

> “When compiling reports, media practitioners must check their facts properly, and the editors and publishers of newspapers and other media must take proper care not to publish inaccurate material. Before a media institution publishes a

> report, the reporter and the editor must ensure that all reasonable steps have been taken to check its accuracy. The facts should not be distorted by reporting them out of the context in which they occurred.
>
> Special care must be taken to check stories that may cause harm to individuals, organizations or the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to ascertain and include the response from the individual or organization."

In cases where "a Media Institution discovers that it has published a report containing a significant distortion of the facts, it must publish a correction promptly and with comparable prominence". Equally, if such a report "has caused harm to a person or institution's reputation, it must publish an apology promptly and with due prominence".

The code introduces the right to reply:

> "Where a person or organization believes that a media report contains inaccurate information or has unfairly criticized the person or organization, the Media Institution concerned must give the person or organization a fair opportunity to reply."

On the crucial issue of comment versus factual reporting, the code says:

> "A media practitioner shall distinguish clearly in his/her publications between comment,

> conjecture and fact. The comment must be a genuine expression of opinion relating to fact. Comment or conjecture must not be presented in such a way as to create the impression that it is established fact."

The code deals at length with reporting on the investigation of criminal cases and court proceedings, and it emphasises the basic principle that "a person is presumed to be innocent until proven guilty".

Too many media report on the private lives of people without much restraint. The Botswana code is very clear in this regard:

> "It is normally wrong for a media practitioner to intrude into and to report upon a person's private life without his or her consent. Reporting on a person's private life can only be justified when in the public interest to do so. This would include: detecting or exposing criminal conduct; detecting or exposing seriously anti-social conduct; protecting public health and safety; and preventing the public from being misled by some statement or action of that individual where such a person is doing something in private which he or she is publicly condemning."

After having dealt with issues such as "intrusion into grief or shock", "interviewing or photographing children", ways of gathering information and the like, the code lists some basic editorial rules, including one on hate speech:

> "Media Institutions must not publish material that is intended or is likely to cause hostility or hatred towards persons on the grounds of their race, ethnic origins, nationality, gender, physical disabilities, religion or political affiliation. Media institutions must take utmost care to avoid contributing to the spread of ethnic hatred or dehumanizing disadvantaged groups when reporting events and statements of this nature. Dehumanizing and degrading pictures about an individual may not be published without the individual's consent."

The Botswana code also tries to come to grips with the very sensitive issue of "national security". Most codes internationally make no mention of this at all. The general view is that matters of security - and breaches thereof - are governed by the respective law of the land anyway. Such laws apply to every citizen equally and need not, therefore, be part of a code especially for media practitioners. This is certainly the correct position to take - but, as experience has shown, not often taken when the authorities seek to keep certain information under wraps. Mindful of this reality, the authors of the Botswana code preferred to tackle this hot potato rather than leave it to individual practitioners to get their fingers burnt. The section on national security reads as follows:

> "Media Institutions must not publish/broadcast material that will prejudice the legitimate national security interests of Botswana in regard to military and security tactics or strategy, or

> material held for the purpose of intelligence relating to defense.
>
> This provision does not prevent the media from exposing corruption in security, intelligence and defense agencies and from commenting upon levels of their expenditure and overall performance."

The clarification made in the second sentence is particularly relevant. It means that the media are allowed to deal with the "overall performance" of the Defence Force, for example. Take the case of a journalist investigating the readiness of the army to protect the country and coming to the conclusion, backed by facts, that it is wanting. When exactly this happened in Zambia, the editor concerned was accused of "spying for the enemy". He argued that, on the contrary, it was in the public interest and in the interest of national security that the public be informed about such a state of affairs and that politicians be urged to take measures to improve the situation.

A particularly sensitive ethical issue is the protection of sources. The Botswana code puts it in this way:

> "When sources are promised confidentiality, that promise shall be honored, unless released by the source."

But what happens if a source reveals to the reporter that he/she has committed a murder? Or even worse: that he/she is about to kill someone? Is the journalist not obliged by law – just like every other

citizen – to prevent this from happening and thus report the information to the police? The MISA Zimbabwe Code (which never came into force due to political circumstances) addresses this dilemma by adding another sentence:

> "However, the media practitioner may tell the source that his or her identity might have to be revealed to the courts if this information is needed to prevent serious criminal conduct."

5. Making the code work

Having a code is fine. What then?

First and foremost, everybody must be made aware of its existence - both inside and outside the profession. So the media must do what they know best: communicate it, spread the message. The code will only have the desired effect if practitioners comply with it and are seen by the public to be doing so. As with all kinds of control mechanisms - self-control included - there must be a way to monitor compliance and sanction non-compliance.

Doesn't that mean putting the media in a kind of straightjacket after all? Can they really be expected to curtail their own precious freedom? - Let us be realistic (or should that be honest, rather?): The media cherish their role as a watchdog. When they do their job well, they are indeed a crucial player in the control of those in power, be it in government, the economy or other fields. And that, in turn, makes the media themselves a powerful force. Hugely - and dangerously - powerful at times. They can make or break personalities in the public domain, they decisively influence public opinion, they can even sway elections. They can't expect then to be

completely left to their own devices and use that power at their will. And if they don't want others to keep watch over them, they must do it themselves.

There are some who believe this won't work. Politicians mostly but occasionally even media practitioners themselves suggest that there should be a monitoring body established by legislation, a statutory commission. This, they feel, is the only way of ensuring compliance by all. They refer to lawyers or medical doctors who are also supervised by bodies set up by legislation – why not journalists?

Because, as was pointed out earlier, they are a completely different kettle of fish, and many different fish at that. Lawyers or medical doctors go through a prescribed course of study, culminating in an officially recognised academic degree, and they have to comply with other set requirements before entering the profession as fully qualified and accredited practitioners. Not so in the case of journalists. They come into their field with varying forms of training or even no training at all and from all sorts of academic and non-academic backgrounds. How then do you define in law who is a journalist and who is not? Do you accredit some and exclude others, and on what basis? How can you do that without violating their right to freedom of expression?

For a statutory body to function it needs to have a complete record of those under its purview, in this case a list of all individuals and institutions in the media field. This means official registration - also in contradiction to the principle of freedom of

expression. If registration of individual journalists is out of the question, a statutory body would have at least to keep a register of publications - if only for the practical purpose of knowing who exactly to contact when complaints are received, findings to be delivered or sanctions imposed. And so we are back to square one: registration. And compulsory registration always implies the possibility of de-registration, banning of publications that is.

