

SAIIA OCCASIONAL PAPER

Analysing key policy and governance issues
in Africa and beyond



MEDIA FREEDOM, TRANSPARENCY AND GOVERNANCE

Raymond Louw

Number 11, September 2008

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Abstract

Can good governance exist without a free and independent media? Africa's premier governance and accountability tool – The African Peer Review Mechanism (APRM) – seems to have ignored the issue.

In initial drafts of the self-assessment questionnaires for countries participating in the APRM, there was a requirement, under the criteria for good governance, for a free and independent media. But this disappeared in later versions.

There is a possible reason for this: some 48 of the continent's 53 countries have 'insult' and criminal defamation laws which criminalise critical reporting of the conduct of public servants. In some cases these cover only heads of state and other high-ranking officials but in others protection is extended to anyone working for the state. These countries would not make the grade under 'good governance' if required to show that their media functioned freely.

In case studies of four countries which have opted to participate in the APRM – Ghana, Kenya, Rwanda and South Africa – he looks at the way freedom of expression issues were covered in their reports to the African Union. In Kenya, for example, the press is seen as crucial whistle-blowers for corruption; in Rwanda, the issue is complicated by the role played by some journalists – and others masquerading as journalists – during the 1994 genocide.

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Why media freedom matters for governance

How important is media freedom in the context of good political governance? Journalists believe it is all-important, that good governance does not exist unless there is a free and independent media out there carrying out a watchdog role. That implies keeping a close eye on politicians in their administrative capacities as well as their law-making roles. It also implies maintaining a watchful role over government officials as they carry out their administrative and government management functions. That means maintaining that watch over the highest as well as the lowest members of the civil service in their dealing with legislation, the public and with colleagues.

A media that is tied to government – such as the media in a country like Zimbabwe, where the government owns most of the media – cannot, I submit, carry out that role. And, indeed, as recent history in that country has shown, the tied media does not criticise the government or show up its shortcomings and those of the incumbents in office. The result is a slide into authoritarianism and corruption.

Only a free and independent media – independent of government controls and free to raise issues – can do that job. One country where that is happening in Africa, even though with variable results, is in South Africa. The media may make mistakes, get stories wrong, but on the whole it is a probing and critical media that highlights the deficiencies of government.

No matter how much a country uses the term ‘democratic’ in its title or in a description of itself, unless it at least tolerates or at best promotes a free and independent media and all that goes with that term – such as the widest access to, and dissemination of, information – the term is meaningless and the government is inevitably authoritarian.

That is a journalist’s view. But support for that view is impressive.

Section 16 of the South African Constitution lays out as a right that the media should be free. It must be noted that of all the segments of commercial society, and all the industries that make up those segments, no other is specifically identified as meriting the full protection of the Constitution. The duties of no other commercial segment are outlined in this document, the core document setting the rules for a country. The Constitution is the supreme law of South Africa and law or conduct inconsistent with it is invalid. Also, the obligations imposed by it must be fulfilled.

Interpretation of those rules means that the freedom of the media is a key value in a democratic country. One of the requirements for the exercise of freedom is that it must be done as an independent institution; a media that is not independently owned, such as one owned by the state, cannot be classified as free.

Further support for that interpretation has come from judges in South Africa’s highest courts who have ruled time and again that a free press is indispensable, a cornerstone, for a democracy. One such ruling was by Ms Justice Kate O’Regan of the Constitutional Court in a case where the South African National Defence Union sued the Minister of Defence. She declared: ‘Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.’

Further, that view is supported by the courts of the European Union, North America and many countries elsewhere in the world. And it is also supported by:

- The United Nations Universal Declaration of Human Rights – its Article 19 states: ‘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 African Union’s African Commission on Human and Peoples’ Rights, whose Declaration of Principles on Freedom of Expression in Africa spells out the importance of media freedom in these terms: ‘Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print including across frontiers is a fundamental and inalienable human right, and

an indispensable component of democracy. No one shall be subject to arbitrary interference with his or her freedom of expression.’ However, this is limited by the standard limitations clause that is itself limited: ‘Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.’ In its preamble it states that signatories are ‘convinced that laws and customs that repress freedom of expression are a disservice to society’.

