

Agnès Callamard

Accountability, Transparency, and Freedom of Expression in Africa

IN 2008, ARTICLE 19, THE INTERNATIONAL ORGANIZATION dedicated to free expression, celebrated its twentieth anniversary by publishing research that reviewed the last 20 years' transformation in the fields of freedom of expression, the press, and access to information (ARTICLE 19 2008). The review found that the changes were dramatic, especially in the areas of legal protection for freedom of expression and technological development. This held true for Africa, also. It concluded, however, that the last 20 years had also been characterized by many unfulfilled promises and that, since 2001, year after year, "freedom of expression, the fundamental guarantor of human rights, has been *weakened and eroded in emerging and older democracies alike*" (ARTICLE 19 2008: 12-13).

Two years on and the global setback for human rights has continued (Freedom House 2010), suggesting that the trend identified in the early years of the twenty-first century is not anecdotal or incidental but entrenched and historical in nature. Not unlike a genie no longer in the bottle, the forces unleashed in the aftermath of 9/11 and in financial quarters around the world have spread out to become part and parcel of the global political and economic landscape, including in Africa.

To explore this trend and its implications, this article will first introduce the relevant normative framework and set out the rela-

tionship between freedom of expression, including transparency, and accountability. It will then offer an overview of the current state of these issues in Africa, and identify the implications for stronger accountability.

This article will present the profound and real changes that took place in Africa, specifically in the areas of press freedom and free speech, particularly in the 1990s, but will argue that there remain much unfinished business and many unfulfilled promises, including stalled legal reform, limited media pluralism, and a lack of political will to move from the rhetoric of transparency to its reality. It is in this context that a global human rights recession has struck. This article will show that the observed global human rights setback applies with equal force to Africa. The setback has not necessarily been greater in Africa than elsewhere, but neither has it been less visible or less marked. In fact, in an environment characterized by weak political institutions and a nascent, and thus fragile democratization process, it is probable that this setback will take longer to reverse.

ACCOUNTABILITY, FREE EXPRESSION, AND TRANSPARENCY IN THE HUMAN RIGHTS FRAMEWORK

Accountability is a broad term underpinned by many different understandings and applications. From a human rights standpoint, accountability is often juxtaposed with other terms, such as responsibility, duties, or obligations, which are often used in reference to the state although increasingly to nonstate actors as well. Accountability serves similar purposes as do responsibility (and liability), including protecting the rule of law, and paving the way for compensation and satisfaction of victims. But it is also essential to the protection of democratic values (Curtin and Nollkaemper 2005: 9) and key to securing control of public power: “rulers generally dislike being held accountable. Yet they often have reasons to submit to accountability mechanisms. In a democratic or pluralistic system, accountability may be essential to maintaining public confidence. . . . But we can expect power holders to seek to avoid accountability when they can do so without jeopardizing

other goals. . . . To discuss accountability is to discuss power” (Keohane 2005: 2).

States can be made accountable through a wide range of measures: judicial mechanisms such as domestic constitutional and legal courts (including judicial review), and regional and international mechanisms (through regional courts or individual complaints procedures for UN bodies such as the Human Rights Committee); political means by way of voters and elections, and in parliamentary democracy, also through political parties, the media, and civil society: “Political accountability is an essential characteristic of democratic government in that it refers to the organization of public power in a democratic fashion, that is, in a way that makes the government answerable to the people. It goes hand in hand with good governance, which concerns the exercise of public power in the pursuit of the public good and justice for all” (van Gerven 2005: 229).

Whichever definition of accountability is adopted, there are a number of characteristics beyond discussion. It requires duty bearers and duty holders, a reporting process, a common understanding of what needs to be reported on or against, and consequences for the actions. To be made operational, accountability thus requires providing for the following five questions: 1) Who is accountable? 2) To whom? 3) For what? 4) How (mechanisms of reporting)? and 5) For which consequences?

When applied to states or governments, this operational definition thus becomes: 1) government officials are accountable (elected officials generally); 2) to the people of the country; 3) for abiding by the laws and the constitution and delivering policies in the public interest; 4) these officials are held accountable through elections and domestic, regional, or international law, but also through scrutiny exercised by the parliament, the public, civil society, and the media; 5) the ultimate consequence of a lack of accountability (perceived or real) may be legal (e.g., trials) or political (nonreelection).

Based on this approach, it is clear that state accountability cannot be exercised without a fully functioning parliament and free and fair

elections, all of which require respect for freedoms of association and expression, transparency, freedom of information, and freedom of assembly.

State accountability also requires a free and vibrant media able to investigate freely and without fear, report, question, and denounce. It further demands an independent civil society to foster voice and participation, and offer citizens a say in decisions and enhance pluralism.

The centrality of freedom of expression, including press freedom and transparency, to human rights, state accountability and democracy has been highlighted and recognized by international courts and bodies worldwide. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I), which states: “Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the United Nations is consecrated.” This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said (HRC 1998. para. 10.3) that “the right to freedom of expression is of paramount importance in any democratic society.” The European Court of Human Rights has recognized the vital role of freedom of expression as an underpinning of democracy (ECHR 1976, para. 49): “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”

The African Commission on Human and People’s Rights has emphasized with equal force the importance of freedom of expression and the role of the media to human rights and accountability. It has highlighted “the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms.”¹ It has also stressed 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.”