Lastly but also very importantly: who will appoint the members of such a body? If it is provided for by law, this must be some sort of state authority, usually a minister – at worst through direct appointment, at best by confirming appointments made by other bodies, for example a parliamentary committee or the media fraternity itself. In any case the state would thus have a foot in the door to exercise some measure of control over the media and how they do their work. Whichever way you turn it: Statutory media bodies just don't work and have no place in a democratic society.

In the final analysis, the debate should not be about whether coercion or voluntary compliance are the preferred option, but about what outcome is to be achieved by either. The Banjul Declaration puts the emphasis clearly and pragmatically on the most salient point:

> "Effective self-regulation is the best system for promoting high standards in the media".

With exactly this aim of "promoting high standards in the media" in mind, journalists and publishers all

over the (democratic) world have introduced self controlling mechanisms, sometimes called “media accountability systems”. Such mechanisms come in a variety of shapes and forms: in-house ombudsmen to receive and address complaints from readers or listeners; peer review - either in dedicated journalism publications or on regular media pages or slots to encourage conscious media use by the public and keep a beady eye on the output of other media; the appointment of members of the public to editorial boards; or monitoring projects run by NGOs. One of the most frequently used institutions is a press complaints commission, in Africa most commonly known as a press or media council.

Objectives of a media council

A media council can play an important role in nurturing and maintaining democracy in more ways than one. And, for those less idealistically inclined and with a sharper eye on the bottom line, it also makes financial sense.

It ensures that the media work to the highest professional standards and thus maximises their effectiveness. It takes up complaints from aggrieved parties and the general public and helps to find ways of redress other than costly court action which can easily threaten - or even destroy - the very existence of a media enterprise. It is thus living proof of accountability on the part of those who make it their job to hold others accountable. It will also register problem areas or patterns of mistakes

and be able to suggest suitable remedies, either within the profession or on a broader political/social/legal level. Lastly, a well functioning media council with clearly defined guidelines for journalists will preempt or help to rebut attempts by the authorities to impose rules, for example in one of the most notorious hot-potato areas: that of election coverage. If there is a need to set guidelines for reporting on polls they should be set by the media themselves - under the umbrella of their media council.

The importance and status of media councils varies from country to country, depending on the degree to which all players are familiar with the rules of the game. The more long standing and ingrained the tradition of democracy, professional journalism and a free press, the less grounds there usually are for serious division over fundamentals.

Of course there remains continuous potential friction between the media and those they report on in all democracies, no matter how young or old. Nobody likes to be criticised, especially not in public, and even less for demonstrably good reasons - and that goes for journalists as well. But such friction is healthy and necessary in a vibrant society where matters are discussed and opinions expressed openly and freely. Given that the media are often most interested in what those in authority are most eager not to have disclosed, it would be a very bad sign of them not doing their job properly if they kept everybody happy all the time. But the more politicians and others in positions of power get used to acting in a democratic manner - as opposed to

just lauding democratic principles - the more tolerance they will exercise. If attacked by the media, they will defend themselves by way of argument rather than by taking the matter to court - a very rare exception in a mature democracy. It will take time, though, to establish such a culture of mutual respect. Media councils can help to pave the way.

Principles for setting up a media council

Looking at the experience gained by existing bodies in Africa there are eight major principles on which a successful media council should rest:

1. The primary objective of the council will be to act as a complaints body. It is not just another association of the media but a vital link between the media and the public. It will lose its direction and its bite if is allowed to develop into a general talk shop or lobbying group on all sorts of media matters. Councils with individual membership have also tended to degenerate into a forum for thrashing out individual differences or those between employers and employees. Membership by institutions only has proved to be the best way to go in order to make a council perform its core task successfully.

2. The council must have teeth. If it is perceived as powerless there will soon be demands - even from within the media themselves - for a stronger, that is: a

statutory council. If the council finds that there has been an infringement of the code, it must impose the corresponding and agreed sanctions firmly, and the offending media must comply - and be seen to do so. The council will have power to reprimand and/or oblige the media in question to publish its findings. In some countries councils can also impose fines or damages to be paid to a complainant. An even harsher sanction for repeat offenders could be exclusion from the media council – a blow to a media company's reputation which could result in loss of advertising revenue and loss of business generally.

3. The council must be a voluntary initiative by the media to serve as a mechanism for self-control; in modern parlance: it must be owned by the media. Media houses and journalists, after all, submit themselves voluntarily to the jurisdiction of the council.

4. All media - both independent and state owned - must be involved in the council. If some, let alone sizeable parts of the industry stay outside, it will not have enough clout to make a difference. In some countries the worst offenders against ethical journalism are refusing to submit to the council's jurisdiction - for obvious reasons. That, indeed, is a serious problem. It might be addressed by extending the objectives of the council to include findings on complaints about non-members, as well, and to have

these published as a form of indirect sanction. Of course this is far from ideal and all possible efforts must be made at inclusivity.

5. The only guideline for the decisions of a media council will be a code of ethics or professional standards. This code must be drawn up in an inclusive process by the profession itself, and all media houses and institutions must agree on it before the council can take up its work.

6. To gain credibility and acceptance with the public, members of the general public ought to be actively involved, as well. Civil society groups should nominate delegates to represent readers/listeners/viewers and thus give consumers a voice on the council.

7. The Council must be as independent and free in its decisions as possible, even from the media. This independence will enable the body to deal with complaints in an unbiased and reconciliatory manner. Its aim is not to punish or divide, but to reconcile the interests of all sides and thus promote good journalism for the benefit of all. It will primarily seek to find an amicable compromise between the complainant - a reader or listener - and the respondent - a paper or radio station. A conciliator, for example the chairperson of the council, will strive for a speedy and friendly settlement of disputes, and the full council will only sit and

make a pronouncement if such a solution is not found - as a last resort.

8. All media enterprises must be dedicated to making the media council a success. It should be a matter of course that they all report on findings of the council - within their editorial independence, naturally. Publishing these only as paid advertisements, as is currently the case in some countries in Africa, should be regarded (and treated) as unethical. And all publications should give the council generally all the necessary publicity - provide contact details as well as basic information on complaints procedures. A complaints body that the public doesn't know about is useless.

