FREEDOM OF EXPRESSION IN UGANDA

ACME Briefing Paper

No. 1

Acknowledgement

This paper was written by Peter G. Mwesige (Ph.D) and Bernard Tabaire. We would like to thank Freedom House for supporting the research for and publication of the report.

We also would like to thank the Department of Journalism and Mass Communication at Makerere University, the Independent Media Council of Uganda, the Broadcasting Council, the Media Council, the Africa Freedom of Information Centre, HURINET, the Uganda Media Development Foundation, Human Rights Network for Journalists—Uganda, the Uganda Journalists Union, the Uganda Human Rights Commission and other institutions of government and civil society for their cooperation and support.

About ACME

The African Centre for Media Excellence (ACME) is a Kampala-based independent, non-governmental, non-partisan and non-profit professional organisation committed to helping African journalists to seek and achieve professional excellence and improving journalism and mass communication in Africa.

ACME conducts research and training that helps make our news media more reliable and credible sources of information on public affairs, effective tools for monitoring official power, and vibrant forums for public debate. We also work on interventions to equip the private sector, civil society, academia, and the government with skills to engage more effectively with the media, as well as educating the public on how to better appreciate the forces that shape the news. ACME is also involved in local and international advocacy to promote and defend freedom of expression and press freedom.

Freedom of Expression Unpacked

Freedom of expression is the freedom to hold opinions, speak, seek, receive and impart information or ideas without undue interference from the state or other actors. It also includes freedom of the press, which is freedom to disseminate information and opinions through print, electronic and other media without undue interference.

The right to freedom of expression is not for journalists or media practitioners only. It is a fundamental right for all individuals. The right to freedom of expression is important not only for self-fulfilment, but also for the enjoyment of many other fundamental human rights. As Uganda's Supreme Court has noted, "the protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance".[1]

In his landmark judgement when the Supreme Court annulled the law against publication of false news, Justice Joseph Mulenga noted: "Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones."[2]

Freedom of Expression under International Law

Uganda is a signatory to several international and regional instruments and protocols that provide for the right to freedom of expression. Some of these include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Windhoek Declaration on Promoting an Independent and Pluralistic African Press, the African Charter on Human and Peoples' Rights, and the Declaration of Principles on Freedom of Expression in Africa.

Article 19 of the Universal Declaration of Human Rights provides:

> 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.

[1] Lead Judgement by Justice Joseph Mulenga (Supreme Court of Uganda, 2004) in Constitutional Appeal No. 2 of 2002 between Charles Onyango Obbo and Andrew Mujuni Mwenda (Appellants) and Attorney General (Respondent).

[2] Lead Judgement by Justice Joseph Mulenga (Supreme Court of Uganda, 2004) in Constitutional Appeal No. 2 of 2002 between Charles Onyango Obbo and Andrew Mujuni Mwenda (Appellants) and Attorney General (Respondent).

Similarly, Article 19 of the International Covenant on Civil and Political Rights declares:

> 1. Everyone shall have the right to hold opinions without interference;
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 9 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981) also provides:

- Every individual shall have the right to receive information.
- Every individual shall have the right to express and disseminate his opinions within the law.

Article 9 of the Windhoek Declaration on Promoting an Independent and Pluralistic African Press (adopted by the general assembly of the UN Educational, Scientific and Cultural Organisation - UNESCO - in 1991) states:

> (We) declare that
> 1. 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.
> 2. 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.
> 3. By a pluralistic press, we mean the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.

Article 1 of the Declaration of Principles on Freedom of Expression in Africa states:

> Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.
>
> Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

The Declaration also emphasizes "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy".

Freedom of Expression under the Ugandan Constitution

The Bill of Rights in the Ugandan Constitution (Chapter Four) contains several provisions that guarantee the right to freedom of expression.

Article 29 (1) (a) states:

> Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.

Article 41 (1) states:

> Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.
> (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

It is also acknowledged in the Constitution (Article 20) that "fundamental rights and freedoms of the individual are inherent and not granted by the State". In addition, Article 20 (2) enjoins "all organs and agencies of Government and all persons" to respect, uphold and promote the rights and freedoms enshrined in Chapter Four of the Constitution.

Limitations to Freedom of Expression

According to international law and the Ugandan Constitution the right to freedom of expression is not absolute. Both recognize that freedom of expression may be restricted. However, any limitations must be within strictly and narrowly defined parameters. Article 19(3) of the ICCPR provides for the conditions that any restriction on freedom of expression must meet:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 2 of the Declaration of Principles on Freedom of Expression in Africa states:

> No one shall be subject to arbitrary interference with his or her freedom of expression; and
> Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

Article 43 (1) of the Constitution states:

> In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedom of others or the public interest.
>
> (2) Public interest under this article shall not permit—
> (a) political persecution;
> (b) detention without trial;
> (c) any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

Restrictions on freedom of expression, therefore, have to meet strict tests. In particular, the restrictions or limitations must be provided for by law, which in turn has to be clearly "formulated with sufficient precision to enable the citizen to regulate his conduct".[3] In addition, the restrictions must serve a legitimate aim, and they must be necessary, that is there must be a "pressing social need" for the limitation.