Freedom of Expression and Transparency: The African Perspective and Contribution

Freedom of expression, including the right to access and receive information, is a fundamental human right, central to achieving all human rights, individual freedoms, and meaningful electoral democracies. It not only increases a society's knowledge and provides a sound basis for participation within a society but it can also secure checks on state accountability and thus help to prevent the corruption that thrives on secrecy and closed political environments.

Freedom of expression is guaranteed under Article 19 of the Universal Declaration on Human Rights (UDHR), and also under more or less in similar terms by Article 19 of the International Covenant on Civil and Political Rights (ICCPR): "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."

In law and public policy, freedom of expression has been interpreted and understood as including two main dimensions: the right to express one's ideas and the right to receive information and ideas. Article 19 of the ICCPR sees no barrier or separation between the right to seek and receive and the right to impart information (with the former loosely associated with freedom of information and the later with freedom of expression): they are sides of the same coin, and most important, they need each other if a society is to be true to their underlying values and in order that they be fully realized. These rights cannot be divorced, conceptually or legally.

Freedom of expression, including access to information, is protected in all three regional human rights treaties: Article 10 of the European Convention on Human Rights (ECHR), Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and Peoples' Right.² The African Charter has been ratified by all 53 African states.

Under Article 9, the African Charter guarantees every individual the right to receive information and express and disseminate his/her

opinions *within the law*. This article is sometimes deemed to include a “claw-back clause”: if its use of the term “law” is interpreted to mean any domestic law regardless of its effect, state parties to the charter would be able to negate the rights conferred upon individuals by the charter.

Under international human rights standards, the right to freedom of expression may be restricted in order to protect the rights or reputation of others, and national security, public order (*ordre public*), or public health or morals, and provided it is “necessary in a democratic society” to do so and it is done by law. This formulation is found in both the ICCPR under Article 19, and in the European Convention on Human Rights. However, the limitations set forth by Article 9 of the African Charter are imprecise and overbroad and would have placed problematic restrictions on freedom of expression, had it not been for subsequent interpretations by the African Commission.

The African Commission on Human and People’s Rights (the African Commission) was established by virtue of Article 30 of the African Charter on Human and People’s Rights (the African Charter) with the specific mandate to promote human and people’s rights and ensure their protection in Africa. Complaints (commonly referred to as communications) can be submitted by individuals, NGOs, or state parties to the African Charter alleging that a state party has violated the rights contained therein.

Over the years, in response to these complaints, the commission has developed jurisprudence on human and people’s rights in general, and the right to freedom of expression, including its legitimate restrictions. The jurisprudence function of the African Commission is particularly important given that to date the African Court for Human Rights has not been functional. It has issued only one judgment since its establishment and this was an inadmissibility decision!

One of the key interpretations by the commission has been of the so-called claw-back clauses. Early on it ruled that this provision constituted a reference to international law (not domestic), meaning that the

only restrictions that can be enacted by the relevant national authorities are those consistent with state parties' international obligations.

In its very important decision, the commission noted that when in its defense a state claims that it acted in accordance with previously laid down domestic law, such laws should not override constitutional or international human rights standards; they must be consistent with the state's obligations under the charter: permitting state parties to construe charter provisions so that they could be limited or even negated by domestic laws would render the charter meaningless. According to Article 9 (2) of the charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedence over the international law of the charter would defeat the purpose of the rights and freedoms enshrined in the charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the charter must be in conformity with the provisions of the charter.³ The commission has also underlined that states could only impose necessary restrictions to rights protected by constitutional or international human rights instruments and that no situation warranted the wholesale violation of human rights.⁴

At its 32nd Ordinary Session held in Banjul, Gambia in October 2002, the African Commission adopted, by resolution, the Declaration of Principles on Freedom of Expression in Africa. The declaration is a result of the combined efforts of many stakeholders working on freedom of expression across the continent. It sets out important benchmarks and elaborates on the precise meaning and scope of the guarantees of freedom of expression laid down under Article 9 of the African Charter.

In particular, the Banjul Declaration states that "1. No one shall be subject to arbitrary interference with his or her freedom of expression. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a demo-

cratic society.” A similar formulation can be found in the European and American regional human rights treaties.⁵

One of the most important decisions of the African Commission was issued in 2004 when, at its 36th Ordinary Session in Dakar, Senegal, it established a Special Rapporteur of Freedom of Expression in Africa. At the 42nd Ordinary Session, held in Brazzaville, Republic of Congo, the commission renewed the mandate of the Special Rapporteur for two years and extended it to include “Access to Information.”

Freedom of expression, including freedom of the press, is also enshrined in New Partnership for Africa’s Development (NEPAD) Declaration on Democracy, which commits African governments to “ensure responsible freedom of expression, inclusive of freedom of the press.” Media freedom and diversity are among the standards considered by NEPAD’s peer review mechanism in assessing a country’s commitment to human rights and good governance.