Structures and procedures of a media council

Complaints must be dealt with and decided upon speedily. If it is found that indeed a mistake was made and has to be corrected, such a correction needs to be in the public arena - in print or on air - within the shortest possible time after the original publication and before wrong perceptions settle in the public mind.

Structures and procedures therefore should be kept as simple as possible. One could even think of a one-man-show like that of the South African Press Ombudsman, (who is indeed a male and) a respected and retired journalist. One of the more indirect but very beneficial effects of his work - or

the mere existence of his office - has been that more and more publications are now rectifying their errors of their own accord, without waiting for the institution of formal procedures. Some, for example, have a little box on page 2 under the heading “Get it right”. This does not harm their credibility, on the contrary it increases it.

Where media councils exist, they usually adopt a two-step approach. Complaints made to the council will be dealt with by a registrar or a conciliator or an Ombudsman (the title varies from country to country). If there is substance to the complaint, the official will try to arrive at a mutual agreement informally, for example by asking the publisher to print or broadcast a correction of the story in question. Where such an agreement is not possible, a finding and a judgement will be issued - for example an order to publish a correction. If the publisher or editor concerned is not satisfied with that decision he or she can appeal to a panel of members of the media council - and they will have the final word.

How then to put the structures in place? As a first step you need a body to elect or nominate the members of the council. This could be arrived at in a number of ways:

1. One could convene a conference of the media council, i.e. media institutions such as publications, broadcasting houses, professional associations, media training institutions and the like to elect the members of the council.

2. A committee of founding bodies such as publishers associations, journalists' unions and media pressure groups could form an appointment panel.
3. An electoral body could be established by inviting every newspaper or broadcasting company to delegate two representatives, one each from the side of management and media practitioners.

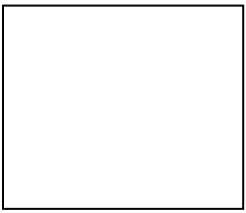
Either of these electoral bodies will elect media and public representatives to the council - in equal numbers. They will make a public call for nominations of media representatives, hold public hearings with the nominees and then make their choice. For the choice of public representatives they could draw up a list of appropriate organisations of civil society: council of churches, for example, chamber of commerce, trade unions, consumer council, law society. Alternatively, posts could be advertised and candidates selected from individual nominations, making sure that the public members are truly representative of the public at large. Finally, the electoral body will appoint a chairperson who should have experience in press law and must be a person of integrity and high standing in society.

When the council and its complaints committee are made up of high calibre members, they are most likely to make a noticeable impact. Take Tanzania for example: Its media council is chaired by the vice-chancellor of the Open University. The chairman of its Ethics Committee (the complaints body) is a former prime minister and judge, and members include the director of a big media house and the

Dean of the Faculty of Law at the University of Dar es Salaam. Many defamation cases have been and are now being resolved - without recourse to the courts - by this council, among them two brought by the former state vice-president and the current prime minister.

How to sustain a media council

If the council is to survive, it must be financially self-sustainable. Donors may come up with some initial funding for a public awareness campaign perhaps, or even with running costs for the first year or two - but usually not more. So costs must be kept minimal. A media council does not need a big office with an administrative director, a deputy, secretaries, official cars ... What it does need is an address, a room where members meet from time to time, some privacy - occasionally - for talks between complainants, respondents and a representative of the council, a computer to store data and compile the findings. All this could be provided by an existing media organisation at no extra cost. Some money will be needed to cover travel expenses for councillors or for meetings with complainants from outside the capital. To meet these costs, publishing houses should make a financial contribution - according to their economic strength (in South Africa this is done through the Newspaper Association). This should be possible because it is in their own best interest to do so - the council, after all, is likely to save them money by helping them avoid incurring fees for litigation and penalties.



6. Gender and the media

The Botswana Code of Ethics says that the media "must take reasonable steps to ensure that they disseminate accurate and *balanced* information". Obviously, you say. But is it? What about balance when it comes to gender?

A project undertaken by Gender Links and MISA in 2002[10] found that women - who make up 52 percent of the population in Southern Africa - constitute only 17 percent of news sources in the media. Women's views and voices are grossly under-represented in the media generally - surely not just in Southern Africa - even those of women politicians:

> "Women constitute an average of 18 percent of the members of parliament in the region. Yet women constituted only eight percent of the sources in the political category. Countries that have the highest representation of women in parliament - South Africa, Mozambique and Tanzania - also had some of the lowest proportions of women politicians being accessed as news sources. South Africa, for example, has 31 percent women in parliament and a similar proportion in cabinet. Yet women constituted only eight percent of the politicians quoted in the media monitored."

Politicians aside, “the only occupational categories in which female views dominated were beauty contestants, sex workers and homemakers”. Men’s voices, on the other hand, were predominant in all the hard news categories: more than 90 percent of news sources in the economics, politics and sport categories were male. Balanced?

The executive director of Gender Links asks a few pertinent questions:

> “Is the media only about policy makers, or is it also about the people affected by policy? What about giving voice to the voiceless? And is it true that women are only objects of beauty or victims of violence? Eighty percent of the food in Southern Africa is grown and produced by women. When last did you hear a woman farmer being interviewed on agricultural prices?”[11]

This can not be easily dismissed as a matter of practicalities, the daily experience that men are generally easier to tap as a source because they are more used to speaking up and voicing their opinion - and hence bound to get the lion’s share of coverage, quite unintentionally. That may be so, but why do the media allow this to happen and thus compromise the quality of their work? On paper, women and men have the same rights. For this to become a reality, a change in mindsets is needed - and not just on the part of some “backward” and “unenlightened” sections of society but of many

editors and journalists as well, those famous torch bearers of human rights and freedoms.

One reason for the continuing male slant of the media is identified in the Gender Links study: "Women constituted only 22 percent of those who wrote news stories [in the print media]":

> "There is not a single news category in which women media practitioners achieve parity with men. Their absence is especially marked in the economics, politics, sports, mining and agricultural beats. The highest percentages of women media practitioners are in the health and HIV/AIDS, human rights, gender equality, gender violence, media and entertainment categories. Even then, women constitute one third or less of those creating news."