- The Declaration of Windhoek on Promoting an Independent and Pluralistic African Press of 3 May 1991, which states: ‘Consistent with Article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation and for economic development. By an independent press we mean a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.’
- The African Charter on Broadcasting, a spinoff of the Windhoek Declaration, which was adopted 10 years after that declaration.
- Many other declarations that have been adopted by governments.

It is significant that one of the first acts carried out by Germany when it emerged from the horror of Nazism was to entrench the values of a free and independent media and freedom of expression, a feature of its constitution and those of its *landen* which it now guards jealously.

That all adds up to the simple fact that a country cannot lay claim to conducting ‘good political governance’ if it does not maintain and uphold the presence of a free and independent press – and it should be borne in mind that a free press is not a condition that applies to a select community; a free press signifies the freedom of every citizen, indeed everybody.

Key issues and trends related to media freedom in Africa

The facts mentioned above have been ignored by the African Union (AU) in drawing up the rules and processes for the African Peer Review Mechanism (APRM). In spelling out the criteria underpinning the assessment of good governance, the APRM lists:

- Adoption of clear codes, standards and indicators of good governance at the national, regional and continental levels;
- Providing an accountable, efficient and effective civil service;
- Ensuring an effective functioning of parliament and other accountability institutions, parliamentary committees and anti-corruption bodies;
- Ensuring an independent judicial system.

It also refers to a political system where people are free to join political parties which, in turn, are free to campaign and compete for power.

These are admirable functions but they cannot be carried out unless there is a free and independent media in a country working under a legal framework which not only ensures freedom but has mechanisms to combat inroads into freedom of expression and the widest access to, and dissemination of, information.

A factor that may have influenced the AU to exclude a free and independent media as a requirement for good governance in its APRM was probably the state of media freedom in Africa. Most countries have ‘insult laws’ and these prevent a media from carrying out a free and independent role. Thus such a requirement would disqualify most countries in Africa from participating in the ‘good political governance’ section of the APRM and that would have seriously inhibited if not collapsed the project.

Further discussion of this issue is carried in the section below dealing with the World Association of Newspapers (WAN) Congress in Cape Town in June 2007.

Weaknesses in the questionnaire related to the media

The approach of the New Partnership for Africa's Development (Nepad) Secretariat to the issue and the documentation reflects denial of the above protocols. Approaches to rectify this omission were made to former Mozambican President Joaquim Chissano when he headed the AU and President Thabo Mbeki when he was in that position, to Professor Wiseman Nkuhlu when he headed the Nepad Secretariat and other officials, but all have ignored the issue.

In light of the above protocols, it is surprising that the APRM makes no specific reference in the criteria for good governance to a role for the media. The criteria as laid down in the Declaration on Democracy, Political, Economic and Corporate Governance (Section 14) sets out the four prime requirements which in the AU's view constitute good governance (referred to above).

This follows Section 13 'in support of democracy and the democratic process', which deals with constitutions reflecting the democratic ethos, promotion of political representation, credible electoral administrations in free and fair political environments and adherence to AU principles promoting democracy, while heightening awareness of the African Charter on Human and Peoples' Rights.

These are all excellent and highly important requirements for a country aspiring to good governance credentials. But they are not enough. There is no requirement for a country to foster a free and independent media.

The member states of the AU should be aware of this. When the questionnaire for the APRM was being devised there was a requirement for a free and independent media included in the good governance criteria but this disappeared without explanation shortly before the questionnaire was published.

In July 2006, then-United Nations Secretary-General Kofi Annan spelled out to the AU heads of state in Addis Ababa his criteria for good governance. He repeated the AU list but added, pointedly, the requirement for 'a free and independent media'.

There was not a flicker of responsiveness from the heads of state. Not one of them appeared to note that this was a glaring omission from the AU Declaration and the criteria for APRM good governance. It was as if, to a man, they were studiously avoiding having to acknowledge that the media has a uniquely important role to play in democratic good governance.

Throughout the many pages of the declaration and its associated documentation, the media features only once, in a section devoted to the promotion of human rights, where the states agree to 'ensure "responsible" free expression, inclusive of the freedom of the press'.