Media Regulation under International Law and African Norms

Freedom of expression also includes freedom of the press, whose legitimate regulation presents specific challenges. The media is an attractive target for control owing to its power to influence public opinion by, for example, reporting critically on government policies and exposing corruption, dishonesty, and mismanagement. The temptation is large for governments to seek to transform the media’s role from that of a watchdog to a lapdog by making the work of independent or opposition journalists and publications illegal or impossible.

Article 2 of the ICCPR places an obligation on states to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that states are required not only to refrain from interfering with rights but are also required to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under a duty to ensure that citizens have access to diverse and reliable sources of information on topics of interest to them. A crucial aspect of this “positive

obligation” is the need to promote pluralism within, and ensure equal access of all to, the media.⁶

In order to promote pluralism and protect the right to freedom of expression, it is imperative that the media be permitted to operate independently of government control. This ensures that the media plays its role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest. This has important implications for media regulatory models.

The African Commission has emphasized that for the print media, self-regulation is the best system for promoting high standards in the media (African Declaration 2002: Principle IX). It has also ruled that the payment of prohibitive registration fees as precondition to the registration of newspapers was essentially a restriction on the publication of news media and a violation of freedom of expression.⁷

With regard to the broadcast media, the African Commission has stated that it may be more strictly regulated than print media in order to manage the limited available radio spectrum, but that this regulation should follow strict principles, including (Principle V):

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

Where self-regulation has demonstrably failed, a public authority may be entrusted with some limited aspects of media regulation, provided it does not function as a quasi-judicial organ and is independent of government control (“Declaration of Principles” 2002, Principle VII):

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

Transparency and the Right to Access Government-Held Information

Despite its importance, there is no consensus on a description of the concept of transparency and there are no legally binding international standards assessing transparency.

The international NGO Transparency International has defined transparency as “a principle that allows those affected by administrative decisions, business transactions or charitable work to know not only the basic facts and figures but also the mechanisms and processes. It is the duty of civil servants, managers, and trustees to act visibly, predictably and understandably.” For its part, the Organization for Economic Cooperation and Development (OECD) has argued that transparency consists in making relevant laws and regulations publicly available, notifying concerned parties when laws change, and ensuring uniform administration and application. Yet another approach to transparency emphasizes public consultation and participation. In spite of their differences, all definitions of transparency tend to highlight openness and availability of information, whether applied to trade, finance, markets, or governments.

Particularly important to transparency is thus the ability of everyone to access information held by public authorities or those working on their behalf, and more generally information of public interest. That ability is a human right backed by a number of international and regional standards and jurisprudence, and referred to as the right to information or freedom of information.

In recognition of the importance of Freedom of Information, Principle IV of the Declaration of Principles of Freedom of Expression in Africa states that:

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.

In April 2009, the European Court of Human Rights explicitly stipulated that Article 10 of the ECHR guarantees the “freedom to receive information” held by public authorities. The same year, the Committee of Ministers of the Council of Europe adopted the European Convention on Access to Official Documents, the first internationally binding instrument that obliges the state parties to guarantee the right to information held by public authorities to everyone, without discrimination on any ground. The European court also stressed that governments have an obligation “not to impede the flow of information” on matters of public concern.

The Inter-American Court of Human Rights recognized the right to information as implicit in the general guarantee of the right to freedom of expression in its decision of September 19, 2006 in the case of *Claude Reyes et al. v. Chile*. On August 7, 2008, the Inter-American Juridical Committee, an official body of the Organization of American States, adopted key principles governing the right to information, including recognition of access to information held by public bodies, as a fundamental human right.

In 2010, the Economic Community of West African States (ECOWAS) announced the development of a new protocol to establish regional legal standards for the Right to Information for the 15 countries in ECOWAS. Once the protocol is approved, ECOWAS will recommend that member states adopt legislation putting the standards into national law. To date, none of the countries have adopted comprehensive Right to Information laws. The new protocol will also complement the existing ECOWAS Protocol on Good Governance and Democracy, which reiterates principles of democracy and rule of law. A similar process may be under way in eastern Africa with the East Africa Community (EAC, including Kenya, Uganda, Tanzania, Rwanda, and Burundi), developing an East Africa Bill of Rights.

The growing international consensus that there is a fundamental right to access officially held information is further reflected in the number of opinions and statements made by United Nations and regional bodies.

The United Nations Special Rapporteur developed his commentary on freedom of information in his 2000 annual report to the Commission on Human Rights, noting the fundamental importance of this right not only to democracy and freedom, but also to the right to public participation and to the realization of the right to development (UN Special Rapporteur 2000).

