

# Freedom of Information: Current Status, Challenges and Implications for News Media

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## Introduction

I have observed that there is increasing frustration or at least a shift in focus internationally from the adoption campaigns of the last two decades or so in favour of exploring the challenge of ensuring more effective implementation.

It would seem that this shift in focus is dictated by a number of factors. The first is the belief that a substantial number of countries now have freedom of information laws and it is probably time to take the campaign to another level. The second reason is a feeling that the level off effort put into advocacy for adoption of freedom of information laws in some countries, particularly in places like Africa, have not paid off in terms of the number of laws that were ultimately adopted. Finally, there also appears to be a high level of dissatisfaction or even disappointment with the state of implementation in those countries which already have freedom of information laws.

However, I would strongly urge caution in this shift, if indeed it is real, and insist that significant attention should continue to be paid to the advocacy for adoption of laws in the remaining countries. In fact, more than ever before, there is a need to devote more energy and resources to exploring and developing effective strategies to ensure that more countries adopt FOI laws.

As we begin to look more and more into the challenges of effective implementation in countries which already have freedom of information laws, it is important to bear in mind that more than 60 per cent of countries in the world still do not have freedom of information laws.

The reason this is important is because in most cases, it is the freedom of information law that establishes the right of access to information for citizens and the public. Even in countries where the right of access to information is recognized and entrenched in the national constitution, the right can hardly be exercised in the absence of a comprehensive freedom of information law. In the result, citizens of countries that do not have freedom of information laws do not have a right of access to information, at least within their national legal frameworks.

Thus, while the issue of effective implementation is important, it is equally of critical importance that the right of access itself is firmly established in law for all. If we fail in establishing the right in most of the countries of the world, no matter how well we are able to craft effective implementation strategies, the citizens of those countries which do not have the laws will always be left out.

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## **Current Status of Freedom of Information in Africa**

Continuing advocacy efforts for adoption of freedom of information laws is of particular importance to me and, I suspect, a lot of other colleagues from Africa because our continent continues to lag behind other regions in the adoption and implementation of freedom of information laws.

This is despite the fairly strong basis laid for freedom of information laws in Africa by the African Commission on Human and Peoples Rights when it adopted the Declaration of Principles on Freedom of Expression in Africa at its 32nd Ordinary Session in October 2002. Article IV(1) of the Declaration provides in part that: *“Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.”*

Although the Declaration establishes the right of everyone to access information held by public bodies, it is apparent from the above text that the right only exists subject to ***clearly defined rules established by law***. This goes further to reinforce the necessity for the adoption of freedom of information laws which contain such clearly defined rules.

Only about a dozen countries on the continent have clear and specific guarantees of the right to information in their constitutions. These include: Ghana, South Africa, Uganda, Malawi, Mozambique, the Democratic Republic of the Congo (DRC), Ethiopia, Tanzania, Cameroon, Madagascar and Senegal.

However, in the absence of comprehensive freedom of information laws, the citizens of most of these countries are unable to enjoy this right. Only three of them – South Africa, Uganda and Ethiopia – have freedom of information laws to give effect to this right.

Although Uganda adopted its Access to Information Act since April 2005, full implementation is still being awaited five years after. The mandated Regulations which will bring the law into force are still not in place and so, despite having a constitutional guarantee and a freedom of information legislation, Ugandan citizens remain unable to enjoy their right of access to information.

Despite challenges of effective implementation, South Africa's Promotion of Access to Information Act (PAIA) of 2000, the first access to information law on the continent, also appears to be most credible effort on the continent to empower citizens through access to information as a matter of right.

Ethiopia adopted the Law on Mass Media and Freedom of Information in 2008. Although merged with a media law, the Ethiopian law contains significant characteristics of a Freedom of Information law.

Besides these South Africa, Uganda and Ethiopia, the only other country on the continent with a freedom of information law is Angola which adopted its Access to Official Documents Law (Law 11/02) in 2005.

This means that only four countries out of the 54 in Africa have adopted freedom of information laws – that is less than 8 per cent. No single country in three (West, Central, and North) out of Africa’s five sub-regions has a freedom of information law.

Zimbabwe has a law which it pretentiously calls Access to Information and Protection of Privacy Act (AIPPA), adopted in 2002. But it would be difficult to classify this piece of legislation as a freedom of information law in the light of the scope of its exemptions and several obnoxious provisions designed to control the media and repress media freedom in the country. It is geared more towards restricting the free flow of information than facilitating it.

Over the past decade or so, there have been ongoing efforts in many countries to adopt Freedom of Information laws. These countries include: Ghana (Right to Information Bill 2003); Kenya (Freedom of Information Bill 2005); Liberia (Freedom Of Information Bill 2008); Malawi (Access to information Bill 2004); Morocco; Mozambique (Right to Information Bill 2005); Nigeria (Freedom of Information Bill 1999); Sierra Leone (Freedom of Information Bill 2006); Tanzania (Right to Information Bill 2006); and Zambia (Freedom of Information Bill).