The study also found that women reporters tend to access more female sources. The conclusion is obvious: If editors mean to live up to the ethical principle of balance then clearly they must embark on a vigorous equal opportunity policy in their news rooms.

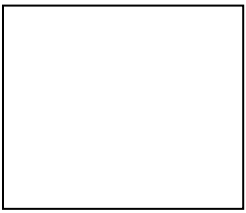
> "This is not only gender mainstreaming, it is also good editorial and business policy. The fact that corrupt male politicians vie to run our countries is hardly news. The fact that as long as women comprise a mere 18 percent of all parliamentarians in our region when they constitute 52 percent of our population we have no democracy – that's news. Imagine for a moment that we were talking about race or

> ethnicity rather than gender. Would this not be a source of outcry? So why do we abandon rudimentary news values when it comes to gender?"[12]

The media pride themselves on their ability to set the agenda for debate in their societies. Why then do they fail so dismally when it comes to gender issues? At present, they are still not part of the solution to the question of gender inequality, but themselves a major part of the problem.

However, the "lights are slowly going on" (Lowe Morna). A pilot project at the Polytechnic of Namibia is presently under way to review and change the entire curricula for that institution's journalism training under gender aspects. The "Times of Zambia" and the Mauritius Broadcasting Corporation have embarked on developing and implementing in-house gender policies. And the Media Institute of Southern Africa (MISA) - in a ground-breaking document - has adopted a gender policy:

> "As an agenda setter, the media has a duty to portray not just what is, but what could be; to be exemplary in its own practices; and to open debate on the complex issues surrounding gender equality."[13]



7. Print media[14] and the lawmaker

With constitutional guarantees of press freedom in place and successful self-regulation of the media through established professional bodies and procedures, there does not seem to be much room or need for additional media-specific legislation. Unfortunately this is a view not widely shared by African lawmakers.

South Africa is one of the few countries not to have a press law at all. There is no statutory Press Council, no statutory complaints body and no requirement that journalists be registered or belong to any particular association. This is in line with the country's much lauded first democratic constitution which reads in Section 16 (1):

> "Everyone has the right to freedom of expression, which includes –
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

Existing media laws in the rest of the continent generally tend to over-regulate.

Some basics to be covered by a press law

No press law would seem to be the best law. But realities seldom follow best case scenarios. Paradoxically, the very advent of democracy has often spurred on the demand for stricter regulation of the press. While things were relatively easy with state media and clear lines of command firmly in place, democratisation has opened up a range of new freedoms – and hence possible abuses of such freedoms. This is why governments in many countries insist on the need for media-specific legislation. Where this is the case, the development of such laws should not be left to the authorities alone.

The media and civil society together need to engage governments in a public debate. And they need to go into this debate with a clear idea of what is to be achieved. If this is done successfully, the process can even be used to advance the cause of press freedom.

So what should an acceptable press law say?[15]

It will start out by reaffirming the obvious:

> "The press (media) is free."

While this may be a truism accepted by all as a common point of departure, it should still be stated. This simple sentence at the outset will also rule out

any attempt to suggest that the media should act in the “national interest” or that they have a “patriotic duty”. - What exactly such a national interest might be and who would be competent to define it is usually left open by the proponents of this view. - A free media’s only reference point in any democratic country is the basic law of that country. This could be spelt out in a second sentence:

> “It is committed to the Constitution of [name of the country].”

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

> “Special measures of whatever kind which adversely affect media freedom are forbidden.”

In other words: there is no room for registration of journalists of any kind, or any regulations which would, for example, stipulate certain qualifications for journalists.

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

> “Media activities, inclusive of 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.”

This, of course, does not preclude the need for publishing houses - like all other enterprises - to register under the company's act.

For the general reading public it will also be useful to know who is responsible for what appears on the printed page and who to contact over any queries they might have. The law could stipulate, for example, that all publications carry an imprint which gives 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:

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

In order to fulfill that public function, the media need access to information, not least to that held by state authorities. The right of access to such information, however, is not restricted to the media only. It extends to all citizens. Therefore, a brief section, following the Banjul principles, should state:

> "Everyone, including the media, has the right to access information held by public bodies. This right is regulated under a special act".[16]

The principle of equality before the law also applies with regard to an issue that often leads to controversy and demands for urgent regulation on

the part of lawmakers. A press law should spell out clearly that there is no need - and indeed no place in a democratic society - for special provisions concerning the propagation of “false news”, libel and defamation, violation of privacy and the like. Such offences can be committed by everyone in a country, not only journalists. Likewise, any sanctions laid down in law will apply equally to all citizens. German press law puts it like this:

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

Right to reply

On a more pragmatic level, it could 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.

The right of reply obliges an editor or publisher to publish a counter-version or a reply from a person who claims a story affecting him or her was factually incorrect. Note here that a counter-version must refer to facts, and not to 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.

This alternative to existing defamation legislation (see below) should be considered seriously because it has the potential to benefit both sides. It makes sure members of the public get their version of the facts published, if need be, and it may prevent a paper from having to pay substantial damages, fines or even incurring a jail sentence for those responsible. In countries where the right to reply has been introduced, especially in continental Europe, it is working well.

Protection of sources

One of the most hotly debated issues between lawmakers and media practitioners is the protection of sources. To put it more bluntly: Should journalists be allowed to conceal the identity of their informers? Mozambique is one of the few countries to have grappled with the issue successfully. Its constitution states in article 74 (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 Press Law explains further (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 such a special right? Because the often unthinkingly used formula 'protection of sources' means just that: the duty to protect a source, that is a person who gives information, from harm. In many countries worldwide the question of how that can best be done remains unresolved, leading to often bruising confrontations.

A likely scenario: A highly placed bureaucrat obtains documentation which shows that her minister is part of a corruption scam. Her conscience tells her that she must act to end this abuse of power. She turns to a journalist she trusts and hands over the papers. The journalist publishes the story, the public prosecutor starts investigating. The first and obvious port of call is the journalist. So the prosecutor demands from him the name of the source and the handover of the documents. Unfortunately, the papers carry a date stamp with the initials of the source. The journalist refuses to give the name and hand over the proof – to prevent his source from being immediately fired from her job and ostracised by her peers.

And what then happens to the minister? Should he be allowed to get away scot-free just because a journalist won't cooperate? Journalists insist that they are not the ones to do the leg work for the prosecution. As in every other case, prosecutors will

have to investigate on their own and come up with their own evidence to bring about a conviction.