The International Press Institute in its criticism of Nepad dismissed this clause, noting that it was not specific to good governance and that the 'responsible' constraint is 'a term which is often used to limit media freedom'.

Until now many of us in media organisations have been striving to have the good governance criteria extended to include this important requirement, but without success.

The questionnaire is seriously lacking in questions relating to the operations of the media and whether they are free and independent. It starts with the omission of any reference to 'the promotion of a freedom of expression and a free and independent press' in the solemn list of undertakings in the Definitions under Section 1 of the questionnaire – 'Democracy and Political Governance'. In rectifying that omission, the undertaking to promote a free and independent media should be placed high up in that section under the reference to the liberty of the individual.

The questionnaire is deficient in failing to require information about a country's attitudes to the codes and standards. It also fails to question countries on their attitudes and conduct towards the media, the legislative frameworks in which the media operate or the deficiencies of the media.

In Annexure A I have outlined how the questionnaire may be improved to accommodate searching questions on a country's treatment of the media and its approach to media freedom issues, all of which are lacking from the current questionnaire. These proposals define the omissions and weaknesses of the questionnaire. A major complaint is the decision to allow countries to abbreviate the questionnaire. That produces a selective approach which can compromise the assessment.

It should be pointed out that the questionnaire is related to the Memorandum of Understanding of the Peer Review Mechanism which was ratified by African leaders in outlining requirements for good governance. It makes no reference to the pivotal role of a free and independent media that is crucially essential for the achievement of good governance. Exclusion of this criterion for good democratic governance poses the danger that authoritarian states could achieve an APRM good governance 'pass rating' relatively easily.

Let us examine the extent to which media issues are covered in the reports from Ghana, Kenya, Rwanda and South Africa. This examination shows that none of these countries recognises the role of a free and independent media as an essential factor in maintaining good democratic governance in a country through its watchdog role, though Kenya makes a reference to the effectiveness of the press after whistle-blowers have highlighted corruption. They all recognise the role of the media in spreading information about the APRM but none of them examined the normal functions of the media in keeping the public informed or the legal and other obstacles inhibiting the media and the need for these to be scrapped.

It is remarkable to note the disproportionate amount of space devoted by the APRM to women and children and other issues, *important as they are*, against the minimal attention paid to the media and its key role in promoting good governance.

Perhaps this is not to be wondered at, given the APRM's avoidance of the media issue, its failure to list the role of a free and independent media as an essential requirement for assessing good political and democratic governance and the cursory attention paid to media freedom in its documentation, such as the guides to the APRM process and the questionnaire.

Following are the examinations of the extent to which media issues are covered in the Country Review Reports from South Africa, Ghana, Kenya and Rwanda.

South Africa

Reference to the media in the report is meagre and relates mainly to its role as a purveyor of news and information about the Peer Review process with singular mentions that it is 'very vibrant' or that there is mutual suspicion between it and the authorities. There is also a reference to the media having been consulted during the country's self-assessment process.

However, despite that consultation and the fact that submissions to the National Governing Council (NGC) were presented by the South African National Editors' Forum and the South African chapter of the Media Institute of Southern Africa (Misa), the latter being accorded the status of a research partner, none of that consultation was reflected in the report

Both organisations made vigorous representations about the list of laws left as a legacy by the apartheid and previous regimes, which make serious inroads on media freedom. Both organisations stressed that the media had been trying for more than a decade to engage with government in discussions about amending or scrapping these laws because they conflict with the Constitution, but this was not acknowledged by the NGC and was ignored in the report.

The lack of interest in the media as a key component of good governance or in promoting its freedom and independence is illustrated by the report's omission of any reference to the media in its listing of the 'nine key objectives' in the political governance thematic area. It listed:

1. Prevent and reduce intra- and inter-country conflicts.
2. Constitutional democracy, including periodic political competition and opportunity for choice, the rule of law, a Bill of Rights and the supremacy of the constitution are firmly established in the constitution.
3. Promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments.
4. Uphold the separation of powers including the protection of the independence of the judiciary and of an effective parliament.

5. Ensure accountable, efficient and effective public office holders and civil servants.
6. Fighting corruption in the political sphere.
7. Promotion and protection of the rights of women.
8. Promotion and protection of the rights of the child and young persons.
9. Promotion and protection of the rights of vulnerable groups, including displaced persons and refugees.