In many of these countries, the efforts have either been led or driven by civil society and have met varying levels of reluctance or resistance on the part of governments. The campaign for the adoption of a Freedom of Information law in Nigeria is now in its 11<sup>th</sup> year and there is no indication that this will be achieved anytime soon.

A variety of reasons have been advanced for the slow pace of adoption of Freedom of Information laws in Africa, including:

- Lack of political will on the part of leaders who ideally have the responsibility for putting such laws in place. The lack of political will itself derives from a number of factors, including the fear by government officials that greater public access to information which freedom of information laws will engender, will make them vulnerable to their political opponents as such laws are likely to expose them when they misconduct themselves or fall short in other ways; put their personal interests at risk; expose the failure of government programmes and policies, etc.
- A culture of secrecy in government which makes the notion of public scrutiny an alien concept. In many countries in Africa, government officials are obliged upon appointment to subscribe to various oaths of secrecy under which they undertake not to disclose any information which comes to them in the course of the performance of their duties. Many countries, especially those that were colonies of Britain, have Official Secrets laws which have guided the operations of officials for decades. Most government officials have therefore grown used to not being asked questions. After decades of operating in this manner, there has emerged an ingrained culture of secrecy among civil servants and public officials and it has become extremely difficult for many of them to change. There is a need for massive public education to enlighten both those in power or authority and the public service as well as the larger society about these issues and the ideal power relations.
- A “messiah complex” among political leaders who believe that they have come to save the people and know what is best for them. They also believe that citizens are too ignorant and they appear to have a deep-seated contempt for the people and their

ability to make or contribute to the making of important decisions about issues that affect them or how they want to be governed.

- Limited capacity within civil society to advocate for the adoption of freedom of information laws. Very few members of civil society have the skills to carry out effective advocacy. Beyond merely calling for the adoption of freedom of information laws, few civil society actors have sufficient knowledge of the relevant issues to speak confidently about it and correct misleading or inaccurate information being put out by opponents or enlighten those who are genuinely ignorant about the issues involved or the purpose of freedom of information laws.
- Other competing priorities in countries where there are fears that requisite institutional arrangements and resources necessary to adopt and implement freedom of information laws will be too costly. Regrettably, although there is general recognition that openness is an essential component of good governance, in many countries political authorities are unable to see it as an issue worth investing resources in. Because the benefits are not quantifiable or even tangible, political leaders compare it to the provision of infrastructure and services such as education and healthcare and immediately declare it a non-starter. Many argue that it will be too expensive to implement freedom of information laws and have used this as an excuse for not adopting freedom of information laws until such resources are available.
- Low levels of awareness among members of the public which severely limits public demand for adoption of freedom of information laws. Most ordinary members of the public do not readily see the link between freedom of information and their struggles in different areas of work or in different aspects of their lives. They therefore do not pay a lot of attention to the issue.

### **Freedom of Information and National Security Concerns**

Additional challenges have arisen since the September 11, 2001 terrorist attacks in the United States which has resulted in heightened national security concerns which have in turn be used as excuses for either not adopting freedom of information laws or in rolling back or restricting access to information in some countries where laws already exist.

When in 2007 the then Nigerian President Olusegun Obasanjo refused to sign into law the Freedom of Information Bill passed by the National Assembly, one of his major excuses was that it would undermine Nigeria's national security, especially in the light of the fact that a decision by the head of a public institution to deny access to information would be subject to judicial review.

Quite frankly, I think the September 11 incident simply provided another excuse for political authorities to restrict the flow of information. Even prior to September 11, the principles of clearly recognized that national security information is sensitive information which should be protected from disclosure and virtually all freedom of information laws in the different countries were constructed to exempt national security information from disclosure.

The insistence however was that because of the possibility of abuse, denial of access on a national security claim should always be guided by a number of principles. I think the principles outlined in the Johannesburg Principles on National Security, Freedom of

Expression and Access to Information continue to provide adequate guidelines on this issue even in the post-September 11 period.

The Johannesburg Principles provided that “A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.”

### **Freedom of Information and the Media**

One of the tactical blunders in the FOI advocacy efforts in a number of countries, with regard to the media’s involvement, has been the tendency for the media to join or lead the campaigns in a proprietary manner. The messaging coming from the media had tended to appropriate the FOI issue as if the question of access to information is essentially a media issue.

For purposes of clarity, it is not being suggested here that the media has appropriated the campaign for itself in order to deliberately exclude other sectors of society from the issue. Besides, it must be conceded the media deal in information, perhaps more than any other segment of the society, and that the media frequently act on behalf of the wider society when they seek information.

It is also conceded that access to information, media freedom and freedom of expression are mutually supportive and equally necessary for effective flow of information to the public.

But they remain separate and distinct issues. Every member of society has specific and individual needs for information that may not necessarily be satisfied through the proxy or intermediary efforts of the media.