The right to protect sources is acknowledged by the United Nations. In 2000, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression wrote:

> "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."[17]

There are examples around the world for such protection in law. In France, article 109 (2) of the Code of Criminal Procedure says:

> "Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source."

In Britain, the Contempt of Court Act, 1981 guarantees similar protection, but makes some

important exemptions in its Section 10. A court may not require a journalist to disclose his or her source

> "unless it is established to the satisfaction of the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime."

This gives the courts unnecessarily, even dangerously wide leeway in the matter, most likely prompted by the United Kingdom's security situation at the time (Northern Ireland).

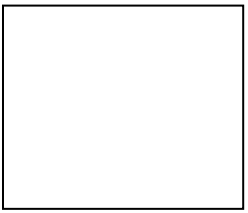
The African Commission's Banjul Declaration on Freedom of Expression also protects the right to non-disclosure of sources (Chapter XV). It then goes on to list a number of more precisely framed exemptions:

> "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."

Experts judge this clause to be "far from optimum"[18], and say its provisions should be seen as

> "…minimum standards, representing an important foundation which can be built upon in national legislation and through judicial pronouncements."[19]



8. Review of existing laws

The best media law will not help much as long as other laws or regulations remain on the statute books that endanger freedom of expression. Most countries in Africa still have legislation in place which was originally meant to protect the colonial masters against their subjects. On independence, this was often inherited without much thought given to it, or quietly carried over into the new order because the new rulers found it to be useful as well. Such legislation needs to be checked closely, chucked out or adapted to conform with democratic principles.

The Banjul Declaration of the African Commission on Human & Peoples' Rights in its 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", as it is called by lawyers, is internationally recognised, for example by the UN's Human Rights Committee, as a yardstick to decide

whether such restrictions are justifiable. To pass this test, they 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 - most importantly - they must be necessary even in a democracy: a pressing social need must be demonstrated, the restriction must be proportionate to the aim, and the reasons given to justify the restriction must be relevant and sufficient.

Let's have a look at some major issues and try to apply this test on them.

State security and press freedom

Some people, politicians in particular, are trying to construe a contradiction between state security and press freedom as if these two values were mutually exclusive. They perceive the "nosy" media with their tendency to shine a light into any dark corners as an ever present threat to the "stability and security" of the state - with the "state", on closer inspection, often being equated with the incumbent administration or even the "ruling party".

One example: 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. That, of course, is legitimate. But

when one looks at the detailed provisions of some of these clauses - for example on the Zambian statute book - things become quite frightening. Seditious intention is defined there as loosely as “to excite disaffection against the government”. That, one would have thought, is normal procedure in a democracy: opposition parties are always touting themselves as the better alternative and thus trying to create “disaffection against the government” by exposing its blunders and shortcomings. The latter also goes for the press.

Using the three-part test, one could argue that these provisions pass with regard to the first component - they are regulated by law. But they obviously fail the second and third part of the test: Protecting an incumbent government’s image is not a “legitimate interest” and it is certainly not “necessary in a democratic society”.

A second example: 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, though maybe not very realistic - James Bond and his colleagues rarely end up in court. 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 question of national security should be taken lightly or shrugged off completely in the name of freedom of expression:

> "National security is a social value of the highest order, upon which the protection of all human rights, indeed our whole way of life, depends. It is universally accepted that certain restrictions on freedom of expression are warranted to protect national security interests. …
> At the same time, historic abuse of restrictions on freedom of expression and information in the name of national security has been, and remains, one of the most serious obstacles to respect for freedom of expression around the world. …
> Intelligence and security bodies play an important role in society and they must, like all public bodies, be subject to democratic accountability."[21]

The "Johannesburg Principles: National Security, Freedom of Expression and Access to Information" (1995)[28] could serve as a very useful tool in grappling with these issues. They were developed by 36 leading experts from all over the world at the invitation of the international lobby organisation ARTICLE 19 and the University of Witwatersrand, South Africa, and have gained ever increasing importance in court rulings and policy formulation since.

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) 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."[22]

This may look overly complicated at first sight, but this is no easy matter after all and one where considerable potential harm is involved. The intention to cause such harm by expressly inciting violence is obviously unlawful. A comment or an article 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 has been written or said and the likelihood or actual perpetration of such harm before a restriction can be justified. The expression of an opinion or a belief in itself does not breach national security:

> "[P]olitical rhetoric can take extreme forms and a rule prohibiting incitement to beliefs could be used to silence opposition parties or critics. Perhaps most importantly, however, there is simply no basis for arguing that beliefs pose a sufficient threat to warrant overriding a fundamental right. …
> Due to the very general nature of national security, a wide range of harmless speech

> could be banned in the absence of a requirement of a close nexus between the speech and the risk of harm."[23]

Although this principle is not widely recognised in international law yet, there are a number of court judgements which make the point that one can only speak of a threat to national security when there is the danger of imminent harm. The Indian Supreme Court said in 1989:

> "The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous. … In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'."[24]

And the Supreme Court of the United States found way back in 1969:

> "[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[25]

The present time and general climate post 11 September 2001 are not exactly ideal for promoting a rational debate on national security and freedom of expression. Governments around the world are

tightening security legislation in the name of the "fight against terrorism", all too often at the expense of human rights. This is what the American journalist Mariane Pearl, whose husband David was murdered by terrorists in Pakistan, has to say on the issue:

> "Though physically violent, terrorism is really a mental battle. By their attacks, terrorists are trying to instil fear and distrust. Journalists need to help voices to be heard, particularly in the Muslim world where people have fear of expressing themselves. Sometimes only extremists use that freedom of expression right. They yell and shout, occupying the public space. There can be no peace without communication.
>
> The fact that expression is a right also makes it a responsibility. You have the duty to reflect and have the general interest at heart before expressing an opinion. It is complicated to achieve, but journalism with the tools of moderation and objectivity is extremely valuable in our present context. …
>
> The fight of journalists against terrorists is pretty obvious. Speak up when they try to silence you. Bridge the world when they try to widen the gap. … Embrace a complex world when they reduce it to caricatures and labels."[26]

It's not easy to think of a more convincing plea for freedom of expression and the people who use it professionally, the journalists. We need the active use of that freedom all the more today, not in spite of the precarious situation we find ourselves in but because of it.