This should not be surprising when the report states that: 'The mandate of the APRM is to ensure that the policies and practices of participating countries conform to the values, principles, codes and standards enshrined in the Nepad Declaration on Democracy, Political, Economic and Corporate Governance. This commonly agreed-to instrument for self-monitoring has at its epicentre the dissemination of best practices and the rectification of underlying deficiencies in governance and socio-economic development processes among AU member states. The framework is aimed at encouraging and building responsible leadership through a self-assessment process, constructive peer dialogue, and sharing of information and common experiences in order to reinforce successful and exemplary practices among African countries.'

That Declaration touches on media freedom almost in passing but does not recognise the key role of the media as a watchdog of democracy or, indeed, spell out any role for the media in observance of good governance.

On the contrary, probably because of government sensitivity about corruption especially among civil servants, the APR Panel recommends a limitation on media freedom by requiring that reports of corruption may require sources of information to be 'verifiable', which would limit the use of unidentified sources. The recommendation states that 'South Africa engage with the media to conduct their reporting, discussions and debates on the issues of corruption based on factual, objective or verifiable sources of information'. There is the further suggestion from which the media would recoil that the monitoring institution for this activity should be the Government Communication and Information System.

The report emphasises the constitutional freedoms in the South African Constitution, which has become 'the bedrock of the country's governance and development', but fails to specifically mention media freedom. It states that the Constitution is supported by well-established democratic institutions and a 'very vibrant media and civil society'.

Ghana

As with South Africa, Ghana does not recognise the media as being a key component of mechanisms to maintain good political governance. The report shows a degree of sensitivity to the media but in its detailing of the codes that the country has signed there is no reference to a code dealing with the maintenance of media freedom and independence. It refers vaguely at one point to a partnership between government, the media and the press but does not spell out what the partnership would tackle and achieve.

One of the recommendations made is that the country signs the amendments to the Constitutive Act of the African Union of 2003 but it is not indicated whether any of these relate to media freedom.

The Country Review Report does refer to an informative role for the media, stating that there should be a free flow of information and access to publicly owned and controlled media and press so that the public is adequately informed about public issues and policy options, It also refers to the constitutional human rights provision for the right to free speech and expression and to access to information.

It also calls for the government to facilitate the enactment of an access to information bill to deepen freedom of expression and information.

Ghana identifies a number of items making up the 'pillars of democratic governance' which include the enjoyment of human rights but there is no reference to the role of a free press.

Its Programme of Action under Requirements for Good Democratic Governance refers to a lack of media specialisation in investigative reporting and proposes the setting up of specialist desks in media houses and specialist training.

Another proposal is for broadcast frequency allocation to be speeded up.

Kenya

Though there is no recognition that the media should play a central role in maintaining good governance, Kenya's Country Review Report recognises a role for the media in governance.

The Report describes the local media as an effective 'whistle blower' for corruption cases as they have played an important role in identifying, investigating and reporting on bad governance practices. Although the country's Self-Assessment Report notes that there is still an element of sensationalism in the press, it recognises that the media has an important role to play in the improvement of governance in the country and that the media needs an enabling environment to carry out this role.

Though the country's report refers to the suppression of the media during the one-party state period, it discusses its subsequent resurrection as one of the country's strengths. Under this heading it refers to a vibrant and diverse civil society including religious bodies, non-governmental organisations and the media – both print and electronic.

The Country Review Mission had this to say: While it noted the vibrancy, openness and diversity of civil society and the media in Kenya – which were specific strengths – it viewed a report of a raid by state agents on a section of the media on 2 March 2006 with concern about the freedom of the press. This raid was undertaken in accordance with the Criminal Code, which allowed state security officials to 'legally' intimidate media practitioners. In addition, existing media policy requires strengthening if the interests of both the media practitioners and other stakeholders are to be effectively protected and assured.

The report is confusing because it varies from references to repression of the media to the country having a long tradition of an open society which is reflected in freedom of the press being used to maximum advantage.

Certain codes have been signed, among them the UN Charter and the African Charter on Human and Peoples' Rights, but some of the codes have not been enacted in local legislation and where they have been they are not enforced.