In December 2004, the three special mandates on freedom of expression—the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression of the Organization of American States—issued a joint declaration that included the following statement (UN 2004):⁸ “the right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example, Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”

The African Special Rapporteur has commented on freedom of information on multiple occasions, making the adoption of bills on access to information one of the key priorities for the continent. She particularly stated with reference to the role of freedom of information with regard to accountability that, “while Freedom of Information derives its origins from and is interrelated with Freedom of Expression, it occupies a special place in the human rights family, in that without the transparency and accountability of public institutions which constitute a fundamental part of its core elements, the right to express and disseminate opinions for the purpose of ensuring good governance and strengthening democracy cannot be enjoyed in its totality.”⁹

PROGRESSES AND SETBACKS FOR STATE ACCOUNTABILITY IN AFRICA

The 1990s: Overall Progress Toward Greater Respect for Freedom of Expression

The first aspect to highlight is that with a few exceptions, there has been clear progress in the 1990s throughout most of Africa toward greater respect for freedom of expression, including freedom of the media.

This progress was particularly marked in the following areas:

- ▶ *Electoral politics*: The principle of competition for political power through multiparty elections has become the norm, replacing many one-party states and military dictatorships.
- ▶ *Constitutional recognition*: Constitutional protections of freedom of expression and the media are heeded and respected to a greater degree than was the case in the 1970s and 1980s (although a plethora of laws, some dating to the colonial period, are still on the statute books). Indeed, most African constitutions seek, to varying degrees, to protect freedom of expression and of the media.
- ▶ *Private ownership*: In the past the major means by which freedom of expression is exercised—the media—were often owned and controlled by non-democratic governments. In particular, broadcasting was almost always a state monopoly and private and community broadcasting were either restricted or simply not allowed. This is no longer the case. The dominance of state ownership across Africa's broadcasting sector has been loosened and privately-owned radio and television stations as well as community-owned media are emerging. Privately-owned print media have also developed and compete for readers and advertisers with state-owned and government-controlled newspapers. Countries in Africa without independent radio or television are now few and far between: Eritrea has neither independent radio nor independent TV, while Gambia, Mauritania, Guinea, and Ethiopia have no independent TV. Mali has a continental channel but it only relays

programs from other African TV outlets, while Nigeria has plenty of television outlets at the state level but the law does not allow them to have nationwide coverage.

- ▶ *Emerging media pluralism*: Media pluralism has led to the emergence not only of independent media outlets but also to avenues for critical voices with alternative viewpoints within society to express themselves. There has been a clear opening up of space for a diversity of voices as compared to the situation that prevailed before the 1990s, when the public sphere was restricted by the state and dominated by state-owned media (ARTICLE 19 2008).

There are examples of the media playing a key role in enhancing accountability and transparency throughout the continent. For instance, in Kenya it is the media that first reported the Goldenberg scandal (1990s) and the Anglo-Leasing scandal (2004). Similarly, it is investigative papers in Tanzania that brought to light an overpriced radar purchase by the state. In Uganda, it is the media that publicized the scandalous expense associated with the Commonwealth Heads of Governments Meeting, where state resources were pilfered (Maina 2010).

Private radio stations such as *Walfajiri* are playing an important role in helping the Senegalese people to learn about and participate in development issues and decisions. The key to *Walfajiri*'s success is its concentration on providing information in the Wolof language to the disadvantaged urban poor residing in Pikine, Guediawaye, Keur Massarr, Yemeul, and Rufisque. One particular weekly program entitled "Face the Citizenry" has enabled local communities to raise issues such as unemployment, poor housing conditions, flooding, and lack of sanitation directly with public officials, who are asked to respond by revealing what they are doing to tackle such issues. Some local research has shown that increasing media focus on delivering the people's Right to Information has resulted in more demands in the same area for social justice. The government of Senegal has also reacted by creating the National Agency for the Employment of Youths specifically to tackle the

issues raised by media programs, such as Walfajiri and “Face the Citizenry.”

- ▶ *Technological transformation:* The African subcontinent has experienced an unprecedented uptake of technology, especially mobile telephony. Between 2003 and 2008, the number of cell phone subscriptions in Africa grew from 11 million to 246 million—faster than anywhere else in the world, according to the International Telecommunications Union (“ITU Telecom” 2008). And while less than 3 percent of rural areas in Africa have landline telephone connections, the ITU has estimated that over 40 percent of these areas have cell phone coverage. As mobile technology is increasingly used to access the Internet, the mobile phone revolution in Africa is closing to some degree the digital divide between Africa and the rest of the world.

The Human Rights Setback of the 2000s

Unfortunately, the democratic leap forward that characterized the end of the twentieth century—stimulated by the fall of the Berlin wall and inspired by the release of Nelson Mandela—has suffered many setbacks at the beginning of the twenty-first century. In Africa, too, many of these, although not all, were linked to 9/11 and the subsequent “war on terror” but also to the past decade’s financial crisis and economic recession. According to Freedom House’s press freedom index, the overall level of press freedom worldwide has dropped for each of the past eight-years, with the most significant declines evident in the Americas and sub-Saharan Africa (Freedom House 2010).

ARTICLE 19 and organizations around the world have also observed an alarming increase in attacks and killings of human rights defenders, impunity for these crimes, and regressive legislation against civil society overall. Such violations have come on top of deepening restrictions on foreign funding available for country-level human rights and democracy initiatives by civil society organizations (CSOs). The year 2010 alone has seen several examples of regressive legislative change, proposed, or enacted in countries such as Ethiopia, Uganda, and Zimbabwe. These laws are narrowing the available space for civic

activity and have set poor legal precedents for the remainder of the continent.