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 willfully violate the privacy and honour of another human being. The question is how best to ensure protection against such violation.

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".

In addition, section 69 of the Zambian Code deals with defamation of the president specifically and provides that "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", without the option of a fine. Note that here no mention is even

made of whether the published matter is true or false: the mere intention to ridicule by making an insulting remark (maybe about something as trivial as the president's outer appearance) would suffice to attract conviction.

In other countries it is not just the head of state who is given similar special protection by law. As is the case in Mozambique, this can also be extended to ministers, parliamentarians, magistrates, foreign heads of state, or diplomats. Depending on how loosely worded the respective provision is, this is likely to turn reporting on all such persons into a veritable minefield.

It is certainly legitimate for the state to protect the privacy and reputation of its citizens - all citizens. But, again, every restriction on freedom of expression in pursuance of this aim must pass the three-part test: it must be prescribed by law, be made only for the purpose of safeguarding a legitimate interest, and be demonstrably necessary and appropriate to achieve that aim.

The question needs to be asked whether it is really necessary and appropriate to prosecute and imprison persons who caused 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, 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. To a journalist or publishing house such loss of credibility by itself can 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 “very chilling effect” on people’s readiness in general to use their right of expression. In simple terms: it tends to shut people up. That, certainly, is not appropriate, let alone desirable in a democratic society.

For all these reasons there is increasing consensus that defamation should be decriminalised to ensure that citizens can exercise their right to freedom of expression without state interference. In recent years, criminal defamation has been struck down by courts in a number of countries as being incompatible with democratic practice. Ghana and Sri Lanka are just two examples.

Still, a person who was seriously harmed by defamatory statements, must have the (civil) right to seek redress and/or compensation. The following guidelines will be useful in drafting appropriate regulations.

1. 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.

2. Liability for defamation comes into play only if the accused person knew that the statement expressed was false or if he or she acted in reckless disregard of its veracity. There shall be no liability for defamation if the statement is an opinion, or substantially true. Article 19 in its Principles on Freedom of Expression and Protection of Reputation[27] puts it like this:

> "(a) No one should be liable under defamation law for the expression of an opinion.
> (b) An opinion is defined as a statement which either:
> i. does not contain a factual connotation which could be proved to be false; or
> ii. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest)."

3. Defamation being defined as one person defaming another, it follows logically that public authorities can not bring defamation claims. Again in the words of Article 19's Principles:

> "[D]efamation laws cannot be justified if their purpose or effect is to:
> i. prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption;

ii. protect the 'reputation' of objects, such as State or religious symbols, flags or national insignia;
iii. protect the 'reputation' of the State or nation, as such …"

4. 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).

5. As a first step in the proceedings, the court will have to examine whether the statement in contention was indeed libelous/defamatory. While it may have been extremely harmful to the aggrieved person's reputation, it could still very well be true. A basic principle of democratic law is that an accused is innocent until proven otherwise. This standard also applies in defamation cases: the person who brings the matter to court will have to prove that the statement or story was false.

6. 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. Article 19 suggests the issuance of an apology, correction and/or reply, or publication of any judgment which finds the statements to be defamatory.

7. 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, for example in the forced closure of publications. In the words of Article 19:

> "Freedom of expression demands that the purpose of a remedy for defamatory statements is, in all but the very most exceptional cases, limited to redressing the immediate harm done to the reputation of the individual(s) who has been defamed. Using remedies to serve any other goal would exert an unacceptable chilling effect on freedom of expression which could not be justified as necessary in a democratic society."

Again, we know from experience that this is not an academic debate. Compensation claims are quite a common route to go in Botswana, for example. In 2001 alone three cases were reported, one initiated by the Vice-President, another by a law firm, and the third by a judge of the High Court. Damages demanded ranged between half a million and five million Pula (US$ 120,000 - 1,200,000). These amounts suggest that the prime aim of litigation was probably not so much to seek compensation for the violation of the aggrieved person's dignity and reputation but rather to cause great, if not terminal financial harm to the publications involved. This must not be allowed to happen.

“False news”

Arrests of editors and journalists - sometimes even printers and vendors - for “publishing false information likely to cause public fear and alarm” (in the wording of regulations in Malawi, for example) are frequent in Africa, in particular where articles are critical of government.

Zimbabwe presently has particularly draconian measures in place. A 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. Section 16 makes it an offence to make a public statement with the intention to, or knowing there is a risk of "undermining the authority of or insulting" the president. This includes statements likely to engender feelings of hostility towards the president, cause "hatred, contempt or ridicule" of the president, or any "abusive, indecent, obscene or false statement" about him personally or his office. The offence attracts imprisonment for up to one year.

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:

> “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 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 masters) 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."

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 a decade ago, 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.

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.

Those who argue against legal restrictions say that any such limitation would be an attempt to control not only the expressed views but also the thoughts of individuals. It would interfere with the right of free expression. Hate speech, they say, does not necessarily lead to actions, and where actions are carried out, the speaker or writer of the message can not be held responsible for the actions of others. They hold the view 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. - Which sounds fine but will, of course, only work on the presumption that propagators of hate speech are willing to enter into a fair exchange of arguments – usually not one of their strong points.

A widely accepted middle way was found in the 1996 Constitution of South Africa. In its section 16 (2) it 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 danger 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 will invite prosecution.

Banning of publications

This is one sub-chapter that shouldn't exist. There is no place for the banning of publications in a democratic society.

Unfortunately, many countries in Africa still have provisions to this effect on their statute books. The banning can be done - as in the case of Botswana - simply by the President himself (which has never happened in the country's history). Or it can be brought about in a more subtle way, as in Mozambique. There, all mass media have to be registered with the Ministry of Information. They are issued with a registration certificate which can be withdrawn by the minister in compliance with a court decision - thus in effect banning the publication concerned. In Zimbabwe, the media law is even harsher: All publications (and journalists) must be registered by a government-appointed Media

Commission which has the power to refuse registration or to de-register - and this power is being used.

Blanket banning of media obviously violates the basic right to freedom of expression as well as lesser, for instance property rights. And there are other, more appropriate ways of sanction even in severe cases of abuse of free speech. If a publication, for example, incites violence - which is a criminal offence under common law - the owner can be prosecuted under the penal code, without the whole business being closed down.