Its recommendations are also contradictory. One recommendation is that the government should remove all forms of discrimination. Yet it also recommends that the Media Council and other media regulatory bodies be legally empowered to sanction 'irresponsible' media organisations and professionals.

The government's response to this shows some exasperation with the inability of the press to make up its mind on media regulation. The government stated that it appreciates the recommendation on the need to balance freedom of the press with high standards of journalistic professionalism.

At the moment, Kenyans are in the middle of an unprecedented national debate on the most appropriate legislation for the media industry that guarantees press freedom, self-regulation and sanctions against unprofessional and socially-destructive reporting. A draft media bill and a proposed information and communications technology bill have been the subject of many stakeholder debates that have produced a divided opinion even within Kenya media. There are proposals for a regulatory and independent national media council. Once consensus is achieved, the government will table revised versions of these bills for debate in Parliament. This is expected to improve professionalism, self-regulation and the relationship between the media and government.

Another recommendation is that the Parliamentary Commission is encouraged to set up an information desk and other coordinating mechanisms to facilitate a mutually beneficial engagement between Parliament, the media and the public in general.

It also calls for a freedom of information law and in its Programme of Action requests the promotion of responsible media, to be achieved by having a dialogue with media owners and by a regulatory mechanism which would place a sanction on irresponsibility.

Rwanda

Given Rwanda's history of genocide and the use of the media in the killings – seemingly mainly by state officials masquerading as journalists but which may have included some journalists – there is considerable wariness about media freedom. There was no recognition of the importance of a free and independent media as a key factor

in promoting good governance, though the traditional reporting role of the media in spreading information was acknowledged on many occasions.

The report states that Rwanda is making progress with freedom of expression, of the press and information and association, respectively. For example, a new press law was established in 2003, and a High Council of the Press (HCP) was set up to authorise and approve various permits, including one for starting a private radio station. It has not been possible to confirm whether freedom of expression is being promoted or undermined by the regulatory regime supervised by the HCP. This would need an opinion survey on press freedoms in Rwanda.

The Country Review Mission confirmed that the most important outstanding problems Rwanda had with regional and international standards and codes on democracy and good political governance were: (a) tardiness in acceding to them; (b) ensuring timely reporting on implementation; and (c) inadequate domestication. For example, Rwanda was until recently not up to date with its reporting obligations under the African Charter on Human and Peoples' Rights.

The report submitted in the 2004 session of the African Commission consolidated the reports previously owed to the regional human rights oversight body.

Another issue discussed in detail during the Review Mission's activities was the limited extent to which Rwanda had actually implemented the international conventions and protocols to which the country had already acceded.

The Mission advised the Rwandan government to:

- Adapt and harmonise its domestic laws to be consistent with international commitments, while giving due attention to its own realities.
- Set up an inter-ministerial structure to co-ordinate actions to enhance the rights of its citizens.

Expanding on the approach to the media in Rwanda, the Country Self-Assessment Report on Civil and Political Rights stated that Articles 33, 34 and 35 of the Rwandan Constitution guarantee freedom of expression, of the press and information, and of association, respectively. A new press law was put into place in 2003 and the HCP was set up; its functions include the authorisation and approval of various permits, including one for starting a private radio station. The state has also allowed more newspapers to operate.

The state licensed six private radio stations. The legacy of the genocide and especially the negative role the media played continue to inform the state's caution on press freedom. The Country Review Mission confirmed during its visit that members of the Council are drawn from media houses and associations of Rwandan journalists. It was not possible to confirm whether freedom of expression is being promoted or undermined by the regulatory regime supervised by the HCP. This would need an opinion survey on press freedom in Rwanda.

The composition of the HCP appears to be inclusive in its membership and also encourages participation from stakeholders of the media, including journalists. While the HCP works with individual journalists and media houses, it was not clear whether there was a strong and independent professional association of the media that can serve as a counterweight to the HCP. The Mission did not get an opportunity to meet with the journalists' association in Rwanda and had no evidence to prove that such an association does exist.

The emergence of press freedom in Rwanda continues to be undermined by the absence of well-trained and professionally experienced journalists who can provide a counterweight to the HCP. Self-censorship, lack of adequate finances and the absence of the culture of reading are also impediments to the emergence of press freedom in Rwanda. Given these factors, a vibrant press will take time to evolve.