In her latest report, made public in May 2010, the Special Rapporteur on Freedom of Expression for Africa, concluded that “we are losing some of the gains that we had made in the enjoyment of the right to freedom of expression and access to information in Africa.” She attributes this regression to the adoption of restrictive media legislation that has the potential to limit the capacity of media practitioners and journalists to effectively carry out their functions; the use of restrictive laws to punish/harass journalists and media practitioners who publish articles that are critical to the government; the slow pace of the adoption of access to information laws by state parties; failure by some media practitioners to adhere to professional and ethical standards of journalism; and the lack of responses from some state parties to the African Charter on the recommendations and appeals of the Special Rapporteur (“Special Rapporteur” 2010: 11).

Among these backward steps, taken at the behest and initiative of the state or enabled by its inaction, are stalled legal and regulatory reforms for freedom of expression. Laws, some dating back to the colonial and apartheid eras, continue to undermine constitutional guarantees of freedom of expression and the media in Africa. Security legislation appears to be a particularly popular tool by which to curtail freedom of expression and media freedom. It is used to harass, arrest, and detain media workers, to close media houses, and ban publications. It also has the effect of inducing self-censorship within the media for fear of repression.

To intimidate the media, both governments and powerful figures are also using defamation laws, including criminal defamation and sedition laws. Imprisonment and hefty fines can be imposed upon journalists and media houses convicted under such legislation. Only Ghana and Lesotho have fully decriminalized defamation. According to the latest annual report on imprisonment of journalists by the Committee to Protect Journalists (CPJ), four of the world’s ten countries responsible for the nearly two-thirds of all journalists in jail are in Africa: Eritrea (19), Ethiopia (4), Egypt (3), and Tunisia (2) (CPJ 2009).

In almost all African countries, independent regulation of the broadcast media is nonexistent. In some, supposedly independent regulators are undermined by interference from the executive arm of government. Many of their members are appointed for their political allegiance. Governments tend to allocate private and community radio frequencies to individuals on this same basis—aligned to their political persuasion. Often licensing of private broadcasters remains politically controlled even in the context of liberalization of broadcasting and the slow pace of change away from state monopoly of broadcasting. Often such powers are used to stifle press freedom whenever incumbents think that the media paints them in bad light. Examples include the Uganda Broadcasting Council, the Rwanda Media High Council, and the Communications Commission of Kenya (although in the case of Kenya an Independent Media Council was established in 2007, following the passage of a Media Council Law).

The Ghanaian situation is somewhat muddled. Overlapping regulatory bodies fail to deliver transparent and independent regulation, in particular with respect to media licensing. Even in South Africa, the independent regulator exists in a context of limitations from the executive. For example, legal amendments gave the South African Minister of Communications the power to appoint members of the regulatory body.

Too many private broadcasters operate without protection from direct state interference, including under threat of forced closure when their broadcasts tackle issues that are considered politically sensitive. Uganda is a case in point where, at critical moments, including during elections, privately-owned broadcasters have come under direct pressure from state organs. One of the most worrying emerging trends is political ownership of the media, bringing with it negative implications in terms of independence and impartiality.

In many African countries self-censorship—more insidious than external censorship because it results in restrictions beyond those that would be imposed by censors—is a prevalent practice or has become part of journalistic culture.

Further Regression for Freedom of Expression

Over the last few years, legal and regulatory reforms have tended to further restrict protection of freedom of expression, rather than enlarge the already minute space provided for pluralism and diversity.

The Uganda legal framework for the media is symptomatic of many of the problems characterizing media regulation in Africa. Uganda has restrictive laws that regulate media (the Press and Journalist Act) dating to 1995. ARTICLE 19 has criticized this law extensively and intervened in a case at the Supreme Court challenging the “false news” provisions of the Penal Code. The oversight bodies provided by this law, in particular the Council and Disciplinary Committee, lack the necessary independence from government. In February 2010, the government decided to amend the law. However, the new draft does not remove the problems but imposes even further restrictions, such as setting a restrictive licensing system for newspapers and providing for broad restrictions on the content of what may be published. The Ugandan government clamped down on the media during the 2009 Kampala riots, in which 21 people died and many others were injured, by closing down four radio stations and banning open-air public radio debates. One radio station remains closed, while the other three have reopened under stringent editorial conditions. The further deterioration of the situation for press freedom in Uganda was sadly demonstrated in 2010 with the murder of two journalists, Paul Kiggundu and Dickson Ssentongo (ARTICLE 19 2011).