Uganda's Supreme Court has concluded that the limitation to the right to freedom of expression and other fundamental rights is itself subject to a limitation.

> ...the limitation provided for in clause (1) [of Article 43] is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.[4]

The Supreme Court went on to declare:

> ...protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective.

---

[3] The Sunday Times v. United Kingdom, 26 April 1979, Application No. 65378/74, para 49 (European Court of Human Rights).

[4] Lead Judgement by Justice Joseph Mulenga (Supreme Court of Uganda, 2004) in Constitutional Appeal No. 2 of 2002 between Charles Onyango Obbo and Andrew Mujuni Mwenda (Appellants) and Attorney General (Respondent).

> Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. The exceptional circumstances set out in clause (1) of Article 43 are the prejudice or violation of protected rights of others and prejudice or breach of social values categorised as public interest.

Citing international law, the Uganda Human Rights Commission has also noted that human rights and freedoms can be and are limited on the grounds of public interest (public security, public order, public health, and public morality), safeguarding and protecting the human rights of others; preventing propaganda for war; and preventing advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.[5] The Commission has clearly outlined the principles to be followed for permissible restrictions to the right to freedom of expression[6].

- They must be **necessary** to protect a number of public areas as well as the rights of others. There must be **exceptional reasons** for such restrictions and they must serve a **legitimate interest**.
- The restrictions must be **clearly and narrowly defined**; they must not be left open to multiple interpretation or abuse.
- They must be applied by a body that is **independent** of political, commercial or other unwarranted influences.
- They must be applied in a manner that is **neither arbitrary nor discriminatory**, and which is subject to **adequate safeguards against abuse**.
- They must respect the **truth principle** i.e. no one should be penalised for statements that are true.
- Criminal sanctions should only be used for dissemination of certain information after it has been proven beyond a reasonable doubt that it was disseminated with the intention of inciting discrimination or violence.

[5] UHRC (2010). "Regulation of Freedom of the Press and Other Media: The Human Rights Considerations." Paper presented at a Panel Discussion on Ugandan Media Laws. Kampala, April 30.

[6] UHRC (2010). "Regulation of Freedom of the Press and Other Media: The Human Rights Considerations." Paper presented at Consultative meeting on Uganda Media Laws, Kampala, April 30, 2010.

Media Regulation

According to international law, bodies that exercise powers over the media must be strictly independent of government.[7] As the special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – noted in a Joint Declaration adopted in 2003:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[8]

Principle VII (1) of the Declaration of Principles on Freedom of Expression in Africa echoes the same message. It states:

> 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.[9]

The key objectives of media regulation are supposed to be the promotion of press freedom and free expression and the protection of the rights of others as well as public order and morality. For broadcasting, regulation is also supposed to ensure that no single player enjoys a monopoly over the spectrum, which is a public resource. It also supposed to ensure orderly use of the spectrum, through careful allocation of frequencies.

Freedom of Expression under Ugandan Laws

The primary object of any media law in a democratic society should be to promote press freedom and free expression. Indeed, Uganda Press and Journalist Act appears to acknowledges this by saying the object of the Act is "to ensure freedom of the press", among others. Unfortunately, the country's legal regime governing the media has several laws, including provisions of the Penal Code, that undermine constitutional guarantees of freedom of expression and contradict the government's expressed commitments to free expression.

---

7 Article 19 (2010). Memorandum on the Press and Journalist Act and the Press and Journalist (Amendment) Bill, 2010.

8 Adopted 18 December 2003. [Cited in Article 19 Memorandum on Press and Journalist Act and Press and Journalist (Amendment) Bill, 2010].

9 Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002, available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

The Press and Journalist Act and the Electronic Media Act introduce two statutory bodies, the Media Council and Broadcasting Council respectively, in contravention of the principles of independence of regulatory bodies from the government. The Minister of Information has broad powers in the appointment of the members and operation of the two councils.

The Press and Journalist Act also introduces restrictions on who can be a journalist, which in effect limits freedom of expression through the media to people with university degrees or professional qualifications. As already noted, international guarantees of freedom of expression are not meant for journalists only. They are for all individuals.