9. Promotion of media diversity

Media freedom and the unhindered public expression of the greatest possible diversity of views may come under threat not just from repressive, undemocratic governments, but also from a very different quarter: the much touted “free market”. And it’s not just because, as we have seen, publishing houses may opt for putting out shoddy, sensationalist material just to make a quick buck, thus lowering standards and limiting the public’s access to relevant information.

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. It’s how the market works and how we as consumers all hope to be able to buy quality goods at fair prices, thanks to the healthy competition between the different providers.

How do you sell more newspapers at lower cost for your company? Preferably by consolidating your operations: bringing several papers under one umbrella, making better use of your technical infrastructure (printing presses, computers) and your

staff: have fewer journalists overall work simultaneously for a number of titles.

What does this mean for the consumer/the reading public? Maybe more affordable papers, but certainly more of the same - less diversity to choose from, a narrower slice of the reality that newspapers are supposed to reflect.

All this is happening now - not just in the big wide globalised world of mega media corporations but right here in Africa. Just a few examples: In Zambia the print media market is shared by the state-owned two dailies (with a combined print run of 41,000 copies) and two Sunday newspapers on the one hand and one privately owned daily (28,000) as the only alternative voice. In Tanzania one media tycoon owns ten newspapers and controls 76 % of TV viewing. In Malawi the major dailies are owned by parliamentarians, and two small independent weeklies struggle for survival. Lastly, in South Africa two media houses between them control 69 % of dailies and 72 % of weekly newspaper titles.

And while media concentration in Africa is proceeding, public debate on the phenomenon and its consequences is only just beginning. Little research has been done so far, let alone options developed for managing the process. So we need to look at the discussion outside the shores of the continent. 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.

In a Study of European Approaches to Media Ownership published by the University of Oxford (1998), the authors A. Harcourt and S. Verhulst write:

> "The media are relied upon in democratic societies for the protection and promotion of human rights and democracy. 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. 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. 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."

A Council of Europe Report on Media Diversity in Europe (December 2002) stresses:

> "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 the word “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”.

Basically there are three ways of arriving at the desired and necessary plurality of media: You either seek to actively encourage and stimulate diversity, you trust the market to sort things out by itself, or you put measures in place to prevent media concentration. (Most of these deal with the media as a whole, in particular the question of cross-ownership between the print and the potentially much more lucrative broadcasting media. There will be a closer look at such regulations in Tool Box 2.)

The first and more unusual option is being tried in South Africa. After much public debate, a Media Development and Diversity Agency (MDDA) Bill was passed in parliament in May 2002 to redress the “exclusion and marginalisation of disadvantaged communities and persons from access to the media

and the media industry". New media outlets, especially community media, are to be subsidised through funds supplied by government, big players in the industry and foreign donors. The big fight, predictably, was over who was going to decide on the distribution of these monies. For the agency to be successful it would need to be independent from government, industry or any other outside interference and make autonomous decisions. This objective has been achieved in part. The president appoints six members of the board on the recommendation of parliament and three of his own choice, one each from the commercial print and the commercial broadcasting media, as well as from the Government Communication and Information Service (GCIS). This board has full autonomy to set criteria for and select projects to be supported.

The school of thought favouring the laissez-faire approach says there is no fighting global trends anyway and big media companies are not a bad thing either. 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 in recent years. 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 can not 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 technology

and infrastructure costs 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 make it, 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, needed.
An additional argument being brought 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. Imagine what the result of letting market forces rule without any regulation could be especially in a small economy: you 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 doesn't do much for 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 is diminished and with it the vibrancy and strength of a democratic society.

The proponents of a middle way or 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 can not 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.

The sooner this question is answered and action taken accordingly, the better. Once powerful media conglomerates have established themselves it will be extremely difficult to embark on a policy aiming to weaken or limit their economic and/or political power.

Editorial control

Talking about ownership and diversity still, not at the macro economic/political level this time but at the actual coal face. There is no doubt that the content of a newspaper will be influenced by the company ethos. Simply put: is it out primarily to make money or to deliver a quality product? - Sadly, cases where

the two interests coincide are becoming increasingly rare.

In many newspapers the managers have taken control of operations, sidelining the formerly all important editors. They report directly to head office (the owner) and/or are even members of the board (in joint-stock companies). The owners (or boards) appoint the editors - and they are likely to decide not in favour of a strong headed journalist but of somebody more pliable and in tune with the interests of management. This is not just a sad loss of status keenly resented by the individuals concerned but can easily result in an even sadder loss on a much wider scale: that of journalistic quality.

The editorial staff 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 guaranteeing a paper's editorial independence. This will spell out clearly that, apart from broad guidelines as to what section of the market/readership profile the paper is targeting, management or owners have no say in editorial decisions. It should also lay down appointment procedures for new editors-in-chief, i.e. giving line editors the right to veto any decision they do not agree with by a two-third majority. Such editorial statutes can be a useful tool to promote press freedom not only against external but also against internal pressures.

Another example is the solution found at Reuters news agency. There a Reuters Founders Share Company in the legal form of a trust has “to ensure that the Reuters trust principles of independence, integrity and freedom from bias in the gathering and dissemination of news and information are preserved”. The trustees are eminent personalities from around the world with a journalistic background who have a “golden share” that will outvote other shareholders on issues that might affect press freedom or integrity.

State-owned print media

If market forces alone can not guarantee media diversity and even private media owners may be a danger to press freedom - is that not a strong argument in favour of a different, back-to-basics 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 inform and influence public opinion, on what grounds can a government - after all representing the collective will of the people and acting on their behalf - be excluded from this activity? Is it not even the responsibility of governments to provide information to its citizens as a social service in the same way as they provide educational facilities and health care?

To start with the last point: 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.

That is precisely what state-owned media are not. They are a legacy of a bygone, pre-democratic era, that of the authoritarian, colonial or one-party state where those in power regarded themselves either as the rulers or the guardians of the populace. And where the media, at the taxpayers' expense and under the watchful eye of the Ministry of Information, were merely the conduit for the authorities to speak (down) to the people, sometimes posing as "the voice of the people".

Apart from a few pockets here and there we live in a very different world now. People have their own voice and ways of making it heard. They are not subjects but equal citizens who, by their vote, delegate some in their midst to take over the businesses of government on their behalf for a limited period. They 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 know how best to get their employer's message across. The better the content and the packaging of the message, the more of a hearing it will get. Ministers of information have outlived their purpose in the information society.

