

## **Media and ‘Good Governance’ – A key feature of APRM glossed over**

by Raymond Louw

The authors of the African Peer Review Mechanism say that a key feature, indeed the core feature, of the process is the assessment of good governance. Through the encouragement of good governance practices the APRM believes that countries will attain political stability, high economic growth, sustainable development and economic integration.

The APRM then spells out the criteria underpinning the process: the need for providing an accountable, efficient and effective civil service; ensuring an effective functioning of parliament, parliamentary committees and anti-corruption bodies; and 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.

It is noteworthy that no democracy flourishes in the absence of a free and independent media. Indeed, it is accepted that democracy does not exist unless the media is free and independent. And countries recognise this. It is significant that one of the first things Germany did 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. Other democratic countries, among them South Africa since it joined the free world in 1994, also insist that the media be free. South Africa did so as a priority in its Constitution. It is worth remembering that in South Africa's Constitution the media is the only private institution to be accorded the right to operate freely. It should be noted that that right becomes a duty under Constitutional clauses 7 (2) -- The state must respect, protect, promote and fulfil the rights in the Bill of Rights -- and 8 (1) -- The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.

Early in its existence, the United Nations set the standard for freedom and its own good governance by adopting in December 1948 the Universal Declaration of Human Rights which contains Article 19, subsequently adopted throughout the free world by journalists and others who support freedom of expression as the definitive expression for freedom. It reads:

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.

There are other Western covenants and declarations which protect freedom of speech and freedom of the media, most in similar terms to Article 19, and all, including Article 19, have limitations which may be applied in certain circumstances.

Among these are the American Convention on Human Rights, the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

A vigilant protector of media freedom has been the European Court on Human Rights which has declared that press freedom requires particular protection to enable the press 'to play its vital role as a public watchdog' and 'to impart information and ideas on matters of public interest'.

In Africa, three important declarations have set values on press freedom. The first was 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 Windhoek Declaration which has been adopted by the United Nations and Unesco and has had an enormous influence in Africa does not have a limitation clause.

The second is the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa which, after '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', states in its preamble that signatories are 'convinced that laws and customs that repress freedom of expression are a disservice to society'.

Article 1 guarantees freedom of expression which is expressed in sub-clause 1 as 'Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally or in print ... is a fundamental and inalienable human right and an indispensable component of democracy'.

Article II lays down that there should be no interference with Freedom of Expression, stating in sub-clause 1 that 'No one shall be subject to arbitrary interference with his or her freedom of expression' but in sub-clause 2 it introduces 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'.

The third protocol is the African Charter on Broadcasting, a spinoff of the Windhoek Declaration adopted 10 years later.

In light of the above 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) lays down four prime requirements which in the African Union's view constitute good governance. These are that countries:

- Adopt clear codes, standards and indicators of good governance;
- Maintain an accountable, efficient and effective civil service;

- Ensure the effective functioning of parliaments and other accountability institutions, including parliamentary committees and anti-corruption bodies; and
- Ensure the independence of the judicial system to prevent abuse of power and corruption.

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 African Union 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.

A free and independent media in essence is the promotion of freedom of expression of a free people (through the Constitution and laws, regulation and practice) and without it 'good governance' is not possible and democracy cannot flourish. No matter how much a country uses the term 'democratic' in its title or in a description of itself, unless it promotes or tolerates 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.

The member states of the African Union 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 2005, United Nations Secretary-General Kofi Annan spelled out to the African Union 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.

The Nepad secretariat's approach to the issue and the documentation reflects this denial. Approaches to rectify this omission have been made to former Mozambican President Joaquim Chissano when he headed the African Union 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.

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 (IPI) 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.

This brings me to the view that perhaps we should concentrate on the reference to media freedom under the Human Rights clause.

So, therefore, instead of lamenting the omission of the media requirement in the specific good governance clause and expending energy on this, we should expand on the requirement for a free press under the human rights criteria. We should insist that a country cannot demonstrate its adherence to good governance unless it supports and practices high standards of human rights.

In line with this we should question the qualification that freedom of expression should be 'responsible' pointing out the IPI observation that the term is frequently used to limit freedom of expression and that the question raised by the term is 'who decides what is 'responsible'?' Journalists reject the term because it implies a form of self censorship where they are required to decide whether in reporting certain news items they are acting 'responsibly'. Such conduct also implies a standard of 'responsibility' that will be acceptable to governments and the authorities. To apply such a standard, by its very nature, means that certain items of news should not be published. Journalists prefer the term 'acting professionally' which means publishing information that is accurate and in the public interest.