Among the recommendations that were made was the promotion of the development and the participation of civil society and the media to ensure accountable, efficient and effective public office holders and civil servants. In the Corporate Governance section the promotion of more financial and economic journalists was urged.

The report also emphasised the role of the investigative media in combating corruption, white-collar crime, insider trading and money laundering. Indeed, the report refers to measures that have been taken to combat these crimes and the need for quality investigative financial journalism in reporting economic crimes and violation of ethics.

The Mission also refers to the need for the media to publish monetary policy and spread health awareness.

One of the over-arching issues identified is the removal of restrictions on political rights and freedoms and consultation with the media on issues. This should have a positive effect on media freedom.

An overall impression gained from the examination is that none of the countries recognise the key role of the media to hold law-makers in the legislature and the executive arm of government – from the president downwards – accountable to the public.

WAN and the APRM

The World Association of Newspapers (WAN), which has a membership of 16 000 publications throughout the world, held its annual conference in Cape Town on 3-6 June 2007 and the 1 600 delegates present adopted a suggestion made by this author that they should issue a Declaration of Table Mountain as a centrepiece of the conference.

The Declaration calls for the abolition of ‘insult’ and criminal defamation laws in Africa – some 48 of the continent’s 53 countries have them and make brutal use of them – and also to review restrictive media legislation in their countries with a view to either scrapping or amending it to remove the restrictions.

The Declaration will be presented to United Nations Secretary General Ban Ki-Moon with the request that it be presented to the General Assembly and to Unesco Director-General Konchiro Matsuura, asking that it be placed before the General Conference and to AU Commission Chairperson Alpha Oumar Konare, requesting that it be distributed to all members of the AU and endorsed by the organisation at its next summit meeting of heads of state.

It records that in the five months leading up to the Cape Town congress, 229 editors, reporters, journalists, broadcasters, bloggers and on-line editors in 27 African countries were harassed, detained and/or imprisoned under those and similar laws.

The Declaration follows the Declaration of Windhoek issued in the capital of Namibia 16 years ago on 3 May 1991. When the UN adopted that Declaration two years later its anniversary became World Press Freedom Day.

The Declaration of Table Mountain was announced by WAN President Gavin O’Reilly, chief operating officer of Independent News and Media Ltd, in his opening speech in the presence of South Africa’s President Thabo Mbeki.

Mbeki, in his speech formally opening the congress, referred to the ‘tussle between media freedom and governance’ and said, ‘There are some countries on our continent where journalists are in prison and this is worrying for all of us’.

Mbeki, who has always upheld the media freedom clauses in the South African Constitution, said media freedom was of special interest to organisations such as the AU and the African Editors’ Forum, which had planned a number of initiatives to bolster this freedom on the continent.

These initiatives included collective debates between political leaders and African editors, the first of which was expected to take place in Accra, Ghana, in July but was postponed. ‘The problem of media freedom around the continent is an important one,’ Mbeki said.

The Table Mountain Declaration focuses a searchlight on the AU’s Peer Review Mechanism as part of the Nepad programme and the exclusion of the fostering of a free and independent press as a key requirement in the APRM assessment of ‘good governance’ in the countries of the continent.

O’Reilly called on Mbeki to help remove some key obstacles to press freedom in Africa where ‘the daily persecution and harassment of the free press must cease’.

He went on to say that ‘we are particularly grieved’ by the exclusion of the fostering of a free and independent press as a key requirement – ‘as indeed it must be’ – in the assessment of good governance, which drew the response from Mbeki that ‘it was an oversight’. Mbeki added, ‘I was surprised to hear that; it’s not deliberate that it’s not there.’

He said he would take this up with his colleagues in the AU and at the historic debate – ‘a new kind of dialogue’ – between the five presidents and editors that is now to take place at another meeting of AU heads of state. ‘We should all of us be sensitive to this problem and act on it and not merely make good speeches,’ he said.

My comment at the time was that Mbeki will have an uphill battle. Those among the 48 states where 'insult laws' exist who volunteer for the AU Peer Review process are unlikely to get to first base if a requirement for the fostering of a free and independent press is added to the four existing criteria for 'good governance'.