Ethiopia remains one of the countries in Africa with a very restrictive regime for civil and political rights in general. Political freedom is highly controlled by the Ethiopian People’s Revolutionary Democratic Front, while media and human rights activities are heavily restricted. The situation facing human rights defenders and journalists has continued to deteriorate since the passing in 2009 of the Proclamation on Charities and Societies and the Proclamation on Anti-terrorism. The new regulatory agency established by the Charities and Societies Proclamation froze the bank accounts of the largest independent human rights group. At least six of Ethiopia’s most prominent human rights activists fled the country in 2009. In July 2009, the anti-

terrorism law was introduced to further restrict democratic dissent. Articles 12 and 14 of the Anti-Terrorism Proclamation give national security intelligence services unfettered powers to search and impound broadcast equipment and force journalists to reveal sources of their stories. The proclamation has been used to threaten with prosecution human rights activists and journalists for any acts deemed to be terrorism under the law's vague definition of the term. The new media code introduced in March 2010 by the National Electoral Board of Ethiopia prevents journalists from interviewing voters, candidates, and observers on the Election Day.

Many journalists have been forced to self-censor while others have fled the country. One of the most recent incidents demonstrates well the extent of the silencing. In May 2010, the Ethiopian magazine *Enku* did not appear on the newsstands as scheduled as police impounded all 10,000 copies before they could be distributed. They also arrested and charged Alemayehu Mahtemework, the magazine publisher and deputy editor and three of his staff with threatening public order for publishing a story that featured the arrest and trial of a well-known pop-singer, Tewodros Kassahun, on April 23, 2010, allegedly for a hit-and-run accident in November 2006. The editor and his staff spent five days in detention before being released. Several journalists also fled in 2009, including the editors of a prominent independent Amharic newspaper, and in February 2010 the government acknowledged that it was jamming Voice of America radio broadcasts.

The situation in Rwanda is another story of deterioration. Rwanda's laws on defamation, genocide ideology, and other restrictive media legislation have ensured an absence of media pluralism and media independence. In the months preceding the 2010 elections, journalists and political opponents have been harassed and intimidated, and two have been killed (Human Rights Watch 2010), while the Rwandan media is operating in an atmosphere of pervasive self-censorship.

Senegal is a particularly striking demonstration of the fragility of the last 20 years' progress. Its 20-point drop in Freedom House's 2010 global survey of press freedom index is the steepest decline in world for the past five years. Government support for media freedom and

tolerance for critical or opposing viewpoints has declined considerably while official rhetoric against members of the press has increased. More important, the incidence of both legal and extralegal forms of harassment—including physical attacks against journalists and the closure of media outlets—has risen sharply, leading to a much more restrictive environment for the press (Freedom House 2010).

Even South Africa has witnessed significant setbacks to democracy and free expression. This is particularly highlighted by the Protection of Information Bill currently before parliament and by an African National Congress (ANC) proposal to establish a special tribunal—the Media Appeals Tribunal—that would issue unspecified sanctions for complaints against the press. The bill, meant to replace a law dating from 1982, is reminiscent of apartheid-era regulations in that it would virtually shield the government from the scrutiny of the independent press and criminalize activities essential to the vital public service of investigative journalism. Violations under the proposed law would see journalists facing heavy custodial sentences (CPJ South Africa 2010).

The liberalization of the airwaves and print media that took place in the 1990s may have achieved media pluralism (introducing many more media owners), but it did not necessarily result in media diversity (different media owners offering the widest range of content). As highlighted by ARTICLE 19 in its compilation on Broadcasting Policy and Practice in Africa (2003: 3-4), “private broadcasters entered the broadcasting arena as legitimate commercial activity and [would] operate them according to how they could make money even if it meant just playing popular music or showing popular television programmes imported from abroad with very little news or locally made programs, if any.” In fact, the rapid expansion of broadcast media in Africa has highlighted numerous gaps in policy, first among them content regulation, including local content, one of the most sensitive and contentious issues in media regulation (Kariithi 2003: 163).

Broadcasting regulation is further complicated in the 2000s by the development of communication technologies, particularly the mobile phone, both in terms of their vast reach and diverse functions,

including their provision of information. In Africa, as in Europe and elsewhere in the world, one of the key concerns this development is raising is the relationship between broadcasting and telecommunication regulations and thus whether these should be brought into one regulatory framework. Regardless of whether Africa opts for one or two regulators, the principle of separation between politicians, government, and regulation will remain fundamental.

Transparency: A Reform Process Hardly Initiated

Nowhere are the unfulfilled promises more clearly demonstrated than in the area of transparency. In fact, “unfinished” is a misnomer: transparency reforms have hardly begun in most of Africa.

Access to information held by public authorities enables citizens to make informed choices and allows them to scrutinize the actions of their government. It is essential to creating a relationship of trust between state bodies and the general public, allowing for transparency and public participation in decision making. Without an individual right to access information, state authorities can control the flow of information, “hiding” material that is damaging to the government and selectively releasing information the government deems appropriate for public consumption only. In such a climate, corruption thrives and human rights violations can remain unchecked.

The rapid growth on the number of such laws worldwide over the past decade highlights the increasing consensus over the importance of the right to access information. States that have recently adopted right to information legislation include Liberia, India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These countries join a number of other countries that enacted access laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia, and Canada, bringing the total number of states with right to information laws to close to 90. A growing number of intergovernmental bodies, such as the European Union, the UNDP, and the World Bank, have also adopted policies on the right to information.