So we should brush aside the term 'responsible' and concentrate on how free the media is to operate in a country undergoing peer review; what legislative barriers there are; how free is access to information and what impediments are there to prevent the dissemination of information.

The specific questions to be asked should relate to the government's attitude to, and the operations of, the media and the legal and social environment in which it operates as the presence of a free and independent press is essential for good governance.

The media plays a critical role as a civil society watchdog over the 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 a key underpinning of accountability and includes the concept that national media should be able to conduct their operations in a free and independent manner and with minimum interference or control by the state.

Though South Africa professes to uphold Constitutional freedom of the media, there are frequent breaches, one of the more telling being the laws which carried over from the apartheid regime and which have not been repealed or amended to remove the media restrictions despite repeated requests for more than a decade.

Of the listed legislation incompatible with the Constitution, the Key Points Act is the law most commonly used by the authorities to restrict the media. The law can be used to prevent media access to, or the picturing of, strategic institutions such as police stations, prisons, broadcasting and rail stations -- all unidentified in the legislation. However,

generally under protest from the media, the authorities withdraw the threat of its use. There is one exception: it is used to prevent photographers from taking pictures of the Presidential jet and its interior, according to information supplied by journalists.

A law which journalists wish urgently to have amended by a clause which will give them a 'just excuse' (media freedom) not to comply with it is Section 205 of the Criminal Procedure Act which gives the police the power to bring before a magistrate any person suspected of having information about a crime or a suspected crime. This legislation was used notoriously during the apartheid era to try to force journalists to disclose their confidential sources of information. Some journalists went to jail rather than disclose.

Journalists have composed an argument that the use of the Act against them compromises them especially when they have given undertakings not to disclose sources.

Another cause for complaint is the removal from long-occupied offices close to the parliamentary Press Gallery in the National Assembly of the whole parliamentary press corps to a building outside parliament but within the parliamentary precincts, which journalists have protested against on the grounds that their ability to discuss issues with parliamentarians encountered in the lobbies and passages of parliament are seriously impeded.

In relation to on-going conflicts arising from public protest -- township dwellers on the outskirts of cities and towns have publicly protested at the lack of service by their municipal administrations, alleging corruption, nepotism, ignorance and inefficiency -- both broadcast and print media have been restricted by the authorities on occasion while covering these events. The media has protested the illegality of police conduct on such occasions and that it was an interference with the freedom of the media and the public's right to know.

In December 2005, the police improperly barred journalists and the public from court proceedings on the grounds that they were 'confidential' when the former deputy president Jacob Zuma appeared on a rape charge. Protest statements were made and an official protest was directed to the Police Commissioner. The media do not believe the police acted in ignorance but in a deliberate attempt to censor journalists.

There have also been complaints against the state broadcaster for favouring the government in its news coverage, though the broadcaster has denied this. An incident that provoked widespread criticism of the South African Broadcasting Corporation (SABC) was its failure to report the booing of the state president at a function and the attempted stoning of an African National Congress (ANC) premier at a demonstration in KwaZulu-Natal. The impression gained was that these were attempts to censor the TV and radio news and, according to one SABC board member, interference by another board member in the conduct of the editorial.

Oversight mechanisms on the media in South Africa are self-regulatory -- the Broadcasting Complaints Commission and the Press Ombudsman and Appeals Committee. These two bodies resolve disputes outside the courts between broadcasters and viewers and listeners and between the print media and readers. Broadcasters and publications which voluntarily subscribe to the authority of these complaints mechanisms were excluded from the provisions of the Films and Publications Act under which films and

certain publications are regulated in terms of audience and ready availability. However, legislation has now been proposed to withdraw the exemption of the media from this Act which journalists fear will bring about censorship and other arduous situations physically impeding publication and broadcast. The media has protested vigorously.

The Promotion of Access to Information Act is in force to enable information to be supplied by public and some private bodies -- but the application of this legislation leaves much to be desired. Government departments are frequently reluctant to provide information in terms of the Act and delay handing it over. There are also indications that officials demand that questions -- which would normally be answered as part of the general question and answer process that occurs daily between media and government officials -- must be framed in terms of the Act which has the effect of delaying the supply of the information and possibly rendering it out of date. The law extends to private business where the information required is in the public interest or enables the person seeking the information to exercise any rights.