'Insult laws' vary from country to country but the common theme is the protection of presidents, prime ministers and parliamentarians from criticism which 'brings their good name into disrepute'. It frequently extends to the heads of the defence force and police and often to all civil servants, foreign diplomats and to the country's flag and name, the dignity of parliament and the good name of state institutions.

O'Reilly called on African governments to release jailed journalists, abolish draconian press laws and recognise the importance of press freedom for economic, political and social development.

The Declaration stated: 'In country after country, the African press is crippled by a panoply of repressive measures, from jailing and persecution of journalists to the widespread scourge of "insult" laws and criminal defamation which are used, ruthlessly, by governments to prevent critical appraisal of their performances and to deprive the public from information about their misdemeanours.'

But O'Reilly also focused on South Africa. He referred to the anti-press legislation contained in apartheid-era laws which the South African press have for more than a decade requested the government to review and repeal or amend. He called on Mbeki to repeal them.

He also spoke of the eight months of media protests against the Films and Publications Amendment Bill which, if not amended, will impose pre-publication censorship on newspapers and news broadcasters.

He also urged Mbeki to use his influence to curb 'flagrant abuses of freedom' in Zimbabwe. 'Though conscious that it is a sovereign state, we hope, Mr President, that you will bring your considerable influence and abiding sense of justice to do all in your power to help to rectify the flagrant abuses of freedom that exist in that country.'

Zimbabwean President Robert Mugabe saw fit to discount any legitimate commentary from the international community but 'we'd hope that a fellow African nation like South Africa can actively encourage real progress and bring normalcy and true liberty to that country', O'Reilly said.

Annexure A: Suggested revisions of the APRM Questionnaire in relation to press freedom

The need for the questionnaire to include references to press freedom is of extreme importance in Africa, where far too many countries maintain media-restrictive laws. The most inhibiting of such laws are the so-called 'insult' and criminal defamation laws which are used by heads of state and governments to prevent critical reporting and commentary on their conduct. Thus a request that questions relating to the status and conduct of the media must be included in the questionnaire.

Following are the detailed changes in the questionnaire:

A reference to 'freedom of expression and a free and independent press' should be included in the Definitions under Section 1 – 'Democracy and Good Political Governance'. It should be the third point in that solemn list of undertakings following on to

- The rule of law
- The equality of all before the law and the liberty of the individual.

Additions elaborating on that simply stated objective should be placed in other parts of the questionnaire and a list of those proposed changes are added to this statement. Those additions would flow naturally from the amendment of the section, 'A Guaranteed Framework of Equal Citizen Rights', which appears under the Introduction.

The amendment envisaged is the addition of clause 1.1.5 after 1.1.4, which should read:

'1.1.5 Another critical issue is the fostering of the right to freedom of expression and of a free and independent media which will enable citizens to exercise their right to freedom of expression in a meaningful and effective manner. The media plays a critical role as a civil society watchdog over government, officials and other key social players, promoting accountability and serving as a powerful instrument in the fight against corruption. Protection for the right to freedom of expression is also a key underpinning of the indicators for this objective, including the concept that state media are able to conduct their operations in a free and independent manner and with minimum interference from the state (all objectives).'

Add the following under Item 2 – 'Standards and Codes' (Page 7)

Under 2.1 'International Instruments and Standards' (as item 7 after 'Declaration of the Rights and Responsibility of Individual, Groups etc...')

- The Windhoek Declaration on the Promotion of an Independent and Pluralistic African Press adopted unanimously by the General Conference of Unesco in 1991. The United Nations officially proclaimed the day on which the declaration was formulated (3 May) as World Press Freedom Day in 1993 (all objectives).

Under 2.2 'Regional Instruments and Standards' (as items three and four immediately below The African Charter)

Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights in Banjul, The Gambia, at its 32nd Ordinary Session from October 17-23, 2002 (all objectives).

- The African Charter on Broadcasting adopted by an international conference of Unesco held from 3-5 May in Windhoek, Namibia, 2001, entitled 'The Windhoek Conference – Ten Years On: Assessment, Challenges and Prospects' and later endorsed by the African Commission on Human and People's Rights (all objectives).