Unfortunately, the right-to-know revolution of the last twenty years has largely bypassed Africa. Lack of political will on the part of African leaders is largely responsible for the absence of clear progress. The rhetoric of transparency has not been accompanied by the required actions.

South Africa, Zimbabwe, Angola, Uganda, and most recently Liberia are the only countries with access to information legislation. However, many present significant weaknesses and problems. The Zimbabwean legislation lacks the safeguards that would ensure maximum disclosure, and is in practice a law promoting nonaccess. In South Africa the law has rarely been put to use. In Uganda the regulations to implement the law were placed before the cabinet after a delay of four years.

In her latest report, the African Special Rapporteur on Freedom of Expression conducted a survey of the steps taken toward respecting the right to access information throughout the African continent (“Special Rapporteur” 2010). The main finding is that while the right to access to information has been entrenched in the constitutions of many countries in Africa, only a handful of these countries have enacted laws that give effect to this right. Her report also illustrates the fact that the right of access to information in these constitutions is often times lumped together with the right to freedom of expression. Consequently, this has had the potential of watering down the importance of access to information and its cause. In the majority of African countries, the right to information and access to information is restricted by other legislation and exclusions that make it a weak tool for empowering the public. In some countries the authorities have balked and failed to pass the legislation.

Transparency: Further Setback in the Late 2000s

Many countries have had bills on access to information pending adoption for many years (“Special Rapporteur” 2010: 6-10). These include Malawi, Mozambique, Zambia, the DRC, Ethiopia, Kenya, Tanzania, Burkina Faso, Ghana, Nigeria, Sierra Leone, and Algeria, all of which have had a draft bill on access to information pending adoption for at

least the last two years. In Francophone Africa, only Mali, Senegal, and Burkina Faso have initiated processes toward development of access to administrative information legislation.

Others have not even initiated the process toward such legal reforms. Ghana is an interesting example of a country that at the political level has made a decisive break with military and political rule, but seems hesitant to pass strong legislation on the right to information (ARTICLE 19 2008). The only progress made on the Ghanaian bill drafted in 2003 is that it was finally tabled in parliament in February 2010.

In South Africa, a Protection of Information Bill was introduced in 2010 by Security Minister Siyabonga Cwel, which would give officials and state agencies unchecked authority and discretion to classify any public or commercial data as secret, confidential, protected, or sensitive based on vaguely defined “national interest” considerations and without any explanation, according to ARTICLE 19 research and legal experts. National interest would, for instance, include “details of criminal investigations,” a definition that risks chilling coverage of public law enforcement and judicial matters. Political appointees overseeing state intelligence agencies would have final say over which information should be classified or not. The bill places the onus on journalists to establish “public interest” (broadly defined as “all those matters that constitute the common good, well-being, or general welfare and protection of the people”) to justify declassifying any information. Journalists and others found guilty of unauthorized disclosure of official or classified information could face up to 25 years in jail (CPJ 2010).

The findings of research conducted by the Media Institute for Southern Africa (MISA) between June and August 2010 across nine countries reveal nontransparent and overly secretive public institutions, making it difficult for citizens to access information in their possession and under their control. No more than 4 of 61 institutions surveyed in this research qualified as open and transparent. These findings are not particularly different from a similar study done in 2009 in which secrecy shrouded the operations, budgets, and activities of governments in southern Africa (Media Institute 2010).

The MISA report does highlight one possible positive development since 2009, although with a caveat: the increase in the use of technology by many governments across the region. From 61 institutions surveyed, 49 had functional websites. All government ministries and institutions surveyed in Botswana, Namibia, Tanzania, Swaziland, and Zambia had functional and accessible websites. However, in sub-Saharan Africa, only 3 percent of the population is online (“ITU Telecom” 2008).

Further, as indicated by MISA, while the use of information and communication technologies (ICTs) by many government institutions is commendable, most have failed to maximize them to their fullest potential. Most websites contained “obvious” rather than relevant, critical information that would help citizens make informed decisions or participate in the affairs of government. For instance, not one of the 49 websites surveyed across the region had information on their budgets and expenditure, while most of them had no information on procurement procedures or signed contracts (Media Institute 2010).

Another study testifying to the state of transparency in Africa is the yearly Transparency International corruption perception index. The latest report (TI 2009) highlights serious corruption challenges across the region, with a particular focus on the case of resource-rich countries: despite their potential for generating huge revenues that could increase social development, countries such as Angola, the Democratic Republic of Congo, Guinea, Chad, and Sudan have not been able to translate their wealth into sustainable poverty-reduction programs. Instead, high levels of corruption in the extractive industries consistently contribute to economic stagnation, inequality, and conflict. This is despite many of these countries having adopted the EITI (Extractive Industry Transparency Initiative) framework.

CONCLUSION

Over the last two or three years, two key factors have contributed to a worsening of the landscape for both freedom of expression and accountability in Africa. The first is the global human rights setback, resulting from the economic and banking crises in many countries

across the globe, the “war on terror” and its security agenda, and the emergence of a multipolar world with human rights-unfriendly actors such as China exercising an increasingly crucial influence.