The Anti-Terrorism Act, the Police Act, and provisions of the Penal Code contain provisions that criminalise publication offences. That is, journalists could be imprisoned for falling afoul of these laws in the exercise of their duties. These provisions introduce a "chilling effect", by scaring away both journalists and ordinary citizens from certain forms of legitimate publication.

Moreover, in the past two years, the government has continued to propose and pass laws that significantly threaten free expression and press freedom. The Regulation of Interception of Communications Act 2010, the proposed Press and Journalist (Amendment) Bill 2010 and the Public Order Management Bill 2010 all threaten freedom of expression and other fundamental liberties and are likely to contribute to an environment of self-censorship.

The State of Freedom of Expression in Uganda

Uganda has made significant strides in the enjoyment of press freedom and freedom of expression in the last two decades. The decision to enshrine the right to freedom of expression and access to information in the Constitution was an important recognition of the importance of free media and freedom of expression in a democracy. Indeed, the Ugandan media have thrived in the last 15 years, scrutinising public affairs, encouraging robust public debate, and exposing corruption and other forms of malfeasance. In that regard, until recently Uganda was often cited as a good example of a vibrant media landscape in the region. Citizens have also been generally free to express themselves.

Unfortunately, reports by international and local human rights organisations including Freedom House, Human Rights Watch, Committee to Protect Journalists, FES Media, Uganda Journalists Network for Human Rights, among others, show that a worrying decline in freedom of expression and press freedom in Uganda over the past five years has been accompanied by a rise in self-censorship and attacks on journalists.

In particular, journalists in the countryside have been forced to carry out their work in an environment of widespread impunity and constant pressure from the authorities, especially

Resident District Commissioners and District Internal Security Officers. Increasingly, members of the opposition have been turned away from radio stations on orders from RDCs and DISOs. Talk show callers also report being followed up and warned by security agents and strangers.

Perhaps the biggest affront on freedom of expression and press freedom in recent years was the closure of four radio stations after the riots that followed a standoff between the Buganda Kingdom and the central government in September 2009. The stations – Central Broadcasting Service (CBS), Suubi FM, Radio Sapientia, and Akaboozi ku Bbiri – were accused of inciting violence, promoting sectarianism, campaigning against the government and abusing the President. Three radio stations were allowed back on air within a few weeks and months under strict conditions that were not discussed transparently through the established regulatory process. CBS, whose licence was revoked, remained off air until October 2010. Cabinet had come up with some strict conditions for re-opening the radio station, which were rejected by Mengo and CBS management. Throughout this period it was apparent that the closure of CBS was not the independent action of the Broadcasting Council but a government decision. This confirmed concerns that the broadcasting regulator was susceptible to influence and manipulation by the Executive. In fact, the President and his handlers have in the last year said on numerous occasions that he had ordered the closure of CBS. Similarly, the President announced in October that he had ordered the re-opening of CBS. This brings into question the independence of the Broadcasting Council.

The closure of the radio stations and arrest of journalists critical of the government as well as the conditions that have been quietly negotiated for the reopening of these stations have combined to send a chilling effect down the spines of both journalists and citizens. There are more reports of self-censorship within newsrooms today than at any one time in the last five years.

The condition of freedom of expression has also not been helped by the failure by the Ministry of Information to pass the regulations that are necessary to operationalise the Access to Information Act 2005. Parliament has also not followed up on the legal requirements that each ministry submits an annual report on the status of the implementation of the law. In the circumstances, journalists, civil society and the public are not always able to get access to vital information that would allow for more meaningful citizen participation in governance and help to hold officialdom accountable.

Recommendations

The following principles should be followed in any attempts to change or reform the legal regime governing the media and freedom of expression in Uganda.

- Freedom of expression and media freedom are for everybody, not only journalists or special categories of individuals.

- The enjoyment of freedom of expression and press freedom are not favours that any government magnanimously grants its citizens. The government is, in fact, under obligation to facilitate citizens' enjoyment of the right to free expression.

- The primary object of any media law in a democratic society should be to promote press freedom and free expression.

- Freedom comes with responsibility. Certain restrictions or limitations on free expression are permissible in the public interest. However, they must be reasonable, "acceptable and demonstrably justifiable in a free and democratic society". The limitations must also be necessary and serve a legitimate interest; they must be clearly and narrowly defined in order to avoid the possibility of abuse.
- Media regulatory bodies must be independent from political, commercial, and other interests. They must be protected against political, economic or any other undue influence.
- Licensing or registration systems for the media should not impose substantive restrictions on the right to freedom of expression.

- Entry into journalism should be free and open to allow people to enjoy free speech and expression.

- Licensing systems for journalists, whereby individuals are prohibited from practising journalism unless they are licensed, are illegitimate.

African Centre for
Media Excellence

© October 2010