And 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 should all opposition parties then run their own newspapers too, also subsidised by the taxpayer - on a sliding scale perhaps, depending on their numerical strength in parliament, and with the exact amounts to be decided on by a commission?

Seriously though: Party political publications - be they government or opposition - are by nature partisan: predictably one-sided and in the long run simply boring, preaching to the converted. Why 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 on the side of 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 the 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 altogether will (and, in fact, do in mature

democracies) mirror the entire spectrum of viewpoints and opinions in any given society.

So - what to do with state-owned media where they still exist? Close them down when there is no more demand for them - who is to decide that and who will look after the redundant staff? Privatise them and see how they fare on the market - what if there is no interested buyer or only the same few who already dominate the private market? What if media houses operating on commercial principles do not have the capacity to distribute a paper all over the country, to rural areas in particular, thus depriving many of a source of information they had been accustomed to?

No ideal solution has been found yet. In France, government subsidises all newspapers regardless of their political stance to make sure that people's basic informational needs are met. Sweden has a similar approach. But this may be too expensive for poor countries.

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

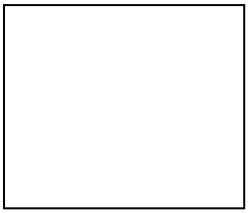
trust to protect such independence could serve as a model).

As a minimum requirement in the interim, state-owned and -controlled media should at least be obliged to be balanced and fair to all political forces in a country when it counts most: during election periods. Parliamentarians in the Southern African Development Community (SADC) region themselves have singled out this crucial area in their 2001 Recommendations on Norms and Standards for Elections:

> "In the majority of SADC countries the state owned media is controlled by Government. This often causes imbalances in the playing field between the stakeholders, mainly the ruling party and opposition parties. It contributes to lack of transparency through selective reporting."

As a remedy the Parliamentary Forum suggests a whole range of norms and standards to be observed in a democratic state:

> "Opposition parties should … be given equal opportunity and agreed upon time and space on the state owned media to put their announcements and broadcasts and advertisements. This is a true test of the Government's commitment to pluralism and multi-party democracy and a democratic political process."



10. And finally …

A media reform process which is to be credible and accepted by society must be driven by society itself. It could be spearheaded by media associations. After all they have the greatest stake in its success and the clearest insight into the deficiencies and dangers of the existing dispensation. Their vested interests - being able to work freely to deliver the best possible product - mostly coincide with the interests of society at large. Both are pitted in equal measure against the interest of the authorities to retain control over the media and the free flow of information.

Tactics and strategies will differ from country to country as will the precise options decided on to fit their specific needs. But experience shows that a successful reform campaign is always based on a coalition of broad cultural and political interests: media organisations, a variety of trade unions, law associations, religious bodies, women's groups, the youth. Strategic partnerships with those engaged in the political decision making processes - political

parties, parliament - are also necessary for the reform drive to succeed.

Having dealt at length with 'The Media and the Law', let's leave the last (but one) word to 'the law'. This is the Uganda High Court again:

> "Democratic societies uphold and protect fundamental human rights and freedoms … the state has the duty to facilitate and enhance the individuals' self-fulfilment and advancement, recognising the individuals rights and freedoms as inherent in humanity. … Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. …
> Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones."

With powerful support like that from the highest quarters – how can media reform in pursuit of "optimal exercise of the freedom of expression" not succeed?

Footnotes

[1] quoted from “Democracy in Africa – A New Beginning? International Conference – Selected papers and discussions, 1992, p. 16
[2] cf. P. 19
[3] Francis P. Kasoma, The African editor, media ethics and law in a privatised and pluralistic press, in: Conference on Media and Freedom of Expression in Southern Africa, Lusaka 1992
[5] Handyside vs UK [1979-80 1 EctHR 737, para 49
[6] Sunday Independent/South Africa, 20/6/2004
[7] Zambia High Court civ. Case No 95/HP/2959 *Francis Kasoma v. The Attorney General*).
[8] Article 2, Press Law for the Free and Hanseatic City of Hamburg
[9] Zambia High Court civ. Case No 95/HP/2959 *Francis Kasoma v. The Attorney General*).
[10] these and the following figures are quoted from: www.genderlinks.org.za
[11] Colleen Lowe Morna, In: FreePress, Windhoek, September 2002
[12] ibid.
[13] ibid.
[14] This chapter concentrates only on print media. Broadcasting needs – due to limited frequencies – special broadcasting laws that are dealt with in Tool Box 2.
[15] For practical reasons the following list takes German press legislation as a guideline.
[16] More on this subject in Tool Box 4.
[17] Report of the Special Rapporteur, In: UN Economic and Social Council Document No. E/CN.4/20000/63/Add.3 of 11/2/2000
[18] Guy Berger, Rhodes University (South Africa) in a paper delivered to an African Conference on Freedom of Expression, Pretoria 2004

[19] Edetaen Ojo, Media Rights Agenda (Nigeria) in a paper delivered to conference mentioned under 18.
[21] Ibid, p. 4-5

[22] ARTICLE 19, London 1996

[23] Mendel ibid., p. 13
[24] S. Rangarajan v. P.J. Ram[1989](2)SCR 204, p. 226 – quoted from ibid. p. 14
[25] 395 U.S. 444, 447 (1969) – quoted from ibid.
[26] Mariane Pearl in an interview with the World Association of Newspapers, In: Cape Times (South Africa), 3 May 2004
[27] ARTICLE 19, Defining defamation, London, August 2000

APPENDIX

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' Eights;*

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 of 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 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 marginalised 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's Rights should make every effort to give practical effect to these principles.

Useful websites

African Commission on Human and Peoples' Rights: www.achpr.org

Article 19: www.article19.org

Codes of journalists' ethics: www.ijnet.org/code.html

Friedrich Ebert Stiftung – Southern African Media Project: www.fesmedia.org.na

Gender Links: www.genderlinks.org.za

Media Institute of Southern Africa: www.misa.org

Online network of freedom of information advocates: www.freedominfo.org

Reporters without frontiers: www.rsf.fr

Southern African Broadcasting Association: www.saba.co.za

Southern African Development Community: www.sadc.int

United Nations Commission on Human Rights: www.unhchr.ch