The second factor that has triggered a specific continent-wide setback has been the holding of a number of elections across Africa. The widespread manipulation of the competitive electoral processes over the last two years or so has both required and resulted in the curtailment of dissenting voices and independent media reporting. Both journalists and civil society were at the center and the forefront of the repression required to flaw elections results. In its latest report, the Observatory for Human Rights Defenders (2010) notes that

Defenders were found at the forefront of crackdowns during crisis situations related to contested or flawed elections (Mauritania, Nigeria, Republic of the Congo). Those who denounced postelection violence (Kenya, Zimbabwe) or called for the holding of free elections (Sudan) were assimilated to the opposition and threatened, arrested, attacked or harassed. In other countries, defenders were subjected to campaigns of intimidation ahead of elections (Ethiopia, Rwanda). In Niger, several demonstrations against reforming the constitution to lift presidential term limits were violently repressed by the police and led to arrests of supporters, some of whom were then subjected to judicial harassment. Finally, in the DRC, defenders who had called for respect of democratic principles during an inter-institutional crisis were either threatened, arrested, or threatened with prosecution (Observatory 2010: 15).

Indeed, some of the worse abuses against the political opposition and the media, in Uganda or Ethiopia for instance, are slowly being reversed, now that those in power for several decades have managed to maintain hold of the state.

This is not to argue that there has been no progress in terms of freedom of expression and accountability. Since the 1990s, the trend as far as free expression, transparency, and accountability goes is a positive one and progress has been real. Furthermore, as highlighted in the first section of this article, African institutions (particularly the African Commission) have contributed to the global development of universal norms and standards regarding freedom of expression and accountability. But there remain too many unfinished reforms, particularly in terms of the legal and regulatory framework at the domestic level, and this has contributed to greatly weaken the potentials for stronger and effective state accountability.

The overall absence of independent, transparent, and credible regulation of the media is of specific concern: it highlights well the unwillingness of African governments and others holding some forms of political power to let go of their control over mass media. It also seriously hampers the development of the media and its watchdog function.

According to Norris (2006), the media has three key roles in contributing to democratization and good governance: as a *watchdog over the powerful*, promoting accountability, transparency and public scrutiny; as a *civic forum* for political debate, facilitating informed electoral choices and actions; and as an *agenda-setter* for policymakers, strengthening government responsiveness to, for example, social problems and exclusion. Of these three ideal functions, the first has been the most difficult to achieve in Africa (and elsewhere) because of direct repression, political manipulation and ownership, and/or self-censorship.

Yet another major obstacle to stronger state accountability is the fact that the reforms required to establish and entrench a transparency regime have barely been initiated. Six countries only have adopted access to public information laws and secrecy remains the *modus operandi* of governments and corporations across the continent.

The challenges ahead to ensure stronger state accountability in Africa remain multiple and complicated, particularly as the global context is not conducive to progressive reforms and is unlikely to generate many demands or incentives for stronger accountability. More

than ever, therefore, civil society activists, the media, and other actors will have to rely on their courage, determination, professionalism, and dynamism to keep watching the powerful, seeking to hold them to account, and also drive the much needed reforms process.

NOTES

1. Resolution on the Declaration of Principles on Freedom of Expression <http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html>.
2. [Banjul] Charter on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government (AHSG) of the Organization of African Union (OAU) (now African Union - AU) meeting in Nairobi, Kenya on June 26, 1981.
3. See for instance and more recently ARTICLE 19 v. Eritrea <<http://www.chr.up.ac.za/index.php/browse-by-institution/achpr-commission/286-eritrea-article-19-v-eritrea-2007-ahrlr-73-achpr-2007-.html>>.
4. Communication 102/93 against Nigeria.
5. This formulation has been interpreted by courts and experts around the world as requiring restrictions to meet a strict three-part test: 1) a restriction must indeed pursue the legitimate aim that it claims to pursue; 2) the restriction must be imposed in a democratic framework (either by parliament or pursuant to powers granted by parliament); and 3) the restriction must be "necessary in a democratic society." The word "necessary" must be taken quite literally and means that a restriction must not be merely "useful" or "reasonable." The word "necessary" means that there must be a "pressing social need" for the restriction. The reasons given by the state to justify the restriction must be "relevant and sufficient" and the restriction must be proportionate to the aim pursued.
6. European Court of Human Rights, *Informationsverein Lentia v. Austria*, November 24, 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38 8. Communication 152/96, also against Nigeria.
7. European Court of Human Rights, *Informationsverein Lentia v. Austria*,

November 24, 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.

8. The African Commission had not yet appointed a special rapporteur at the time. Since 2006, the African Special Rapporteur has been a member of these joint initiatives.
9. African Special Rapporteur on Freedom of Expression, Activity report, presented to the 44th Ordinary Session of the African Commission on Human and Peoples' Rights <<http://www.achpr.org/english/Commissioner%27s%20Activity/44th%20OS/Special%20Rapporteurs/Freedom%20of%20expression.pdf>>.

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