The trend of media involvement or leadership in freedom of information advocacy in many countries in Africa is therefore a tactical error because the manner in which the media has pursued the campaign in some countries has in fact contributed to the lack of progress in those countries. The media are frequently feared and hated by government officials and the leadership role of the media in an FOI advocacy campaign can automatically provoke resistance.

Rather than the media leading the campaign and speaking on behalf of the people, I believe a more effective approach would be for the media to give “voice” to various sectors of the society and interest groups campaigning for FOI. This the media can do by serving simply as a platform for the debate.

Freedom of information is a cross-cutting issue. It impacts on all areas of work for the broad spectrum of civil society. The campaigns would be most effective if the media can serve as a vehicle through which these different sectors and groups demonstrate the impact of freedom of information laws on their work, their interests and their lives.

The media must be awakened and enlightened to the fact that access to information is a right which ought to be guaranteed to everyone, including vulnerable members of the population and marginalized groups. Media advocacy should therefore be supported with the skills to make linkages with various issue areas, empower ordinary citizens to be active participants in

the campaign for adoption of freedom of information laws and to demand information. It will thereby broaden the constituency for support far beyond the media.

Low levels of awareness within the general population about the existence of freedom of information laws and how to use them are among the factors inhibiting their effective implementation and enforcement. With widespread ignorance about their existence, only an insignificant number of people end up using them.

Even among relatively well-educated and otherwise sophisticated members of the society, there is only very superficial knowledge of the law, what it seeks to achieve and how they can take advantage of it. Much of the public discussion about freedom of information laws gives the impression that it is no more than a guarantee of media freedom.

A major challenge we face is how to ensure that ordinary people have a fair knowledge of these laws, the procedures and conditions outlined in them, the remedies available in the event of a denial of access to information, and most importantly, the potential impact of the law on their lives.

Most ordinary people, especially in Africa, do not read legal texts. There is a widely held belief, unfortunately encouraged by lawyers, that ordinary people will not be able to understand. Since freedom of information laws are essentially legal texts, it is unlikely that many ordinary people will read the original texts. Even among frontline advocates, very few of those who are non-lawyers actually read the texts of the laws or draft laws, as the case may be.

Countries which are still in the process of adopting freedom of information laws need to bear this fact in mind and ensure that their texts are not excessively legalistic or technical.

But right now, the sad truth is, in an average African country, it will be extremely optimistic to expect that up to one percent of the population would read the freedom of information law. If less than one percent of the population actually gets to read the law and therefore have a clear understanding of what they should do, it would be a miracle of phenomenal proportions if we are actually achieving 20 per cent usage.

It seems to me therefore that a major first step in trying to achieve effective implementation would be to devise ways to make people actually read the text of the law or find some mechanism which will enable them to have an in-depth understanding of the provisions of the law even without reading it.

Some strategies would include producing simplified or abridged versions of the laws, guidelines, FAQs, etc. which distill the key issues in the laws and are easy to digest. Even then, there would still be a huge challenge of the number of copies of such documents that can be produced before any meaningful penetration of the society can be achieved.

Of course, with the technological advancements that are taking place, ICTs can also be deployed to enhance knowledge of freedom of information laws.

However, in my view, the greatest prospect for ensuring widespread public awareness and understanding of freedom of information laws continues to rest with the media. With

consistent, repeated, rigorous and in-depth reporting of the laws and their usage, the media can ensure better awareness and understanding of freedom of information laws.

By giving voice to people from different sectors and by carrying out analyses which demonstrate the linkages between lack of access to information and the various ills which plague their societies, the media can interest different constituencies in the freedom of information debate.

This will help to create demand for information by members of the public who will thereby have a better understanding of the importance of the law to them, how to use it and how it can impact their lives. The media can itself also periodically monitor and assess the implementation of the law, drawing attention to inadequacies.

It is in the enlightened self interest of media institutions in Africa to support and work towards the adoption of freedom of information laws in their respective countries. Obviously, media professionals will not be able to carry out their duties effectively if they do not have access to information held by government bodies.

The legal environment in most African countries is one that severely restricts the ability of journalists to source information about government's policies and activities and to properly inform the public about these. The environment one in which investigative reporting is either impossible or extremely dangerous because of the difficulty of obtaining information.

In many countries, it is an offence for public officers to give information to the public, including the media. This creates a serious problem for the investigative journalist seeking information as public officers are usually unwilling to give the media information. The journalist can therefore hardly secure any information through official sources.

Although there is the option of getting information through unofficial sources, this can be extremely dangerous because most countries in Africa do not have any protection for journalists' confidential sources and journalists enjoy no immunity regarding disclosure of their sources. They can therefore be compelled by judicial or legislative bodies to disclose where they got their information even when such information was obtained from confidential sources, thereby putting those sources at risk. This obviously affects the willingness of public officials to give information to journalists anonymously or confidentially.

## **Conclusion**

The adoption of freedom of information laws in such countries would help the media to address these impediments. The media should then be able to obtain more accurate and reliable information that will enhance the relevance and reliability of the media.