Under 3 Questions Relating to Standards and Codes (What measures has the country taken to sign, ratify, adopt and comply with these standards?)

Add to Indicators

- (v) List laws and policies that are in conflict with the codes and standards and, in particular, with respect to freedom of expression and freedom of the media.

Under 5 Questions relating to Objectives ('What are the recent or on-going conflicts in your country and the sources of these?')

Add the following to Indicators (i)

Demonstrations of public protest which have escalated into violence

- Operations of the media

Add the following to Indicators after (ii)

- (iii) Has any action been taken against the media (or efforts made to influence it) in relation to the prevention of inter-state or intra-state conflict?

Add the following to Indicators after (iii)

- (iv) Has any attempt been made to derogate from the rights of freedom of expression, assembly and protest by invoking a state of emergency, either in accordance with international instruments or otherwise?

Under Objective Two, Question 1 (In your judgement, does the political system as practised in your country allow for free and fair competition for power and the promotion of democratic governance?)

Add the following

- (viii) What special rules apply to the conduct of elections in relation to the media (print, broadcast and internet)? Outline any provisions or policies that exist for the broadcast media in relation to the allocation of free airtime (advertising) to political parties on the one hand, and the treatment of election news and views within news bulletins and current affairs programmes on the other hand. Are there any monitoring institutions or processes that ensure equitable treatment of political parties by the media?
- (ix) What charges have been brought against broadcast and print media and internet service providers and users for offending against election rules or in relation to election coverage in the last 5-10 years?
- (x) What steps are taken to ensure that government facilities and resources are not used to favour or prejudice any candidate or political party, including state-owned media?

Under Objective 3, remove 'Freedom of Speech' from the indicators under Question 1 (i) and insert New Question 3:

Question 3: What measures have been put in place to promote and protect freedom of expression and freedom of the media?

- (i) Provide evidence of constitutional and legislative provisions protecting freedom of expression and the freedom and independence of the media (print, broadcast and internet).
- (ii) Is there an access to information (freedom of information) law guaranteeing the right of access to information held by public bodies and other institutions providing public services?
- (iii) What laws restrict the content of what may be published or broadcast (please provide specific references to criminal defamation and 'insult laws'¹) and actions requiring journalists to disclose confidential sources of information? How many cases have there been under these laws against media workers and others in the last 5-10 years and has anyone been jailed under them (please provide details, including the outcome)?
- (iv) What regulatory rules (registration, accreditation, licensing) apply, respectively, to journalists, print media outlets, broadcasters and internet service providers and users? Are there statutory oversight mechanisms? What steps have been taken to ensure that oversight bodies are independent? What self-regulatory bodies exist for the media? Does an effective dispute resolution mechanism, outside of the court system, exist for complaints against the media?
- (v) Does the state provide any financial or other subsidies to the media (for example, to cover state or court activities, the subsidising of public or community media or the provision of subsidised postal or communications facilities)?
- (vi) Are there rules relating to foreign ownership of the media or undue concentration of media ownership?
- (vii) Have there been complaints about the improper use of the media by owners and publishers or improper interference with editorial conduct by commercial interests?
- (viii) What journalists' and media associations exist and are they independent?
- (iv) What actions by the media detract from or impede good governance?

It would be admirable if a clause in the questionnaire could ask whether 'All member governments of the

African Union submitting themselves for Peer Review would commit themselves to a comprehensive review of their ‘insult laws’ and laws of criminal defamation – and other laws that criminalise content – with a view to their removal in their entirety?’ An ancillary question would be whether agreement with this commitment would be followed within six months by the institution of a comprehensive review of all law with the intention of eliminating those laws that offend against democratic principles and freedom of expression.

Endnotes

1. ‘Insult laws’ or ‘contempt laws’ are terms used to describe criminal legislation which ostensibly is designed to protect the reputation and dignity of kings, presidents, prime ministers and, depending on the country, other state dignitaries and heads of police, military and other departments, low-ranking civil servants and foreign diplomats. The term derives from the French press law of 1881 which made ‘insult to the president of the republic’ a crime. These laws, which criminalise the publication of certain news and views, provide for sentences ranging from fines to lengthy prison terms.



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