Other criticisms are that there is a strong sense that parliamentary committees are 'going through the motions' of consultation without actually taking note of the issues raised by people. This was especially apparent in a number of recent hearings related to media issues where media bodies felt that their representations were not heeded; insufficient time -- on occasion three weeks or even two weeks -- given between publication of draft legislation and the closing date for representations; the refusal of the police to supply meaningful and timely crime statistics under a ministerial moratorium; and refusal by some local authorities and officials to supply information to the media or certain journalists on the ground that media houses were biased against them and a similar refusal by some police officers to respond to reporters' questions.

A particular issue of complaint was the cutting of political correspondents' telephones by parliamentary authorities who also refused to allow messengers to deliver parliamentary documents to the journalists.

There is intermittent coverage of South Africa's peace-keeping operations and generally inadequate coverage of the deteriorating situation in Zimbabwe.

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## APPENDIX

### Questions relating to role of media in good governance assessment

#### Good Governance

Questions relating to the role of the media as a free and independent institution in a state practising good governance:

#### Standards and Codes

1. Which of the following Standards and Codes, both international and regional, does the country subscribe to?
  - a) The Windhoek Declaration on the Promotion of an Independent and Pluralistic African Press as adopted unanimously by the General Conference of UNESCO in 1991.
  - b) The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights.
  - c) The African Charter on Broadcasting adopted by an international conference of UNESCO held from May 3-5 in Windhoek, Namibia, 2001.
  - d) The Universal Declaration of Human and People's Rights adopted and proclaimed by the General Assembly of the United Nations on December 10 1948.
2. What measures has the country taken to sign, ratify, adopt and comply with these standards?
3. 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.

#### Inter-state or intra-state conflict

4. What are the recent or on-going conflicts in your country and the sources of these?
5. 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?

#### States of emergency

6. 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?

#### Free and fair elections

7. In your judgment, does the political system as practised in your country allow for free and fair competition for power and the promotion of democratic governance?
8. 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 contending 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.
9. Are there any monitoring institutions or processes that try to ensure equitable treatment of political parties by the media?

10. 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?
11. What steps are taken to ensure that government facilities and resources, including state-owned media, are not used to favour or prejudice any candidate or political party and do the media report on such incidents?

### **Promoting and protecting freedom of the media**

12. What measures have been put in place to promote and protect freedom of expression and freedom of the media? Provide evidence of constitutional and legislative provisions protecting freedom of expression and the freedom and independence of the media (print, broadcast and internet).

### **Access to Information\**

13. 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?
14. Is there an access to information (freedom of information) law guaranteeing the right of access to information held by private bodies and other institutions and what circumstances apply?

### **Restrictions on content such as ‘insult laws’; and sources disclosure**

15. What laws restrict the content of what may be published or broadcast (please provide specific references to criminal defamation and ‘insult laws’\* 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 outcomes)?

### **Regulatory rules such as registration, licensing**

16. What regulatory rules (registration, accreditation, licensing) apply, respectively, to journalists, print media outlets, broadcasters and internet service providers and users?

### **Oversight of journalistic practice**

17. 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?

### **Subsidies for the media from the state**

18. 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)?

### **Foreign ownership**

19. Are there rules relating to foreign ownership of the media or undue concentration of media ownership?

### **Improper internal manipulation of editorial**

20. Have there been complaints about the improper use of the media by owners and publishers or improper interference with editorial conduct by commercial interests?

### **Media institutions**

21. What journalists' and media associations exist and are they independent?

### **Media conduct that impedes good governance**

22. What actions by the media detract from or impede good governance?

### **Government consultation processes**

23. How thorough and effective is government consultation processes such as through parliamentary committee hearings, workshops, task forces' set up to investigate issues and public meetings?

24. Is sufficient time given between publication of a draft Bill and the closure of deadline dates, i.e. final date for representations.

### **Other forms of restrictive measures against the media**

25. Have local authorities and similar officials in other aspects of the civil service restricted the release of information to journalists?

### **Media failures -- slanting of news, pursuing publishers personal goals, commercial interests interfering with news coverage**

26. What is the record under this heading of mainstream, regional and local papers?